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State Report Citation of Cases in the PACIFIC REPORTER, VOL. 183.

The left-hand column shows the page of this volume on which a case begins, and opposite at the right is shown where same case is to be found in the State Report.

Illustration: The case of *Houck v. Houck*, is in Pac. Rep., vol. 183, p. 3. This table shows that the same case is reported in "93 Or. 281."

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
1.....	93 Or. 247	216.....	41 Cal. App. 500	395.....	25 N. M. 374	535.....	181 Cal. 119	762.....	96 Or. 100
3.....	93 Or. 281	218.....	41 Cal. App. 683	397.....	25 N. M. 361	538.....	181 Cal. 150	765.....	93 Or. 519
9.....	93 Or. 461	220.....	41 Cal. App. 657	398.....	25 N. M. 379	540.....	181 Cal. 147	768.....	93 Or. 561
12.....	94 Or. 580	222.....	41 Cal. App. 552	402.....	25 N. M. 391	541.....	181 Cal. 155	773.....	93 Or. 370
20.....	93 Or. 257	224.....	41 Cal. App. 630	403.....	25 N. M. 365	542.....	181 Cal. 158	776.....	93 Or. 591
23.....	93 Or. 254	225.....	42 Cal. App. 82	406.....	25 N. M. 372	545.....	181 Cal. 66	780.....	93 Or. 538
24.....	93 Or. 473	227.....	41 Cal. App. 620	406.....	25 N. M. 373	548.....	181 Cal. 73	785.....	26 Wyo. 390
34.....	25 N. M. 319	229.....	42 Cal. App. 63	406.....	25 N. M. 374	552.....	181 Cal. 82	786.....	26 Wyo. 305
37.....	26 Wyo. 261	230.....	41 Cal. App. 520	407.....	76 Okl. 292	562.....	181 Cal. 135	789.....	181 Cal. 202
41.....	15 Okl. Cr. 434	234.....	41 Cal. App. 543	409.....	76 Okl. 258	566.....	42 Cal. App. 206	794.....	181 Cal. 106
42.....	75 Okl. 198	235.....	41 Cal. App. 534	411.....	76 Okl. 276	568.....	42 Cal. App. 198	798.....	181 Cal. 227
49.....	75 Okl. 175	236.....	41 Cal. App. 637	413.....	76 Okl. 216	569.....	42 Cal. App. 215	800.....	181 Cal. 233
55.....	74 Okl. 298	239.....	41 Cal. App. 624	416.....	69 Okl. 74	572.....	42 Cal. App. 232	802.....	181 Cal. 238
56.....	75 Okl. 158	241.....	41 Cal. App. 776	419.....	76 Okl. 288	574.....	42 Cal. App. 361	807.....	181 Cal. 247
63.....	108 Wash. 15	243.....	41 Cal. App. 667	422.....	76 Okl. 185	576.....	42 Cal. App. 320	809.....	181 Cal. 212
65.....	108 Wash. 238	247.....	41 Cal. App. 688	427.....	76 Okl. 274	578.....	41 Cal. App. 787	816.....	42 Cal. App. 372
67.....	107 Wash. 606	248.....	41 Cal. App. 652	428.....	16 Okl. Cr. 700	580.....	42 Cal. App. 266	820.....	39 Cal. App. 461
70.....	107 Wash. 595	250.....	41 Cal. App. 793	429.....	16 Okl. Cr. 703	582.....	42 Cal. App. 238	822.....	42 Cal. App. 479
74.....	108 Wash. 183	250.....	41 Cal. App. 770	429.....	107 Wash. 698	585.....	42 Cal. App. 325	823.....	42 Cal. App. 496
75.....	108 Wash. 35	251.....	41 Cal. App. 758	429.....	16 Okl. Cr. 715	588.....	42 Cal. App. 221	824.....	42 Cal. App. 555
79.....	108 Wash. 63	254.....	41 Cal. App. 679	430.....	16 Okl. Cr. 317	591.....	42 Cal. App. 290	828.....	42 Cal. App. 463
81.....	108 Wash. 167	255.....	42 Cal. App. 24	431.....	16 Okl. Cr. 702	592.....	42 Cal. App. 364	829.....	42 Cal. App. 527
82.....	108 Wash. 235	259.....	41 Cal. App. 701	431.....	16 Okl. Cr. 316	594.....	42 Cal. App. 182	830.....	42 Cal. App. 462
83.....	108 Wash. 174	261.....	42 Cal. App. 7	432.....	16 Okl. Cr. 699	598.....	42 Cal. App. 271	832.....	42 Cal. App. 520
84.....	108 Wash. 231	263.....	41 Cal. App. 648	432.....	16 Okl. Cr. 709	604.....	42 Cal. App. 263	833.....	42 Cal. App. 527
86.....	108 Wash. 93	264.....	42 Cal. App. 1	433.....	25 N. M. 395	606.....	42 Cal. App. 265	833.....	42 Cal. App. 104
87.....	108 Wash. 261	267.....	42 Cal. App. 16	435.....	25 N. M. 404	608.....	66 Okl. 130	836.....	42 Cal. App. 499
89.....	108 Wash. 161	269.....	41 Cal. App. 586	437.....	180 Cal. 783	609.....	Okla.	838.....	42 Cal. App. 513
91.....	108 Wash. 170	273.....	41 Cal. App. 619	438.....	181 Cal. 58	610.....	76 Okl. 1	841.....	42 Cal. App. 563
92.....	108 Wash. 305	274.....	41 Cal. App. 633	439.....	181 Cal. 48	613.....	17 Okl. Cr. 47	843.....	42 Cal. App. 474
93.....	108 Wash. 307	276.....	41 Cal. App. 689	440.....	181 Cal. 61	620.....	16 Okl. Cr. 388	845.....	42 Cal. App. 800
95.....	108 Wash. 97	277.....	41 Cal. App. 693	442.....	181 Cal. 55	625.....	16 Okl. Cr. 709	845.....	42 Cal. App. 411
101.....	108 Wash. 265	278.....	41 Cal. App. 755	443.....	181 Cal. 44	626.....	16 Okl. Cr. 709	852.....	42 Cal. App. 530
103.....	108 Wash. 127	280.....	42 Cal. App. 55	445.....	179 Cal. 284	626.....	16 Okl. Cr. 320	855.....	42 Cal. App. 304
105.....	108 Wash. 271	282.....	42 Cal. App. 39	447.....	181 Cal. 35	637.....	16 Okl. Cr. 402	862.....	42 Cal. App. 567
107.....	108 Wash. 211	284.....	41 Cal. App. 676	451.....	181 Cal. 51	639.....	16 Okl. Cr. 410	865.....	42 Cal. App. 385
111.....	108 Wash. 292	285.....	41 Cal. App. 604	453.....	181 Cal. 33	642.....	43 Nev. 196	870.....	42 Cal. App. 505
112.....	108 Wash. 256	287.....	41 Cal. App. 696	453.....	42 Cal. App. 100	645.....	96 Wyo. 272	874.....	42 Cal. App. 540
113.....	108 Wash. 73	289.....	41 Cal. App. 727	455.....	42 Cal. App. 166	651.....	23 Or. 326	880.....	76 Okl. 1
115.....	108 Wash. 133	291.....	42 Cal. App. 77	456.....	42 Cal. App. 168	653.....	93 Or. 333	880.....	76 Okl. 8
120.....	108 Wash. 146	293.....	42 Cal. App. 12	457.....	42 Cal. App. 148	655.....	93 Or. 339	881.....	76 Okl. 78
120.....	108 Wash. 296	295.....	41 Cal. App. 715	458.....	42 Cal. App. 170	657.....	181 Cal. 193	886.....	76 Okl. 71
121.....	108 Wash. 299	297.....	41 Cal. App. 712	461.....	42 Cal. App. 209	660.....	181 Cal. 165	889.....	76 Okl. 84
123.....	108 Wash. 220	298.....	41 Cal. App. 708	463.....	42 Cal. App. 213	664.....	181 Cal. 187	894.....	76 Okl. 45
127.....	108 Wash. 276	301.....	41 Cal. App. 721	464.....	42 Cal. App. 202	667.....	42 Cal. App. 487	898.....	65 Okl. 58
130.....	108 Wash. 287	303.....	41 Cal. App. 596	466.....	42 Cal. App. 178	668.....	42 Cal. App. 406	900.....	76 Okl. 4
132.....	108 Wash. 259	307.....	42 Cal. App. 53	467.....	42 Cal. App. 192	668.....	42 Cal. App. 353	905.....	76 Okl. 70
134.....	108 Wash. 148	308.....	41 Cal. App. 733	470.....	42 Cal. App. 152	669.....	42 Cal. App. 332	907.....	76 Okl. 16
137.....	108 Wash. 116	310.....	43 Nev. 165	476.....	98 Or. 386	670.....	42 Cal. App. 332	918.....	76 Okl. 7
141.....	180 Cal. 774	312.....	43 Nev. 159	477.....	75 Okl. 255	672.....	42 Cal. App. 456	923.....	76 Okl. 7
145.....	180 Cal. 785	314.....	43 Nev. 78	478.....	75 Okl. 265	674.....	42 Cal. App. 369	925.....	16 Okl. Cr. 71
146.....	181 Cal. 11	317.....	43 Nev. 128	480.....	75 Okl. 288	675.....	42 Cal. App. 426	925.....	16 Okl. Cr. 70
148.....	181 Cal. 6	320.....	54 Utah, 606	481.....	75 Okl. 298	679.....	42 Cal. App. 490	926.....	16 Okl. Cr. 44
150.....	181 Cal. 1	323.....	54 Utah, 550	483.....	75 Okl. 282	681.....	42 Cal. App. 448	926.....	16 Okl. Cr. 42
152.....	180 Cal. 771	325.....	54 Utah, 497	489.....	75 Okl. 263	683.....	42 Cal. App. 355	931.....	16 Okl. Cr. 71
153.....	180 Cal. 730	328.....	55 Utah, 1	495.....	76 Okl. 181	686.....	42 Cal. App. 230	932.....	16 Okl. Cr. 44
156.....	180 Cal. 736	331.....	55 Utah, 4	499.....	76 Okl. 4	686.....	42 Cal. App. 404	933.....	94 Or. 41
161.....	181 Cal. 15	334.....	54 Utah, 599	501.....	75 Okl. 278	689.....	42 Cal. App. 441	937.....	93 Or. 41
164.....	41 Cal. App. 523	337.....	180 Cal. 748	505.....	75 Okl. 256	692.....	41 Cal. App. 763	945.....	181 Cal. 17
166.....	41 Cal. App. 607	342.....	181 Cal. 22	507.....	75 Okl. 260	695.....	42 Cal. App. 469	950.....	181 Cal. 78
169.....	41 Cal. App. 435	347.....	181 Cal. 32	512.....	16 Okl. Cr. 352	696.....	42 Cal. App. 292	950.....	40 Cal. App. 60
171.....	41 Cal. App. 420	347.....	42 Cal. App. 73	514.....	16 Okl. Cr. 704	701.....	42 Cal. App. 523	951.....	42 Cal. App. 65
174.....	41 Cal. App. 439	349.....	42 Cal. App. 67	515.....	16 Okl. Cr. 701	702.....	40 Cal. App. 432	951.....	42 Cal. App. 66
178.....	41 Cal. App. 468	350.....	42 Cal. App. 61	516.....	16 Okl. Cr. 696	703.....	42 Cal. App. 435	952.....	42 Cal. App. 65
185.....	41 Cal. App. 247	351.....	42 Cal. App. 121	516.....	16 Okl. Cr. 718	706.....	42 Cal. App. 246	954.....	42 Cal. App. 64
187.....	41 Cal. App. 547	352.....	42 Cal. App. 70	517.....	107 Wash. 698	712.....	42 Cal. App. 465	956.....	42 Cal. App. 59
189.....	41 Cal. App. 497	353.....	42 Cal. App. 115	517.....	Cal. 716	722.....	42 Cal. App. 337	957.....	42 Cal. App. 58
190.....	41 Cal. App. 569	356.....	42 Cal. App. 19	517.....	76 Okl. 146	723.....	42 Cal. App. 398	960.....	42 Cal. App. 62
195.....	41 Cal. App. 577	358.....	41 Cal. App. 739	518.....	16 Okl. Cr. 704	725.....	75 Okl. 294	963.....	42 Cal. App. 68
197.....	41 Cal. App. 509	364.....	42 Cal. App. 50	518.....	16 Okl. Cr. 707	726.....	75 Okl. 295	966.....	42 Cal. App. 61
198.....	41 Cal. App. 323	365.....	42 Cal. App. 48	519.....	16 Okl. Cr. 708	728.....	75 Okl. 182	969.....	76 Okl. 3
199.....	41 Cal. App. 664	366.....	42 Cal. App. 131	520.....	16 Okl. Cr. 706	731.....	76 Okl. 27	971.....	74 Okl. 30
200.....	41 Cal. App. 661	368.....	42 Cal. App. 111	520.....	16 Okl. Cr. 692	734.....	16 Okl. Cr. 420	975.....	76 Okl. 14
201.....	41 Cal. App. 773	369.....	42 Cal. App. 97	520.....	16 Okl. Cr. 715	737.....	20 Ariz. 575	978.....	76 Okl. 3
202.....	41 Cal. App. 511	370.....	42 Cal. App. 124	521.....	16 Okl. Cr. 380	740.....	20 Ariz. 531	979.....	76 Okl. 3
204.....	41 Cal. App. 782	373.....	42 Cal. App. 133	521.....	16 Okl. Cr. 417	745.....	26 Wyo. 293	980.....	74 Okl. 29
206.....	41 Cal. App. 580	379.....	42 Cal. App. 81	523.....	43 Nev. 298	747.....	26 Wyo. 287	983.....	76 Okl. 4
208.....	42 Cal. App. 44	386.....	43 Nev. 191	529.....	181 Cal. 157	749.....	25 N. M. 408	984.....	43 Nev. 27
209.....	42 Cal. App. 37	387.....	43 Nev. 172	529.....	181 Cal. 115	751.....	93 Or. 502	986.....	16 Okl. Cr. 71
210.....	41 Cal. App. 556	391.....	43 Nev. 182	531.....	181 Cal. 131	752.....	93 Or. 501	987.....	32 Idaho, 38
211.....	41 Cal. App. 515	394.....	25 N. M. 387	532.....	181 Cal. 125	756.....	93 Or. 312	990.....	32 Idaho, 38

Not reported in State Reports.

[End of Table.]

**Official Report Citation of CALIFORNIA Supreme and Appellate Court Cases in the
PACIFIC REPORTER, VOL. 183.**

The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Muggrave v. Renkin*, is in Pac. Rep., vol. 183, p. 145. It can be cited as from the State Report by giving the citation opposite "145" (Reporter page column) in this table, *i. e.*, "180 Cal. 785."


Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
141.....	180 Cal. 774	250....41	Cal. App. 701	453 ² ...42	Cal. App. 100	686 ¹ ...42	Cal. App. 230
145.....	180 Cal. 785	261....42	Cal. App. 7	455....42	Cal. App. 166	686 ² ...42	Cal. App. 404
146.....	181 Cal. 11	263....41	Cal. App. 646	456....42	Cal. App. 168	689....42	Cal. App. 441
148.....	181 Cal. 6	264....42	Cal. App. 1	457....42	Cal. App. 148	692....41	Cal. App. 763
150.....	181 Cal. 1	267....42	Cal. App. 16	458....42	Cal. App. 170	695....42	Cal. App. 459
152.....	180 Cal. 771	269....41	Cal. App. 586	461....42	Cal. App. 209	696....42	Cal. App. 292
153.....	180 Cal. 730	273....41	Cal. App. 649	463....42	Cal. App. 213	701....42	Cal. App. 523
156.....	180 Cal. 736	274....41	Cal. App. 633	464....42	Cal. App. 292	702....40	Cal. App. 432
161.....	181 Cal. 15	276....41	Cal. App. 689	466....42	Cal. App. 178	703....42	Cal. App. 435
164....41	Cal. App. 528	277....41	Cal. App. 693	467....42	Cal. App. 192	706....42	Cal. App. 246
166....41	Cal. App. 607	278....41	Cal. App. 755	470....42	Cal. App. 152	712....42	Cal. App. 465
169....41	Cal. App. 435	280....42	Cal. App. 55	529 ¹	181 Cal. 157	716....42	Cal. App. 337
171....41	Cal. App. 420	282....42	Cal. App. 39	529 ²	181 Cal. 115	723....42	Cal. App. 398
174....41	Cal. App. 439	284....41	Cal. App. 676	531.....	181 Cal. 131	789.....	181 Cal. 202
178....41	Cal. App. 468	285....41	Cal. App. 604	532.....	181 Cal. 125	794.....	181 Cal. 106
185....41	Cal. App. 247	287....41	Cal. App. 696	535.....	181 Cal. 119	798.....	181 Cal. 227
187....41	Cal. App. 547	289....41	Cal. App. 727	538.....	181 Cal. 150	800....41	181 Cal. 233
189....41	Cal. App. 497	291....42	Cal. App. 77	540.....	181 Cal. 147	802.....	181 Cal. 238
190....41	Cal. App. 559	293....42	Cal. App. 12	541.....	181 Cal. 155	807.....	181 Cal. 247
195....41	Cal. App. 577	295....41	Cal. App. 715	542.....	181 Cal. 158	809.....	181 Cal. 212
197....41	Cal. App. 509	297....41	Cal. App. 712	545.....	181 Cal. 66	816....42	Cal. App. 372
198....41	Cal. App. 323	298....41	Cal. App. 706	548.....	181 Cal. 73	820....39	Cal. App. 453
199....41	Cal. App. 664	301....41	Cal. App. 721	552.....	181 Cal. 82	822....42	Cal. App. 479
200....41	Cal. App. 661	303....41	Cal. App. 596	562.....	181 Cal. 135	823....42	Cal. App. 496
201....41	Cal. App. 773	307....42	Cal. App. 53	566....42	Cal. App. 206	824....42	Cal. App. 555
202....41	Cal. App. 511	308....41	Cal. App. 733	568....42	Cal. App. 198	828....42	Cal. App. 453
204....41	Cal. App. 782	337.....	180 Cal. 748	569....42	Cal. App. 215	829 ¹ ...42	Cal. App. 527
206....41	Cal. App. 580	342.....	181 Cal. 22	572....42	Cal. App. 232	829 ² ...42	Cal. App. 462
208....42	Cal. App. 44	347 ¹	181 Cal. 32	574....42	Cal. App. 361	830....42	Cal. App. 520
209....42	Cal. App. 37	347 ² ...42	Cal. App. 73	576....42	Cal. App. 320	832....42	Cal. App. 527
210....41	Cal. App. 556	349....42	Cal. App. 67	578....41	Cal. App. 787	838....42	Cal. App. 104
211....41	Cal. App. 515	350....42	Cal. App. 61	580....42	Cal. App. 296	838....42	Cal. App. 499
214....41	Cal. App. 614	351....42	Cal. App. 121	582....42	Cal. App. 238	838....42	Cal. App. 513
216....41	Cal. App. 500	352....42	Cal. App. 70	585....42	Cal. App. 325	841....42	Cal. App. 563
218....41	Cal. App. 683	353....42	Cal. App. 115	588....42	Cal. App. 221	843....42	Cal. App. 474
220....41	Cal. App. 657	356....42	Cal. App. 19	591....42	Cal. App. 290	845 ¹ ...42	Cal. App. 800
222....41	Cal. App. 552	358....41	Cal. App. 739	592....42	Cal. App. 364	845 ² ...42	Cal. App. 411
224....41	Cal. App. 680	364....42	Cal. App. 50	594....42	Cal. App. 182	852....42	Cal. App. 530
225....42	Cal. App. 32	365....42	Cal. App. 48	598....42	Cal. App. 271	855....42	Cal. App. 304
227....41	Cal. App. 620	366....42	Cal. App. 131	604....42	Cal. App. 262	862....42	Cal. App. 567
229....42	Cal. App. 63	368....42	Cal. App. 111	606....42	Cal. App. 285	865....42	Cal. App. 385
230....41	Cal. App. 520	369....42	Cal. App. 97	657.....	181 Cal. 193	870....42	Cal. App. 505
234....41	Cal. App. 543	370....42	Cal. App. 124	660.....	181 Cal. 165	874....42	Cal. App. 540
235....41	Cal. App. 534	373....42	Cal. App. 133	664.....	181 Cal. 187	945.....	181 Cal. 174
236....41	Cal. App. 637	379....42	Cal. App. 81	667....42	Cal. App. 497	950 ¹	181 Cal. 783
239....41	Cal. App. 624	437.....	180 Cal. 783	668 ¹ ...42	Cal. App. 409	950 ² ...40	Cal. App. 600
241....41	Cal. App. 776	438.....	181 Cal. 58	668 ² ...42	Cal. App. 353	951....42	Cal. App. 659
243....41	Cal. App. 667	439.....	181 Cal. 48	669....42	Cal. App. 382	952 ¹ ...42	Cal. App. 662
247....41	Cal. App. 688	440.....	181 Cal. 61	670....42	Cal. App. 332	952 ² ...42	Cal. App. 653
248....41	Cal. App. 652	442.....	181 Cal. 55	672....42	Cal. App. 456	954....42	Cal. App. 648
250 ¹ ...41	Cal. App. 793	443.....	181 Cal. 44	674....42	Cal. App. 369	956....42	Cal. App. 593
250 ² ...41	Cal. App. 770	445.....	179 Cal. 284	675....42	Cal. App. 426	957....42	Cal. App. 580
251....41	Cal. App. 758	447.....	181 Cal. 35	679....42	Cal. App. 490	960....42	Cal. App. 628
254....41	Cal. App. 679	451.....	181 Cal. 51	681....42	Cal. App. 448	963....42	Cal. App. 687
256....42	Cal. App. 24	453 ¹	181 Cal. 33	683....42	Cal. App. 355	966....42	Cal. App. 612

Pa
1
3
9
12
20
23
24
34
37
41
42
49
55
56
63
65
67
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74
75
79
81
82
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141
145
146
148
150
152
153
156
161
164
166
169
171
174
178
185
187
189
190
195
197
198
199
200
201
202
204
206
208
209
210
211
214





This is a Key-Numbered Volume

Each syllabus paragraph in this volume is marked with the topic and Key-Number section  under which the point will eventually appear in the American Digest System.

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THE PACIFIC REPORTER

VOLUME 183

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WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
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JUDGES

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BY THIS VOLUME

ARIZONA—Supreme Court.

D. L. CUNNINGHAM, CHIEF JUSTICE.

JUDGES.

HENRY D. ROSS.
ALBERT C. BAKER.

CALIFORNIA—Supreme Court.

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AMENDMENTS TO RULES

SUPREME COURT OF CALIFORNIA¹

It is ordered that rule I of the Rules for the Government of the Supreme Court and the District Courts of Appeal as it now stands be and the same is hereby abrogated, and that in place thereof the following rule be and the same is hereby adopted as one of the said rules to be known as rule I:

RULE I.

ADMISSION OF ATTORNEYS.

1. The Board of Bar Examiners shall have full charge and control of the matter of the examination of applicants for license to practice as attorneys and counsellors, with the authority to prescribe, subject to the approval of the Supreme Court, the subjects upon which applicants shall be examined, the previous course of study which shall have been pursued by applicants, and the time, place and manner of holding examinations, provided examinations shall be held in each of the cities of San Francisco, Los Angeles and Sacramento. The Board of Bar Examiners is hereby vested with authority to adopt such rules, regulations, and orders in this behalf as it deems proper. Said board is hereby vested with authority to incur such expenses as may be necessary, including all necessary traveling, printing, clerical assistance and incidentals, payable only out of the fund provided by law therefor, each demand therefor presented to this court to be approved in writing thereon by two of the members of the board.

2. No applicant will be examined unless there shall have been filed with the clerk of the proper District Court of Appeal his application, with satisfactory testimonials of good moral character, and a certificate signed by at least two attorneys of the court, each of whom shall have been regularly engaged in practice as such attorney for at least four years next theretofore, stating, in substance, that they have, and that each of them has separately, carefully and diligently examined the applicant touching the qualifications of such applicant in point of learning in the law; that it satisfactorily appeared to them, and to each of them, upon such examination, that the applicant had been engaged in the study of the law for a period of time to be named in the certificate, naming the place at which, and the person under whom, if any, such study had been prosecuted; that the applicant had, during that time, read certain books of law, which books shall be enumer-

ated in the certificate; and stating any other fact tending to show the character of the attainments of the applicant, and also stating that, in their opinion, the applicant possesses the requisite qualifications in point of learning in the law to be entitled to be admitted to practice. No such application shall be received by the clerk unless accompanied both by the fee prescribed by law for certificate of admission and the sum of fifteen dollars as a fee for examination, the fee for certificate to be returned in the event of rejection. Such application, with testimonials and certificate, must be filed at least ten days prior to the time fixed for examination.

3. The clerk of the District Court of Appeal of each district shall be advised by the Board of Bar Examiners of the time and place when it is proposed to hold an examination in his district, at least thirty days prior to the time fixed, and such clerk shall thereupon give general notice of such time and place by entry upon the minutes of the court. He shall further notify, by United States mail each person whose application is on file or whose application is filed at least ten days prior to such time, of the time and place when such examination will be held. Ten days prior to such date he shall forward to the Board of Bar Examiners all applications on file, with the accompanying testimonials and applications, which shall be returned to him by the Board of Bar Examiners as soon as practicable after the examination, with a report of its determination thereon. Such report shall be entered upon the minutes of the court, and thereupon the court shall make an order denying the applications of those who have not passed the examination to the satisfaction of the Board of Bar Examiners; and directing the return to the applicant of the fee for certificate only. No person rejected may again apply for admission to any court earlier than six months after rejection. To each person passing the examination satisfactorily, the Board of Bar Examiners shall issue a certificate to that effect, and upon the presentation of such certificate to the court by the applicant in person, the report of the Board of Bar Examiners having been filed, the court is authorized to proceed to a final determination on the application.

4. The clerk of each District Court of Appeal shall report at the end of each month to the clerk of the Supreme Court the

¹ For other rules, see 176 P. vii; 181 P. vii.

amount paid in by him to the state treasury to the credit of the bar examinations fund, and the names of all persons admitted to the practice of the law by his court, whether upon examination or motion.

5. When a District Court of Appeal consists of two divisions, all applications for admission, whether upon examination or motion, shall be determined during odd numbered years by Division One thereof, and during even numbered years by Division Two thereof.

6. Every applicant for admission under section 279, Code of Civil Procedure, from a sister state or foreign country, must accompany his application with a certificate from a justice or judge of the highest court of the state or country in which the license was issued, certifying to his good standing as a lawyer in such state or country, together with such other evidence of character and fitness as may be required by the court to which he applies. In every such case, except where the District Court of Appeal shall in a particular case otherwise direct, the clerk of said court to which the application is made shall forthwith forward the papers filed or presented by such applicant to the Board of Bar Examiners, which board, after making the requisite investigation, shall forthwith send its report thereon, together with the papers received, to the clerk of said court.

7. Two members shall constitute a quorum of the Board of Bar Examiners, authorized to perform any function of said board.

8. The clerk of the Supreme Court shall keep an account showing all moneys paid into the bar examinations fund, and all amounts ordered paid therefrom, with a statement of the person to whom and for what purpose the payment is made. He shall preserve all demands for such payments, and shall certify all orders for payment made by the court.

In effect November 15, 1919.

It is ordered that the following rule be and the same is hereby adopted as one of the rules for the government of the Supreme Court and District Courts of Appeal to be known as subdivision 4 of rule XXVI:

RULE XXVI.

SERVICE ON INDUSTRIAL ACCIDENT COMMISSION.

4. When an application is made to the Supreme Court or a District Court of Appeal for a writ of certiorari, to review an order or award of the Industrial Accident Commission, the application shall be accompanied by proof of service of a copy thereof upon the Industrial Accident Commission, which commission may within 5 days after such service upon it of such copy, serve and file in such court, a reply to said petition. If any such reply be served and filed, the petitioner may within 2 days thereafter serve and file an answer to such reply.

In any application for such a writ where a want of evidence sufficient to warrant the conclusion of the commission is relied on as one of the grounds, it shall be the duty of the petitioner to fairly state all the material evidence relative to the point as to which such want of evidence is claimed to exist.

In effect October 15, 1919.

It is ordered that the following rule be and the same hereby is adopted, to be known as subdivision 5 of rule XXX, viz.:

RULE XXX.

5. When a cause is transferred for determination to the Supreme Court after decision by a District Court of Appeal, the Supreme Court, if it deems such course proper in the particular cause, may order the same forthwith submitted for decision upon the briefs on file, without entertaining further argument, oral or otherwise.

In effect September 15, 1919.

SUPREME COURT OF OKLAHOMA¹

Adopted September 30, 1919

Rules Nos. V and IX of the Supreme Court, revised and adopted June 11, 1917, are hereby amended as follows:

V. MOTIONS—REQUISITES. All motions to the court shall be reduced to writing, and shall contain a brief statement of facts and objects of the motion, supported by citation of the authorities relied upon; and,

except in cases where all the facts relied upon are of record, such motions shall be supported by affidavit.

Copies of all motions shall be served upon opposing counsel, who will be allowed ten days from the service thereof to file response thereto. No motion will be filed or considered without proof of such service, except

¹ For other rules, see 165 P. vii.

where, in the opinion of the court an emergency exists.

Five (5) copies of all motions and of the response thereto shall be filed.

IX. REHEARINGS. Applications for a rehearing in any cause, unless otherwise ordered by the court, shall be made by a petition to the court, signed by counsel and filed with the clerk, within fifteen days from the date on which the opinion in the cause is filed. Such petition shall state briefly the grounds upon which counsel rely for a rehearing and show either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called either in brief or oral argument, or which has been

overlooked by the court, and the question, statute or decision overlooked must be distinctly and particularly set forth in the petition. No oral argument on an application for a rehearing and no response or brief in opposition to such application will be allowed, except on order of the court; but if such application is granted, the cause shall be assigned for rehearing and the clerk shall notify both parties or their counsel of the time when such rehearing will be had, and such time may be given for argument or brief as the court shall allow.

In any case in which a petition for rehearing is denied, or in which an opinion is rendered on rehearing, no further motions or applications for rehearing or review will be allowed and the clerk shall not file any such motions or applications, except by leave of court first obtained.

CASES REPORTED

	Page		Page
Abercrombie, Stubbs v. (Cal. App.).....	458	Bonifield, Kanotex Refining Co. v. (Okl.)..	971
Aburrea, Fernandez v. (Cal. App.).....	368	Boone, California Portland Cement Co. v.	447
Adair, Moline Plow Co. v. (Okl.).....	499	(Cal.)	323
Ætna Accident & Liability Co., Columbia	137	Boothe v. Wyatt (Utah).....	514
Sec. Co. v. (Wash.).....	455	Bornheim v. State (Okl. Cr. App.).....	856
Alameda County, State Board of Health of	726	Bousfield, Withers v. (Cal. App.).....	432
California v. (Cal. App.).....	241	Bowers v. State (Okl. Cr. App.).....	230
Alcorn, Wallingford v. (Okl.).....	261	Boyd v. Sierra Madre (Cal. App.).....	620
Al G. Barnes Co., Opelt v. (Cal. App.)....	798	Boyer v. State (Okl. Cr. App.).....	706
Allen, Wright v. (Cal. App.).....	830	Boyle, Warren Bros. Co. v. (Cal. App.)..	185
Althouse, McClelland v. (Cal.).....	439	Bradshaw, Doyle v. (Cal. App.).....	12
American Steel Pipe & Tank Co. v. Hub-	809	Bradshaw, Nickell v. (Or.).....	529
bard (Cal. App.)	70	Brautigam v. Brautigam (Cal.).....	712
Amigo Co., Patten & Davies Lumber Co. v.	273	Bray, People v. (Cal. App.).....	310
(Cal.)	838	Brennen, Ex parte (Nev.).....	572
Anaheim Sugar Co. v. Orange County	95	Bridge, Mackey v. (Cal. App.).....	541
(Cal.)	202	Bright, Berger v. (Cal.).....	898
Anderson v. Rucker Bros. (Wash.).....	517	Bright, Okmulgee Window Glass Co. v.	89
Anderson v. National Ice & Cold Storage	171	(Okl.)	216
Co. (Cal. App.).....	356	Brown v. Baker (Wash.).....	829
Andrews v. Karl (Cal. App.)	307	Brown, La Chance v. (Cal. App.).....	889
Archibald v. Northern Pac. R. Co. (Wash.)	521	Brown, People v. (Cal. App.).....	166
Arendt v. McConnell (Cal. App.).....	824	Brown Co., Wichita Falls & N. W. R. Co.	442
Armstrong v. State Tax Commissioner	453	v. (Okl.).....	369
(Wash.)	952	Browne, Lompoc Produce & Real Estate	42
Arnold v. California Portland Cement Co.	171	Co. v. (Cal. App.).....	325
(Cal. App.).....	356	Browning, Nahhas v. (Cal.).....	747
Arny, Pemberton v. (Cal. App.).....	307	Brunner v. Hegvi (Cal. App.).....	832
Arthur v. Fetterman (Cal. App.).....	521	Burbridge, Kennedy v. (Utah).....	517
Ashburn v. State (Okl. Cr. App.).....	824	Burley-Winter Pottery Co. v. Onken Bros.	171
Atchison, T. & S. F. R. Co. v. Smith (Cal.	453	& West Co. (Wyo.).....	604
App.)	952	Burmester v. McNear (Cal. App.)	880
Avery v. Avery (Cal. App.).....	413	Burrows, Vallejo v. (Cal.).....	884
Azevedo, Ex parte (Cal. App.).....	89	California Portland Cement Co., Arnold v.	855
Bahnson, Hamilton v. (Okl.).....	440	(Cal. App.).....	601
Baker, Brown v. (Wash.).....	222	California Portland Cement Co. v. Boone	845
Ballou's Estate, In re (Cal.).....	538	(Cal.)	655
Bank of Commerce & Trust Co. v. Hum-	752	Cameron v. Richmond (Cal. App.).....	894
phrey (Cal. App.).....	716	Camp, People v. (Cal. App.).....	880
Bank of Los Banos v. Industrial Accident	951	Camp, Roseburg Nat. Bank v. (Or.).....	785
Commission of California (Cal.).....	241	Camp, Roseburg Nat. Bank v. (Or.).....	92
Barbour, McPherson v. (Or.).....	274	Campbell, Federal Oil & Gas Co. v. (Okl.)..	566
Barceloux, Schaad v. (Cal. App.).....	236	Carbon Coal Co., Blanlot v. (Okl.).....	161
Barnebee v. Hudson (Cal. App.).....	364	Carey, State v. (Wyo.).....	669
Barnes Co., Onelt v. (Cal. App.).....	305	Carnation Lumber & Shingle Co., Swafford	794
Barneson, Hudson v. (Cal. App.).....	148	v. (Wash.).....	523
Barrios v. Pacific States Trading Co. (Cal.	150	Carpenter, Elmer Bros. v. (Cal. App.)....	828
App.)	9	Carragher's Estate, In re (Cal.).....	224
Barrow v. Barrow (Cal. App.).....	419	Carver, Williams v. (Cal. App.).....	75
Barrow v. Barrow (Cal. App.).....	886	Casey v. Hanley (Cal.)	610
Barry, Lemle v. (Cal.).....	298	Cassinelli v. Humphrey Supply Co. (Nev.)	968
Barry, Lemle v. (Cal.).....	841	Castro, People v. (Cal. App.).....	247
Bay City Land Co., McCracken v. (Or.)...	925	Catalano, Fatta v. (Cal. App.).....	200
Bayless Drug Co., Conqueror Trust Co. v.	529	Chapman, Co-wok-ochee v. (Okl.).....	328
(Okl.)	156	Chapman, Dodge v. (Cal. App.).....	34
Bearman, Probst v. (Okl.).....	766	Chapman, Konick v. (Wash.).....	802
Beazley v. Embree (Cal. App.).....	541	Chapman, Co-wok-ochee v. (Okl.).....	905
Bechtold v. Coney (Cal. App.).....	105	Chapman, Dodge v. (Cal. App.).....	291
Belchner v. State (Okl. Cr. App.)	293	Chapman, Konick v. (Wash.).....	822
Bennjamin v. Walton (Cal.).....	403	Chapman, Co-wok-ochee v. (Okl.).....	342
Bennett v. Potter (Cal.).....	402	Chapman, Dodge v. (Cal. App.).....	347
Bennett, Ralston v. (Or.).....	880	Chapman, Konick v. (Wash.).....	189
Berger v. Bright (Cal.).....	200	Chapman, Co-wok-ochee v. (Okl.).....	933
Bernstein v. Schwartz (Wash.).....	461	Chapman, Dodge v. (Cal. App.).....	933
Bernstein Film Productions, M. H. Hoff-	463	Chapman, Konick v. (Wash.).....	604
man, Inc., v. (Cal. App.).....	517	Charles Boldt Co. v. Julius Levin Co. (Cal.	230
Berry v. Eureka Const. Co. (Okl.).....	403	App.)	328
Bissetti v. Roberts (N. M.).....	402	Christensen, Farmer v. (Utah).....	34
Blacklock v. Fox (N. M.).....	880	Citizens' Nat. Bank, Ellis v. (N. M.).....	802
Blanlot v. Carbon Coal Co. (Okl.).....	200	City and County Bank, Post v. (Cal.).....	905
Boldt Co. v. Julius Levin Co. (Cal. App.)	461	City Nat. Bank, Schreiner v. (Okl.).....	291
Bond, Martinelli v. (Cal. App.).....	463	City of Bakersfield, Wible v. (Cal. App.)..	822
Bond, Martinelli v. (Cal. App.).....	463	City of Los Angeles, Coe v. (Cal. App.)....	342
		City of Los Angeles, Frost v. (Cal.).....	347
		City of Los Angeles, Hart v. (Cal.).....	189
		City of Orange v. Clement (Cal. App.)....	933
		City of Portland v. Kitchen (Or.).....	933
		City of Portland v. Traynor (Or.).....	604
		City of Richmond, Cameron v. (Cal. App.)..	230
		City of Sierra Madre, Boyd v. (Cal.	230
		App.)	230

CASES REPORTED

(188 P.)

xi

	Page		Page
City Properties Co. v. Fitzmaurice (Cal. App.)	267	Escalle v. Mark (Nev.)	387
Clark v. Wilson (Wash.)	103	Etienne v. Etienne (Cal. App.)	689
Clausen, State v., two cases (Wash.)	115	Eureka Const. Co., Berry v. (Okl.)	517
Clausen, State v. (Wash.)	120	Evans v. Rublee (Wash.)	83
Clement, City of Orange v. (Cal. App.)	189	Evans, St. Louis, I. M. & S. R. Co. v. (Okl.)	609
Clohan v. Kelso (Cal. App.)	349	Exposito v. United Railroads of San Francisco (Cal. App.)	576
Coe v. Los Angeles (Cal. App.)	822	Eymann, Stouffer v. (Cal. App.)	210
Coffey v. Northwestern Hospital Ass'n (Or.)	762	Farmer v. Christensen (Utah)	328
Cole v. State (Okl. Cr. App.)	734	Fatta v. Catalano (Cal. App.)	224
Colkins, Melicharek v. (Cal. App.)	457	Federal Life Ins. Co. v. Lewis (Okl.)	975
Collins v. John Roberts Co. (Cal. App.)	829	Federal Oil & Gas Co. v. Campbell (Okl.)	894
Columbia River Timber & Logging Co. v. Commissioners of Diking Dist. No. 2 of Wahkiakum County (Wash.)	134	Fernandez v. Aburrea (Cal. App.)	366
Columbia Sec. Co. v. Aetna Accident & Liability Co. (Wash.)	137	Ferrear v. Roberts (N. M.)	406
Commissioners of Diking Dist. No. 2 of Wahkiakum County, Columbia River Timber & Logging Co. v. (Wash.)	134	Ferrier v. Roberts (N. M.)	406
Coney, Bechtold v. (Cal. App.)	841	Fetterman, Arthur v. (Cal. App.)	307
Connolly, Salsberry v. (Nev.)	391	Fife, Crist v. (Cal. App.)	197
Conqueror Trust Co. v. Bayless Drug Co. (Okl.)	419	First Nat. Bank, Lankford v. (Okl.)	56
Cook v. Reid (Cal. App.)	820	First Nat. Bank v. Northwest Motor Co. (Wash.)	81
Cormond v. United Railroads of San Francisco (Cal. App.)	218	Fitzmaurice, City Properties Co. v. (Cal. App.)	267
Co-wok-ochee v. Chapman (Okl.)	610	Flickinger v. McKesson (Cal. App.)	195
Crane v. Superior Court in and for Los Angeles County (Cal. App.)	606	Foster, State v. (N. M.)	397
Crenshaw Bros. & Saffold v. Southern Pac. Co. (Cal. App.)	208	Fox, Blacklock v. (N. M.)	402
Crist v. Fife (Cal. App.)	197	Fraser, St. Louis & S. F. R. Co. v. (Okl.)	478
Cruel, Knox v. (Okl.)	427	Freeman v. State (Okl. Cr. App.)	626
Cushing v. Newbern (Okl.)	409	Frost v. Los Angeles (Cal.)	342
		Frost v. Superior Court in and for Modoc County (Cal. App.)	206
Darter, United States Farm Land Co. v. (Cal. App.)	696	Fullerton, State v. (Okl.)	979
Davenport, Nelson v. (Wash.)	132	Garbarino v. Noce (Cal.)	532
Davies v. Ramsdell (Cal. App.)	702	Garner, Wangerheim v. (Cal. App.)	670
Davis v. State (Okl. Cr. App.)	431	Garrott, Title Guarantee & Trust Co. v. (Cal. App.)	470
Davis, Vinson v. (Okl.)	902	Gassen, Heatt v. (Cal. App.)	227
Deasy, Metropolitan Life Ins. Co. v. (Cal. App.)	243	Gaume v. Sheets (Cal.)	535
Dehail, Weichers v. (Cal. App.)	187	Gibson, Rennie v. (Okl.)	483
De Johnson, Kurtz v. (Cal. App.)	588	Globe Grain & Milling Co. v. Drenth (Cal. App.)	285
Diamond Coal Co., Luckie v. (Cal. App.)	178	Gould's Estate, In re (Cal.)	146
Diamondstein, People v. (Cal. App.)	679	Gousse v. Lowe (Cal. App.)	295
Dickerson v. Superior Court in and for Imperial County (Cal. App.)	235	Graham, Werner v. (Cal.)	945
Dixon, Ex parte (Nev.)	642	Graham's Estate, In re (Cal. App.)	952
Dixon v. Second Judicial Dist. Court in and for Washoe County (Nev.)	312	Gray v. McKnight (Okl.)	489
Dodge v. Chapman (Cal. App.)	966	Great Northern R. Co. v. Stevens County (Wash.)	65
Doi v. McMurtry (Cal. App.)	211	Green v. Hynes (Cal. App.)	568
Donovan, State v. (Wash.)	127	Griffiths & Sprague Stevedoring Co., Lund v. (Wash.)	123
Double Eagle Mining Co. v. Hubbard (Cal. App.)	282	Gustafson v. Wasson (Cal. App.)	352
Doughty v. Moors (Cal. App.)	199	Hale v. Kennedy (Cal. App.)	723
Douglas, H. E. Wright & Co. v. (Wyo.)	786	Hale v. Pacific Telephone & Telegraph Co. (Cal. App.)	280
Douglas County, Rice v. (Or.)	768	Hale v. Pendergrast (Cal. App.)	833
Douglass, Turben v. (Okl.)	881	Halstid, Holmes v. (Okl.)	969
Dow's Estate, In re (Cal.)	794	Hamilton v. Bahnson (Okl.)	413
Doyle v. Bradshaw (Cal. App.)	185	Hamilton v. Klinke (Cal. App.)	675
Drenth, Globe Grain & Milling Co. v. (Cal. App.)	285	Hand v. Superior Court of Los Angeles County (Cal. App.)	456
Drevoir, People v. (Cal. App.)	370	Hanley, Casey v. (Cal.)	794
Duffill's Estate, In re, two cases (Cal.)	337	Hansing v. Hansing (Okl.)	978
Duncan Lumber Co. v. Willapa Lumber Co. (Or.)	476	Harmon v. Keogh (Cal. App.)	201
Dutour, Earl v. (Cal.)	438	Hart v. Los Angeles (Cal.)	347
		Hartford Accident & Indemnity Co. v. Industrial Accident Commission of California (Cal. App.)	234
Earl v. Dutour (Cal.)	438	Hay v. Hollingsworth (Cal. App.)	582
Ebert, State v. (Nev.)	314	Headlee, Smith v. (Or.)	20
Echo Pub. Co., Mahana v. (Cal.)	800	Healey, Kendrick v. (Wyo.)	37
Ehrenpfort, Nissen v. (Cal. App.)	956	Hechler, Siegel v. (Cal.)	664
Ellensburg Milling Co., Jones-Scott Co. v. (Wash.)	113	Hegyi, Bruner v. (Cal. App.)	369
Elliott v. McIntosh (Cal. App.)	692	Hejduk v. Snyder (Okl.)	923
Ellis v. Citizens' Nat. Bank (N. M.)	34	Henne, Krenwinkel v. (Cal. App.)	957
Elmer Bros. v. Carpenter (Cal. App.)	566	Henne, Suck v. (Cal. App.)	957
Elzo, N. S. Sherman Machine & Iron Works v. (Okl.)	608	Hensley v. Hensley (Cal.)	445
Embree, Beasley v. (Cal. App.)	298	Herbst, Rogers v. (N. M.)	749
		H. E. Wright & Co. v. Douglas (Wyo.)	786
		Heatt v. Gassen (Cal. App.)	227
		Hill v. Buckholts (Okl.)	42
		Hillcrest Co. v. Shrier (Cal. App.)	239

	Page		Page
Hillside Water Co., Watterson v. (Cal. App.)	592	Kelsey v. Tracy (Cal. App.)	668
Hilton v. Second Judicial Dist. Court in and for Washoe County (Nev.)	317	Kelso, Clohan v. (Cal. App.)	349
Hinkhouse, Kelly v. (Wash.)	86	Kendrick v. Healey (Wyo.)	37
Hinkson v. Kansas City Life Ins. Co. (Or.)	24	Kennedy v. Burbidge (Utah)	325
Hirschberg v. Southern Pac. Co. (Cal.)	141	Kennedy, Hale v. (Cal. App.)	723
Hoehman, Kerley v. (Okl.)	980	Kent v. Tallent (Okl.)	422
Hoffman, Inc., v. Bernstein Film Productions (Cal. App.)	293	Kent v. Walla Walla Valley R. Co. (Wash.)	87
Holje, Scales v. (Cal. App.)	308	Kenworthy, Parker v. (Cal.)	950
Hollingsworth, Hay v. (Cal. App.)	582	Keogh, Harmon v. (Cal. App.)	201
Holmes v. Halstid (Okl.)	969	Kerley v. Hoehman (Okl.)	980
Holton v. Jones (N. M.)	395	Killough v. State (Okl. Cr. App.)	430
Home Builders' Lumber Co. v. White (Okl.)	725	Kim, Mitchell v. (Cal. App.)	368
Hopkins, Hudson v. (Okl.)	507	King, Palmer v. (Okl.)	411
Hopper, People v. (Cal. App.)	836	Kirkman, Roush v. (Cal. App.)	353
Hop Wah v. Wilde (Cal. App.)	164	Kirkman Nurseries v. Sargent (Cal. App.)	591
Houck v. Houck (Or.)	3	Kitchen, City of Portland v. (Or.)	933
House v. Piercy (Cal.)	807	Klamath County, Irwin v. (Or.)	780
Howe v. Tiger (Okl.)	983	Klein, Leach v. (Cal. App.)	703
Hubbard, American Steel Pipe & Tank Co. v. (Cal. App.)	830	Klein v. San Pedro, L. A. & S. L. R. Co. (Cal. App.)	672
Hubbard, Double Eagle Mining Co. v. (Cal. App.)	282	Klinke, Hamilton v. (Cal. App.)	675
Hudson v. Barneson (Cal. App.)	274	Knox v. Cruel (Okl.)	427
Hudson v. Hopkins (Okl.)	507	Kohler & Chase, Silverstin v. (Cal.)	451
Huffman, Noyes v. (Cal. App.)	284	Konick v. Champneys (Wash.)	75
Hughes v. State (Okl. Cr. App.)	431	Krenwinkel v. Henne (Cal. App.)	957
Humphrey, Bank of Commerce & Trust Co. v. (Cal. App.)	222	Kurtz v. De Johnson (Cal. App.)	588
Humphrey Supply Co., Cassinelli v. (Nev.)	523	La Chance v. Brown (Cal. App.)	216
Hunstock, Barnebee v. (Cal. App.)	951	La Fetra, Thomson v. (Cal.)	152
Hunt, Randolph v. (Cal. App.)	358	Lankford v. First Nat. Bank (Okl.)	56
Hurlburt, Paulson v. (Or.)	937	Lanktree v. Lanktree (Cal. App.)	954
Hutton v. Newhouse (Cal. App.)	276	Lapara, People v. (Cal.)	545
Hutton, Shaw v. (Okl.)	477	Lawrence Coal Co. v. Shanklin (N. M.)	435
Hynes, Green v. (Cal. App.)	568	Leach v. Klein (Cal. App.)	703
Incorporated Town of Guernsey, in Platte County, Peterson v. (Wyo.)	645	Leddon v. State (Okl. Cr. App.)	432
Industrial Accident Commission of California, Bank of Los Banos v. (Cal.)	538	Leffel, Runnells v. (Or.)	756
Industrial Accident Commission of California, Hartford Accident & Indemnity Co. v. (Cal. App.)	234	Lemle v. Barry (Cal.)	148
Industrial Accident Commission of California, United States Fidelity & Guaranty Co. v. (Cal.)	540	Lemle v. Barry (Cal.)	150
Industrial Commission of Utah, Murray City v. (Utah)	331	Lehmmermann v. Pope & Talbot (Cal. App.)	467
Industrial Ins. Commission, Talbot v. (Wash.)	84	Leonard, Tucker v., two cases (Okl.)	907
Industrial Ins. Department, Parker v. (Wash.)	82	LeVee v. LeVee (Or.)	773
Inyo Cerro Gordo Mining & Power Co., Ryan v. (Cal. App.)	250	Levin Co., Charles Boldt Co. v. (Cal. App.)	200
Inyo Cerro Gordo Mining & Power Co., Ryan v. (Cal. App.)	251	Levy, Jackson v. (Okl.)	505
Irwin v. Klamath County (Or.)	780	Lewis, Federal Life Ins. Co. v. (Okl.)	975
Jackson v. Levy (Okl.)	505	Linkugel v. Linkugel (Okl.)	55
Jacobson-Reimers Co. v. Tozai Co. (Cal. App.)	466	Lisenbee v. Lisenbee (Cal. App.)	862
Janes, Holton v. (N. M.)	395	Lloyd, McManis v. (Wash.)	93
J. J. Brown Co., Wichita Falls & N. W. R. Co. v. (Okl.)	889	Local Improvement Dist. Nos. 29-37 of Town of Grandview, In re (Wash.)	107
John Roberts Co., Collins v. (Cal. App.)	829	Loeser, Roos v. (Cal. App.)	204
John Simpson & Co., Schmohl v. (Cal. App.)	350	Lompoc Produce & Real Estate Co. v. Browne (Cal. App.)	166
Johnson v. State (Okl. Cr. App.)	926	Lopez, People v. (Cal. App.)	674
Johnson, Welch v. (Or.)	776	Los Angeles Athletic Club v. United States Fidelity & Guaranty Co. (Cal. App.)	174
Jones v. State, two cases (Okl. Cr. App.)	518	Los Angeles County, Title Insurance & Trust Co. v. (Cal. App.)	683
Jones v. State (Okl. Cr. App.)	519	Loydal Bros. Co., Reclamation Dist. 785 v. (Cal. App.)	598
Jones v. State (Wyo.)	745	Lowe, Gousse v. (Cal. App.)	295
Jones-Scott Co. v. Ellensburg Milling Co. (Wash.)	113	Luckie v. Diamond Coal Co. (Cal. App.)	173
Julius Levin Co., Charles Boldt Co. v. (Cal. App.)	200	Lund v. Griffiths & Sprague Stevedoring Co. (Wash.)	123
Kanotex Refining Co. v. Bonifield (Okl.)	971	Luttrell, People v. (Cal. App.)	681
Kansas City Life Ins. Co., Hinkson v. (Or.)	274	Lynch, Nadeau v. (Cal. App.)	278
Karl, Andrews v. (Cal. App.)	838	McAuliff v. McFadden (Cal. App.)	870
Kelly v. Hinkhouse (Wash.)	86	McClelland v. Althouse (Cal.)	798
		McClelland's Estate, In re (Cal.)	798
		McClure v. Southern Pac. Co. (Cal. App.)	248
		McConnell, Arendt v. (Cal. App.)	202
		McCracken v. Bay City Land Co. (Or.)	9
		McCurdy, McGuire v. (Okl.)	507
		McDermott, Ex parte (Okl.)	437
		McEwen v. New York Life Ins. Co. (Cal. App.)	373
		McFadden, McAuliff v. (Cal. App.)	870
		McGinn v. Van Ness (Cal.)	950
		McGuire v. McCurdy (Okl.)	507
		McIntosh, Elliott v. (Cal. App.)	692
		McKay's Estate, In re (Cal. App.)	574
		McKesson, Flickinger v. (Cal. App.)	195
		Mackey v. Bridge (Cal. App.)	572
		McKnight, Gray v. (Okl.)	489
		McLaughlin v. Nettleton (Okl.)	416

CASES REPORTED

(183 P.)

xlii

Page	Page
McManaman v. Vickery (Cal. App.).....	229
McManis v. Lloyd (Wash.).....	93
McMurry, Doi v. (Cal. App.).....	211
McNamara v. McNamara (Cal.).....	552
McNamara's Estate. In re (Cal.).....	552
McNear, Burmester v. (Cal. App.).....	832
McPherson v. Barbour (Or.).....	752
Magee, People v. (Cal. App.).....	289
Maguire v. Reardon (Cal. App.).....	303
Mahana v. Echo Pub. Co. (Cal.).....	800
Manatt, Noble v. (Cal. App.).....	823
Mandeville, Union Bank v. (N. M.).....	394
Marco, State v. (Or.).....	653
Mark, Escalle v. (Nev.).....	387
Martin, Robertson v. (Or.).....	651
Martinelli v. Bond (Cal. App.).....	461
Martinelli v. Bond (Cal. App.).....	463
Marx & Rawolle v. Standard Soap Co. (Cal. App.).....	225
Masterson's Estate, In re (Wash.).....	93
Mattson v. Mattson (Cal.).....	443
Maupin v. Solomon (Cal. App.).....	198
Mays v. Robert Mays Estate Co. (Or.).....	751
Mays Estate Co., Mays v. (Or.).....	751
Melicharek v. Colkins (Cal. App.).....	457
Menefee v. Oxnam (Cal. App.).....	379
Metropolitan Life Ins. Co. v. Deasy (Cal. App.).....	243
M. H. Hoffman, Inc., v. Bernstein Film Productions (Cal. App.).....	293
Middleton v. State (Okl. Cr. App.).....	626
Midland Counties Public Service Corporation, Royal Indemnity Co. v. (Cal. App.).....	960
Midland Savings & Loan Co. v. Nicoll (Okl.).....	731
Mills Sing, People v. (Cal. App.).....	865
Mitchell v. Kim (Cal. App.).....	368
Mogg, State v. (Okl. Cr. App.).....	520
Moline Plow Co. v. Adair (Okl.).....	499
Molloy, Swansea Lease, Inc., v. (Ariz.).....	740
Moore, Nichols v. (Cal.).....	531
Moors, Doughty v. (Cal. App.).....	199
Mortgage & Debenture Co. v. Rhodes (Okl.).....	481
Motor Parcel Delivery Co., Webster v. (Cal. App.).....	220
Mullen, Van Degrift v. (Cal. App.).....	351
Multnomah Fuel Co., Newman v. (Or.).....	1
Murray City v. Industrial Commission of Utah (Utah).....	331
Musgrave v. Renkin (Cal.).....	145
Nadeau v. Lynch (Cal. App.).....	278
Nahhas v. Browning (Cal.).....	442
National Bank v. Whitney (Cal.).....	789
National Ice & Cold Storage Co., Anderson v. (Cal. App.).....	273
National Surety Co. v. Wilcox (Cal. App.).....	701
Nelson v. Davenport (Wash.).....	132
Nettleton, McLaughlin v. (Okl.).....	416
Newbern, Cushing v. (Okl.).....	409
Newhouse, Hutton v. (Cal. App.).....	276
Newman v. Multnomah Fuel Co. (Or.).....	1
New York Life Ins. Co., McEwen v. (Cal. App.).....	373
Nichols v. Moore (Cal.).....	531
Nickell v. Bradshaw (Or.).....	12
Nicoll Midland Savings & Loan Co. v. (Okl.).....	731
Nielsen v. Rebard (Nev.).....	984
Nissen v. Ehrenpfort (Cal. App.).....	956
Noble v. Manatt (Cal. App.).....	823
Noce, Garbarino v. (Cal.).....	532
Northern Pac. R. Co., Archibald v. (Wash.).....	95
North Pac. Fruit Distributors, Umpqua Valley Fruit Union v. (Wash.).....	101
Northwestern Hospital Ass'n, Coffey v. (Or.).....	762
Northwest Motor Co., First Nat. Bank v. (Wash.).....	81
Norton v. Norton's Estate (Cal. App.).....	214
Norton's Estate, Norton v. (Cal. App.).....	214
Noyes v. Huffman (Cal. App.).....	284
N. S. Sherman Machine & Iron Works v. Elzo (Okl.).....	608
Oden v. Peterson (Nev.).....	314
Okmulgee Window Glass Co. v. Bright (Okl.).....	898
Onken Bros. & West Co., Burley-Winter Pottery Co. v. (Wyo.).....	747
Opelt v. Al G. Barnes Co. (Cal. App.).....	241
Orange County, Anaheim Sugar Co. v. (Cal.).....	800
Orcutt, Todd v. (Cal. App.).....	963
Oregon Short Line R. Co., Smart v. (Utah).....	320
Owens River Canal Co., Watterson v. (Cal. App.).....	816
Oxnam, Menefee v. (Cal. App.).....	379
Ozella v. Roberts (N. M.).....	406
Pacific American Fisheries, Petersen v. (Wash.).....	79
Pacific States Trading Co., Barrios v. (Cal. App.).....	236
Pacific Telephone & Telegraph Co., Hale v. (Cal. App.).....	280
Pacific Western Commercial Co. v. Western Wholesale Drug Co. (Cal. App.).....	287
Page, Winemiller v. (Okl.).....	501
Palmer v. King (Okl.).....	411
Palmer, Shattuck v. (Cal. App.).....	259
Paraskevopolis, People v. (Cal. App.).....	585
Parker v. Industrial Ins. Department (Wash.).....	82
Parker v. Kenworthy (Cal.).....	950
Parks, State v. (N. M.).....	433
Patten & Davies Lumber Co. v. Amigo Co. (Cal.).....	439
Patterson, People v. (Cal. App.).....	209
Patterson Glass Co. v. Thomas (Cal. App.).....	190
Paulson v. Hurlburt (Or.).....	937
Pemberton v. Arny (Cal. App.).....	356
Pendergrast, Hale v. (Cal. App.).....	833
People v. Bray (Cal. App.).....	712
People v. Brown (Cal. App.).....	829
People v. Camp (Cal. App.).....	845
People v. Castro (Cal. App.).....	828
People v. Diamondstein (Cal. App.).....	679
People v. Drevoir (Cal. App.).....	370
People v. Hopper (Cal. App.).....	836
People v. Lapara (Cal.).....	545
People v. Lopez (Cal. App.).....	674
People v. Luttrell (Cal. App.).....	681
People v. Magee (Cal. App.).....	289
People v. Mills Sing (Cal. App.).....	865
People v. Paraskevopolis (Cal. App.).....	585
People v. Patterson (Cal. App.).....	209
People v. Rose (Cal. App.).....	874
People v. Trigeros (Cal. App.).....	668
Pershing County v. Sixth Judicial Dist. Court (Nev.).....	314
Pesante, Chapuis v. (Cal. App.).....	247
Pestarino, Subsidiary High Court, A. O. F. v. (Cal. App.).....	297
Petersen v. Pacific American Fisheries (Wash.).....	79
Peterson v. Guernsey, in Platte County (Wyo.).....	645
Peterson, Oden v. (Nev.).....	314
Peyton v. State (Okl. Cr. App.).....	639
Phillips v. State (Okl. Cr. App.).....	521
Piercy, House v. (Cal.).....	807
Pingree Nat. Bank v. Weber County (Utah).....	334
Plunkett, Stock v. (Cal.).....	657
Pope & Talbot, Lemmermann v. (Cal. App.).....	467
Post v. City and County Bank (Cal.).....	802
Postal Telegraph-Cable Co., State v. (Wash.).....	429
Potter, Bennett v. (Cal.).....	156
Pratt v. Rosenthal (Cal.).....	542
Presta, State v. (Wash.).....	112
Probst v. Bearman (Okl.).....	886
Ralston v. Bennett (Or.).....	766

	Page		Page
Ramsdell, Davies v. (Cal. App.)	702	Schwartz, Bernstein v. (Wash.)	105
Ramsdell v. Raymond (Cal. App.)	569	Scott, Magner & Miller, Rossi v. (Cal. App.)	263
Randolph v. Hunt (Cal. App.)	358	Second Judicial Dist. Court in and for Washoe County, Dixon v. (Nev.)	312
Rankin, Ex parte (Cal. App.)	686	Second Judicial Dist. Court in and for Washoe County, Hilton v. (Nev.)	317
Rankin, State v. (Okl. Cr. App.)	520	Seelye v. Southern California Canning Co. (Cal. App.)	667
Rasure v. Sparks (Okl.)	495	Shadrick v. State (Okl. Cr. App.)	520
Raulerson v. State Industrial Commission of Oklahoma (Okl.)	880	Shanklin, Lawrence Coal Co. v. (N. M.)	435
Ratzlaff v. Trainor-Desmond Co. (Cal. App.)	269	Shattuck v. Palmer (Cal. App.)	259
Raymond, Ramsdell v. (Cal. App.)	569	Shaw v. Hutton (Okl.)	477
Reardon, Maguire v. (Cal. App.)	303	Sheets, Gaume v. (Cal.)	535
Rebard, Nielsen v. (Nev.)	984	Sherman, Spexarth v. (Or.)	23
Reclamation Dist. 785 v. Lovdal Bros. Co. (Cal. App.)	598	Sherman Machine & Iron Works v. Elzo (Okl.)	608
Reid, Cook v. (Cal. App.)	820	Shrier, Hillcrest Co. v. (Cal. App.)	239
Reilly, In re (Okl.)	723	Siegel v. Hechler (Cal.)	664
Renkin, Musgrave v. (Cal.)	145	Silverstin v. Kohler & Chase (Cal.)	451
Rennie v. Gibson (Okl.)	483	Simpson & Co., Schmohl v. (Cal. App.)	350
Reno Electrical Co., U. S. Fidelity & Guaranty Works v. (Nev.)	386	Siskiyou County, Sarter v. (Cal. App.)	852
Rex Consol. Mining Co., Rossi v. (Wash.)	120	Sixth Judicial Dist. Court, Pershing County v. (Nev.)	314
Rhodes, Mortgage & Debenture Co. v. (Okl.)	481	Skinner, Sonoma County Nat. Bank v. (Cal. App.)	464
Rice v. Douglas County (Or.)	768	Slankard v. Wagnon (Cal.)	562
Ridley v. State (Okl. Cr. App.)	516	Smart v. Oregon Shore Line R. Co. (Utah)	320
Ringer v. Wilkin (Idaho)	986	Smith, Atchison, T. & S. F. R. Co. v. (Cal. App.)	824
Robert Mays Estate Co., Mays v. (Or.)	751	Smith v. Headlee (Or.)	20
Roberts, Bissetti v. (N. M.)	403	Smith v. Royer (Cal.)	660
Roberts, Ferrear v. (N. M.)	406	Smith v. State (Okl. Cr. App.)	429
Roberts, Ferrier v. (N. M.)	406	Smith v. State (Okl. Cr. App.)	515
Roberts, Ozella v. (N. M.)	406	Smith's Estate, In re (Wash.)	517
Roberts Co., Collins v. (Cal. App.)	829	Snyder, Hejduk v. (Okl.)	923
Robertson v. Martin (Or.)	651	Solomon, Maupin v. (Cal. App.)	198
Rogers v. Herbst (N. M.)	749	Sonoma County Nat. Bank v. Skinner (Cal. App.)	464
Rogers v. State (Okl. Cr. App.)	41	Southern California Canning Co., Seelye v. (Cal. App.)	667
Ross v. Loeser (Cal. App.)	204	Southern Pac. Co., Crenshaw Bros. & Safold v. (Cal. App.)	208
Rose, People v. (Cal. App.)	874	Southern Pac. Co., Hirschberg v. (Cal.)	141
Roseburg Nat. Bank v. Camp (Or.)	655	Southern Pac. Co., McClure v. (Cal. App.)	248
Rosenthal, Pratt v. (Cal.)	542	Southern Pac. Co., Scherrer v. (Cal. App.)	250
Ross, State v. (Okl.)	918	Southern Pac. Co., Squires v. (Cal. App.)	695
Rossi v. Rex Consol. Mining Co. (Wash.)	120	Southern Pac. Co., Thompson v. (Cal.)	153
Rossi v. Scott, Magner & Miller (Cal. App.)	263	Southern Pac. Co., Trulsson v. (Cal. App.)	686
Roush v. Kirkman (Cal. App.)	353	Southern Pac. Co., Ward v. (Cal. App.)	594
Roy v. State (Okl. Cr. App.)	428	Sparks, Rasure v. (Okl.)	495
Royal Indemnity Co. v. Midland Counties Public Service Corporation (Cal. App.)	960	Spexarth v. Sherman (Or.)	23
Royer, Smith v. (Cal.)	660	Springer v. Wasson (N. M.)	398
Rublee, Evans v. (Wash.)	83	Squires v. Southern Pac. Co. (Cal. App.)	695
Rucker v. San Diego Electric R. Co. (Cal. App.)	578	Standard Soap Co., Marx & Rawolle v. (Cal. App.)	225
Rucker Bros., Anderson v. (Wash.)	70	State, Ashburn v. (Okl. Cr. App.)	521
Runnells v. Lefel (Or.)	756	State, Belchner v. (Okl. Cr. App.)	925
Rust, Ex parte (Cal.)	548	State, Bornheim v. (Okl. Cr. App.)	514
Ryan v. Inyo Cerro Gordo Mining & Power Co. (Cal. App.)	250	State, Bowers v. (Okl. Cr. App.)	432
Ryan v. Inyo Cerro Gordo Mining & Power Co. (Cal. App.)	251	State, Boyer v. (Okl. Cr. App.)	620
St. Louis, I. M. & S. R. Co. v. Evans (Okl.)	609	State v. Carey (Wyo.)	785
St. Louis & S. F. R. Co. v. Fraser (Okl.)	478	State v. Clausen, two cases (Wash.)	115
Salsberry v. Connolly (Nev.)	391	State v. Clausen (Wash.)	120
Sam Kee v. Wilde (Cal. App.)	164	State, Cole v. (Okl. Cr. App.)	734
San Diego Electric R. Co., Rucker v. (Cal. App.)	578	State, Davis v. (Okl. Cr. App.)	431
Sands v. State (Okl. Cr. App.)	429	State v. Donovan (Wash.)	127
San Pedro, L. A. & S. L. R. Co., Klein v. (Cal. App.)	672	State v. Ebert (Nev.)	314
Sargent, Kirkman v. (Cal. App.)	591	State v. Foster (N. M.)	397
Sarter v. Siskiyou County (Cal. App.)	852	State v. Fullerton (Okl.)	979
Savidge, State v., three cases (Wash.)	111	State, Freeman v. (Okl. Cr. App.)	626
Saylor v. Taylor (Cal. App.)	843	State, Hughes v. (Okl. Cr. App.)	431
Saylor v. Taylor (Cal. App.)	845	State, Johnson v. (Okl. Cr. App.)	926
Scales v. Holje (Cal. App.)	308	State, Jones v., two cases (Okl. Cr. App.)	518
Schaad v. Barceloux (Cal. App.)	716	State, Jones v. (Okl. Cr. App.)	519
Scherrer v. Southern Pac. Co. (Cal. App.)	250	State, Jones v. (Wyo.)	745
Schmaling v. Swain (Cal. App.)	580	State, Killough v. (Okl. Cr. App.)	430
Schmohl v. John Simpson & Co. (Cal. App.)	350	State, Leddon v. (Okl. Cr. App.)	432
Schneider, Whitehead Coal Mining Co. v. (Okl.)	49	State v. Marco (Or.)	653
Schreiner v. City Nat. Bank (Okl.)	905	State, Middleton v. (Okl. Cr. App.)	626
Schultheiss Bros. Co. v. Steinberg (Cal. App.)	847	State, Mogg v. (Okl. Cr. App.)	520
		State v. Parks (N. M.)	433
		State, Peyton v. (Okl. Cr. App.)	639
		State, Phillips v. (Okl. Cr. App.)	521

CASES REPORTED
(183 P.)

XV

	Page		Page
State v. Postal Telegraph-Cable Co. (Wash.)	429	Todd v. Orcutt (Cal. App.)	903
State v. Presta (Wash.)	112	Tozai Co., Jacobson-Reimers Co. v. (Cal. App.)	466
State, Rankin v. (Okl. Cr. App.)	520	Tracy, Kelsey v. (Cal. App.)	668
State, Ridley v. (Okl. Cr. App.)	516	Traders' Bank v. Wilcox (Cal. App.)	256
State, Rogers v. (Okl. Cr. App.)	41	Trainor-Desmond Co., Ratzlaff v. (Cal. App.)	269
State v. Ross (Okl.)	918	Traynor, City of Portland v. (Or.)	933
State, Roy v. (Okl. Cr. App.)	428	Trigaros, People v. (Cal. App.)	668
State, Sands v. (Okl. Cr. App.)	429	Trulsson v. Southern Pac. Co. (Cal. App.)	686
State v. Savidge, three cases (Wash.)	111	Tucker v. Leonard, two cases (Okl.)	907
State, Shadrick v. (Okl. Cr. App.)	520	Turben v. Douglass (Okl.)	881
State, Smith v. (Okl. Cr. App.)	429	Umpqua Valley Fruit Union v. North Pac. Fruit Distributors (Wash.)	101
State, Smith v. (Okl. Cr. App.)	515	Underwood, Walberg v. (Cal. App.)	254
State, Sturges v. (Okl. Cr. App.)	516	Union Bank v. Mandeville (N. M.)	394
State v. Superior Court for King County (Wash.)	74	United Railroads of San Francisco, Cormond v. (Cal. App.)	218
State v. Superior Court of Yakima County (Wash.)	63	United Railroads of San Francisco, Exposito v. (Cal. App.)	576
State, Thaxton v. (Okl. Cr. App.)	926	United States Farm Land Co. v. Darter (Cal. App.)	696
State, Thayer v. (Okl. Cr. App.)	981	United States Fidelity & Guaranty Co. v. Industrial Accident Commission of California (Cal.)	540
State v. Urquhart (Wash.)	121	United States Fidelity & Guaranty Co., Los Angeles Athletic Club v. (Cal. App.)	174
State, Waldon v. (Okl. Cr. App.)	637	United States Fidelity & Guaranty Co. of Baltimore, Md., Storey v. (Idaho)	990
State v. Wardall (Wash.)	67	U. S. Fidelity & Guaranty Co. v. Reno Electrical Works (Nev.)	386
State, Watt v. (Okl. Cr. App.)	512	United Verde Copper Co. v. Wiley (Ariz.)	737
State, Weeks v. (Okl. Cr. App.)	932	Urquhart, State v. (Wash.)	121
State v. Whalen (Wash.)	130	Vaden, Webb v. (Okl.)	480
State, Whatley v. (Okl. Cr. App.)	925	Vallejo v. Burrows (Cal.)	517
State, Wilhite v. (Okl. Cr. App.)	625	Van Degrieff v. Mullen (Cal. App.)	351
State, Wilson v. (Okl. Cr. App.)	613	Van Ness, McGinn v. (Cal.)	950
State Board of Health of California v. Alameda County (Cal. App.)	455	Van Vleet, Ex parte (Okl. Cr. App.)	986
State Industrial Commission of Oklahoma, Raulerson v. (Okl.)	880	Vickery, McManaman v. (Cal. App.)	229
State Tax Commissioner, Armstrong v. (Wash.)	517	Vinson v. Davis (Okl.)	902
Steinberg, Schultheiss Bros. Co. v. (Cal. App.)	347	Vollmer v. Wheeler (Cal. App.)	264
Stevens County, Great Northern R. Co. v. (Wash.)	65	Wagnon, Slankard v. (Cal.)	562
Stock v. Plunkett (Cal.)	657	Walberg v. Underwood (Cal. App.)	254
Storey v. United States Fidelity & Guaranty Co. of Baltimore, Md. (Idaho)	990	Waldon v. State (Okl. Cr. App.)	637
Stouffer v. Eymann (Cal. App.)	210	Walla Walla Valley R. Co., Kent v. (Wash.)	87
Stubbs, Swanson v. (Wash.)	91	Wallingford v. Alcorn (Okl.)	726
Stubbs v. Abercrombie (Cal. App.)	458	Walton, Benjamin v. (Cal.)	529
Sturges v. State (Okl. Cr. App.)	516	Wangenheim v. Garner (Cal. App.)	670
Subsidiary High Court, A. O. F. v. Pestarino (Cal. App.)	297	Ward v. Southern Pac. Co. (Cal. App.)	594
Suck v. Henne (Cal. App.)	957	Wardall, State v. (Wash.)	67
Superior Court, Yolo Water & Power Co. v. (Cal.)	453	Warren Bros. Co. v. Boyle (Cal. App.)	706
Superior Court for King County, State v. (Wash.)	74	Wasson, Gustafson v. (Cal. App.)	352
Superior Court in and for Imperial County, Dickerson v. (Cal. App.)	235	Wasson, Springer v. (N. M.)	398
Superior Court in and for Los Angeles County, Crane v. (Cal. App.)	606	Watt v. State (Okl. Cr. App.)	512
Superior Court in and for Modoc County, Frost v. (Cal. App.)	206	Watterson v. Hillside Water Co. (Cal. App.)	592
Superior Court of Los Angeles County, Hand v. (Cal. App.)	456	Watterson v. Owens River Canal Co. (Cal. App.)	816
Superior Court of Yakima County, State v. (Wash.)	63	Webb v. Vaden (Okl.)	480
Swafford v. Carnation Lumber & Shingle Co. (Wash.)	92	Weber County, Pingree Nat. Bank v. (Utah)	334
Swain, Schmaling v. (Cal. App.)	580	Webster v. Motor Parcel Delivery Co. (Cal. App.)	220
Swansea Lease, Inc., v. Molloy (Ariz.)	740	Weeks v. State (Okl. Cr. App.)	932
Swanson v. Stubbs (Wash.)	91	Weichers v. Dehail (Cal. App.)	187
Talbot v. Industrial Ins. Commission (Wash.)	84	Welch v. Johnson (Or.)	776
Tallent, Kent v. (Okl.)	422	Welch, Western California Land Co. v. (Cal. App.)	169
Taylor, Saylor v. (Cal. App.)	843	Werner v. Graham (Cal.)	945
Taylor, Saylor v. (Cal. App.)	845	Western California Land Co. v. Welch (Cal. App.)	169
Thaxton v. State (Okl. Cr. App.)	926	Western Wholesale Drug Co., Pacific Western Commercial Co. v. (Cal. App.)	287
Thayer v. State (Okl. Cr. App.)	931	Whalen, State v. (Wash.)	130
Thomas, Patterson Glass Co. v. (Cal. App.)	190	Whatley v. State (Okl. Cr. App.)	925
Thompson v. Southern Pac. Co. (Cal.)	153	Wheeler, Vollmer v. (Cal. App.)	264
Thomson v. La Petra (Cal.)	152	Wheeler v. Widener (Okl.)	407
Tiger, Howe v. (Okl.)	983	White, Home Builders' Lumber Co. v. (Okl.)	725
Title Guarantee & Trust Co. v. Garrett (Cal. App.)	470		
Title Insurance & Trust Co. v. Los Angeles County (Cal. App.)	683		

	Page		Page
White Co. v. Winton (Cal. App.).....	277	Willapa Lumber Co., Duncan Lumber Co. v. (Or.).....	476
Whitehead Coal Mining Co. v. Schneider (Okl.)	49	Williams v. Carver (Cal. App.).....	669
Whitney, National Bank v. (Cal.).....	789	Williamson v. Williamson (Cal. App.)....	301
Wible v. Bakersfield (Cal. App.).....	291	Wilson, Clark v. (Wash.).....	103
Wichita Falls & N. W. R. Co. v. J. J. Brown Co. (Okl.)	889	Wilson v. State (Okl. Cr. App.).....	613
Widener, Wheeler v. (Okl.).....	407	Winemiller v. Page (Okl.).....	501
Wilcox, National Surety Co. v. (Cal. App.)	701	Winton, W. J. White Co. v. (Cal. App.)..	277
Wilcox, Traders' Bank v. (Cal. App.)....	256	Withers v. Bousfield (Cal. App.)	855
Wilde, Hop Wah v. (Cal. App.).....	164	W. J. White Co. v. Winton (Cal. App.)..	277
Wilde, Sam Kee v. (Cal. App.).....	164	Wright v. Allen (Cal. App.).....	261
Wiley, United Verde Copper Co. v. (Ariz.)	737	Wright & Co. v. Douglas (Wyo.).....	786
Wilhite v. State (Okl. Cr. App.)	625	Wyatt, Boothe v. (Utah).....	323
Wilkin, Ringer v. (Idaho).....	986	Yolo Water & Power Co. v. Superior Court (Cal.)	453

See End of Index for Tables of Pacific Cases in State Reports

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THE
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NEWMAN v. MULTNOMAH FUEL CO.

(Supreme Court of Oregon. July 29, 1919.)

1. FRAUDS, STATUTE OF §89(3) — SALE OF GOODS—ACCEPTANCE OF PART.

Where the oral buyer of 2,500 cords of wood received and accepted at least 150 cords, the case came within the exception to the statute of frauds (L. O. L. § 808, subd. 5) providing that an agreement for the sale of personalty at a price not less than \$50 must be in writing, unless the buyer accepted and received some part of the property.

2. SALES §383—ACTION FOR BREACH—DAMAGES—EVIDENCE.

In an action for breach of a contract to purchase and pay for cordwood cut by plaintiff, plaintiff's testimony as to the cost of the stumping and of the cutting and hauling held to afford a basis for the computation of damages.

In Banc.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by C. L. Newman against the Multnomah Fuel Company. From judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff alleges that the defendant is an Oregon corporation; that about July 1, 1915, he entered into a parol agreement with it by which he was to sell, and the defendant was to purchase, not less than 2,500 cords of wood by March 1, 1916; and that said wood was to be delivered as ordered, at the contract price of \$3.50 per cord for No. 1, and \$3 per cord for No. 2 wood, f. o. b. Portland, payment to be made within ten days after receipt and measurement by the defendant. The complaint recites that, pursuant to said contract, the plaintiff bought from the defendant one team of horses at the price of \$500 and agreed that the amount of the purchase should be taken out of the proceeds of the sale of 500 cords of wood, and that this subsequent agreement for the payment of the purchase price of the team was reduced to writing on July 6, 1915.

The plaintiff says that, pursuant to the verbal agreement of July 1, 1915, he entered

into a contract with other parties, for stumping, cutting and hauling the wood, and purchased materials necessary to carry out the agreement; that he has at all times been ready, able, and willing to carry out his part of the contract; that prior to November, 1915, the defendant kept the contract and purchased about 650 cords, but at that time the plaintiff, at the defendant's request, cut the amount of his shipments about one-half, and in December, 1915, the defendant requested him to stop all shipments for the time being, but continued to affirm its agreement and advised plaintiff that it would soon use "at least one carload of wood per day, and could use all the wood it had contracted for." It is further averred that the plaintiff continued to cut the wood and endeavored to comply with the contract, and that on February 28, 1916, the defendant informed him that it would not take any more wood, and ever since has refused, and still refuses, to carry out its agreement, by reason whereof the plaintiff has been damaged in the sum of \$1,500.

After denying all the material allegations of the amended complaint, for a further and separate answer the defendant alleges that on July 6, 1915, it entered into a written contract with the plaintiff, which is pleaded in *hæc verba*, and further avers:

"Said written contract constitutes the only contract for the purchase of any definite quantity of wood by defendant from plaintiff, and said contract was subsequently fully executed and discharged by both parties thereto.

"That the purchase of said team of horses from defendant and the purchase of 500 cords of wood by defendant from plaintiff, as set forth in said written contract and subsequently carried out, formed no part of and had no connection whatsoever with any other contract or understanding which this defendant had with the plaintiff for the purchase of wood or otherwise."

The defendant also alleges that after the completion of the written contract there was an understanding that the plaintiff should continue to furnish wood as it might be needed, at such times and in such amounts as de-

defendant might designate, for which the defendant was to pay \$3.50 per cord, and that "no wood was to be delivered unless ordered by the defendant," that "said arrangement contemplated and covered only such quantities of wood as the defendant might be able to handle in its business from time to time, but that no definite or specific number of cords nor any specific quantity of wood was designated or contracted to be so delivered." It is further averred that under such arrangement in and between the months of July, 1915, and February, 1916, the defendant repeatedly urged plaintiff to deliver carloads of wood as they were required by the defendant in its business, that the plaintiff failed to make such deliveries, alleging shortage of cars and inadequate transportation facilities, and that the defendant was thereby embarrassed in its business, resulting in its damage.

The reply specifically denied all the new matter in the answer.

When the plaintiff rested his case, the defendant filed the following motion:

"We desire at this time, your honor, in order to save the record, to move the court for a nonsuit in this case, for the reason that the evidence of the plaintiff is not sufficient to sustain the allegations of the complaint."

The court sustained the motion, but after further argument reversed its ruling.

When the testimony was all taken, the court instructed the jury in a charge remarkable for its brevity. Neither counsel requested any instructions or took any exceptions. The jury found for the plaintiff for \$200. No motion was filed for a directed verdict or to set aside the verdict rendered. From a judgment in favor of the plaintiff the defendant appeals, claiming that the trial court erred in denying its motion for a nonsuit, for the reason that there was no legal evidence to support the judgment; that the alleged oral agreement was merged in the written contract; that there is no damage shown; that, exclusive of the written contract, the oral agreement was void, because it was an oral contract for the sale of personal property at a price exceeding \$50, and also because of uncertainty; that the plaintiff's alleged cause of action was "one for the breach of a contract arising out of the sale and delivery of cordwood, and not one arising out of the manufacture of any article to be delivered"; and that there is no evidence of the market value of the wood at the time and place of delivery.

Gebhardt & Hendrickson, of Portland, for appellant.

Conrad P. Olson and James R. Bain, both of Portland, for respondent.

JOHNS, J. (after stating the facts as above). In the absence of any requested in-

structions or exceptions to those which were given, a motion for a directed verdict or to set aside the judgment, the overruling of the motion for a nonsuit is the only question before this court. While that motion does not point out or specify the grounds upon which it should be sustained, it appears that it was argued before the court, and after argument the court made this ruling:

"I don't see how you can get away from the law, Mr. Olson. It seems to me this amounts to a sale of personal property to the value of more than \$50, and, if so, the agreement should be in writing."

After further argument the court ruled:

"Well, this evidence went in without objection. On cross-examination you inquired into the cost of cutting the cordwood, and so forth. I think I will change my ruling on that. The motion for a judgment of nonsuit is denied, and an exception is allowed."

It is apparent from this that in any event the question of the statute of frauds was argued to and considered by the court.

Assuming that the remaining questions now urged by the defendant were embraced within the motion for a nonsuit and argued before the trial court and are now legally before this court, we think the judgment should be affirmed.

[1] It appears that the plaintiff did not have any cordwood and was not engaged in the wood business at the time of the alleged oral agreement, that the contracted wood was then in the form of standing timber, only a portion of which was owned by the plaintiff, and that he had contracted with the owners of timber for the remainder of the 2,500 cords. It is also shown that under the terms of the alleged contract the wood was to be delivered f. o. b. Portland at the defendant's place of business. To comply with his contract it was necessary for the plaintiff to fell the timber, cut it into cordwood, and haul it to the railroad for shipment, to purchase tools, to employ men for the cutting and to procure men, wagons, and teams for the hauling. This was done, and the plaintiff was actually engaged in complying with his alleged oral contract. The evidence shows that the plaintiff cut the wood expressly for the defendant, and not for the public market, and that in fact his contract was one to make cordwood out of standing timber and to deliver it by the labor of man and team. The jury found for the plaintiff, and for such reason we must assume that there was an oral contract between the plaintiff and the defendant. The alleged written contract was for 500 cords of wood, but it is undisputed that the plaintiff delivered and the defendant accepted 650 cords of wood. It must follow that at least 150 cords of wood were delivered and accepted under the oral contract. Subdivision 5 of section

808, L. O. L., known as the statute of frauds, specifying what contracts shall be void, says:

"An agreement for the sale of personal property at a price not less than \$50, unless the buyer accept and receive some part of such personal property. * * *"

By the undisputed facts after verdict the defendant did accept and receive at least 150 cords of wood on the oral contract, and it did "accept and receive some part of such personal property," and for such reason the defendant comes within the exception.

[2] The defendant also contends that there was no legal testimony on the measure of damages. The plaintiff testified as to the cost of the stumpage and of the cutting and hauling, and the railroad charges upon each cord of wood, that he was to receive \$3.50 per cord for No. 1, and \$3 per cord for No. 2, or doty wood, and that as to the latter there was no stumpage charge. From this evidence the amount of plaintiff's damage was a question of mathematics only.

While the defendant contends that the only contract which it ever had with the plaintiff was in writing, and was for only 500 cords of wood, the plaintiff alleges that there was a parol agreement for the sale and purchase of 2,500 cords, to be delivered on or before March 1, 1916, and that such parol agreement was separate and distinct from, and was not embraced within, the terms of the written contract; in other words, that there were two separate and distinct contracts, one in writing for 500 cords of wood, from the proceeds of which the plaintiff was to pay \$500 as the purchase price of the team, and the other in parol, for 2,500 cords. That was a question of fact, and the jury found for the plaintiff. While reasonable men might and would differ as to the verdict which should be rendered, the fact remains that there is sufficient evidence to sustain the verdict returned by the jury. The judgment is affirmed.

HOUCK v. HOUCK et al.*

(Supreme Court of Oregon. July 29, 1919.)

1. DEEDS ⇨208(1)—DELIVERY—EVIDENCE.

In suit by a son against his mother and the other children of her and the deceased father to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, evidence held to show that it was not the purpose of the parents at the time of the alleged transaction to deliver their deed to the son or part with title to the property.

2. DEEDS ⇨56(3)—DELIVERY.

Delivery of a deed, to be valid, must be such as deprives the grantor of the possession and control of the instrument.

3. DEEDS ⇨194(1) —DELIVERY—BURDEN OF PROOF.

In suit by a son against his mother and the other children of her and her deceased husband to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, the burden to prove delivery of the deed to the son was upon him.

4. DEEDS ⇨56(2)—DELIVERY—INTENTION.

In the absence of intention on the part of parents to deliver to their son a deed to the home farm in consideration of his agreement to support them, there was no delivery of the deed.

Department 2.

Appeal from Circuit Court, Josephine County; F. M. Calkins, Judge.

Suit by J. G. Houck against Hilla A. O. Houck and others. From decree for plaintiff, defendants appeal. Reversed, and suit dismissed.

The plaintiff is a son of David Houck, now deceased, and Hilla A. O. Houck, who in April, 1907, were the owners of a portion of the John Thomas and Norman Patterson donation land claim situate in Josephine county, embracing 187.23 acres. The defendants are the surviving widow of David Houck and the sons and daughters of David and Hilla A. O. Houck.

The plaintiff alleges that in April, 1907, for a valuable consideration, David and Hilla A. O. Houck conveyed to him "the said property and premises by warranty deed containing general covenants of warranty, and the plaintiff thereupon entered upon said premises and took possession of the same, and ever since has been, and still is, the owner thereof in fee simple and in possession thereof," and "plaintiff further alleges that he failed to cause said deed to be recorded, but retained the same awaiting a convenient time for transmitting the same to the recording officer of said county, and that subsequently the defendant Hilla A. O. Houck, or some of the other defendants herein, wrongfully and unlawfully, and without right or authority so to do, destroyed said deed, and by reason thereof the plaintiff has been deprived of his muniment of title to said lands, and is unable to complete his record title of the same." It is then averred that subsequent to the execution of the deed David Houck died, that the plaintiff and the defendants are his only heirs, and that the latter dispute the plaintiff's title and claim that he has no right in the property, although he is the owner in fee simple. He prays that he be decreed such owner and entitled to possession of the premises.

All of the defendants except George Houck filed a joint answer, in which it is admitted that in April, 1907, Hilla A. O. Houck and

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 9, 1919.

David Houck were the owners of the premises in controversy, but they deny the execution of the deed to the plaintiff, that the latter ever had possession of the deed, that it was ever destroyed, or that the plaintiff ever had or now has any interest in the premises except as an heir of David Houck, deceased.

For a first further and separate answer it is alleged that in 1903, as the result of illness and debility from old age, David Houck became demented and of feeble mind, which affliction continued to grow and was in progress up to the time of his death on May 13, 1908; that during this period his faculties were so impaired as to render him wholly irresponsible to care for himself, to transact any business, or execute any deed or contract; that he was a constant care and burden to his wife; and that at the time of his death he was 77 years of age, and his wife was more than 70 years old. It is further alleged that by reason of the mental and physical condition of his parents and the inducements and promises of the plaintiff, the defendant Hilla A. C. Houck, in April, 1907, entered into a contract with him by which he promised and agreed to care for his father and mother during the remainder of their lifetime and furnish all their necessities and comforts, to pay the taxes, keep up the improvements, and cultivate the premises in a prudent manner, in consideration of which Hilla A. C. Houck agreed with the plaintiff that upon her death he should have an undivided half interest in the premises; that he should have possession thereof for his own use, and of the personal property thereon, until her death; and that such half interest was of the reasonable value of \$5,000 to \$10,000 and of the rental value of \$100 per annum.

It is averred that soon after the execution of the contract the plaintiff began a system of neglect and disregard and pursued an unnatural course of conduct toward his parents; that he left the state of Oregon and was absent for a period of about six months; that the premises were left entirely in charge of his mother, in violation of the contract; that the plaintiff knew David Houck required constant care, nursing, and attention; that after the latter's death he continued to violate his agreement and failed and neglected to provide or care for his mother, leaving her entirely to her own resources, and the charity of her other children; that he failed to pay the funeral expenses or provide a monument for his father; that such expenses were paid by his mother out of the money which she received as the pension of her deceased husband; and that by reason of such mistreatment and neglect Hilla A. C. Houck left the premises in 1910, in order to regain her health and strength, and lived with her other children for about one year. It is alleged that upon her return in 1911 she was ill and unable to work, and on account of the continued neglect by the plaintiff in violation of

his contract, and for her comfort and protection, she finally left the plaintiff, since which time she has resided with her other children, and that by the acts of the plaintiff she is fully discharged and relieved from carrying out the provisions of the contract.

For a second further and separate answer the defendants aver that between the years 1908 and 1916, inclusive, the plaintiff had the exclusive use of the disputed property, and that the reasonable rental value thereof is \$100 per annum, and that Hilla A. C. Houck is the duly appointed, qualified, and acting administratrix of the estate of David Houck, deceased; wherefore defendants pray for an accounting for the rental value of the premises and judgment for that amount.

As a reply the plaintiff admits that he entered into a contract with Hilla A. C. Houck and David Houck during the latter's life, in April, 1907, wherein he agreed to care and provide for them and to furnish them with necessities during their lifetime, and that he has been in possession of the premises during the years 1908 to 1916, "except up to and including 1910, when the premises were being operated by a lessee." He further admits that there has never been an accounting, but denies all other material allegations.

The trial court made findings sustaining the allegations of the complaint and to the effect that, while the deed and contract were in the custody and possession of the defendant Hilla A. C. Houck, she destroyed them without the knowledge or consent of the plaintiff; that upon the service of the summons in this suit, and without just cause, she left the premises where the plaintiff resides, and has refused and still refuses to accept maintenance and support furnished by the plaintiff under the provisions of the contract; that such acts on her part were without just cause; that the defendants knew of the execution of the deed and contract; and that they had never made any objection to the manner of performing the agreement prior to the filing of the answer in this suit. Upon such findings the court made conclusions of law and based thereon rendered a decree in favor of the plaintiff, from which the defendants appeal, assigning ten alleged errors.

George W. Colvig, of Grants Pass, and Fred A. Williams, of Salem, for appellants.

H. D. Norton, of Grants Pass, for respondent.

JOHNS, J. (after stating the facts as above). The plaintiff claims that in April, 1907, his father and mother executed to him a warranty deed by which they conveyed the premises in dispute, that he then became, ever since has been, and now is the owner thereof in fee simple, and that he then took, and has ever since retained, possession. The defendants specifically deny each of these contentions.

The complaint is silent as to any contract between the plaintiff and his parents. The defendants allege the execution of a contract between the plaintiff and the defendant Hilla A. C. Houck only by which the plaintiff agreed to care and provide for both of his parents during their lifetime, in consideration of which the mother promised to convey to him her undivided half interest in the property effective upon her death, pending which he was to have the use and possession of the premises. The reply "admits that the plaintiff and the defendant Hilla A. C. Houck and her said husband while living entered into a contract on or about April, 1907, wherein the plaintiff agreed to care and provide for the said Hilla A. C. Houck and her husband during their lifetime."

The land was free of any incumbrance and had a reasonable value of from \$10,000 to \$12,000. The liabilities of the parents, if any, did not exceed \$200. At the time of the alleged transaction the son George had a 5-year lease of the premises, which he took in 1906, holding the property until 1910 at an agreed annual rental of \$100.

David Houck was a Grand Army man, receiving a government pension. He was about 77 years old, and his wife was past 70. Their life was simple and their wants were few. The mother was then able to attend to her household duties and was well and active for one of her age. The father was more or less helpless and in need of care and attention.

After some correspondence between them, the plaintiff, who was then 26 years old, returned from Nevada, where he was working in the mines, to the home of his parents. Within 5 days after he came back he went to Kerby and employed J. H. Austin, an attorney, to come to the family home and prepare some papers. For that purpose the attorney brought with him his wife, Isabel Austin, who acted as his clerk, and a typewriter. After some conversation with the old folks, from whom a description of the property was obtained, Isabel Austin, under the direction of J. H. Austin, prepared a deed to the land in question, using a blank form, and in connection therewith, as a part of the transaction, in consideration of the deed a contract was prepared by which the plaintiff was to take care of and provide for his parents for the remainder of their lives. Before the execution the agreement was read over to David Houck, and the deed and contract were then duly executed by the respective parties.

Many other points are raised, but the vital question is as to whether the papers were then actually delivered and whether the contract was executed or executory. The plaintiff claims that, at the time of the execution of the papers his father and mother, the attorney, Austin, Mrs. Austin, Cy Ducommun, and himself were present, and that Ducommun and Mrs. Austin acted as witnesses.

This transaction took place about April 25, 1907, and the consideration in the deed was \$1. Concerning the disposal of the papers, the plaintiff testified as follows:

"Q. What was done with the deed upon its being executed by the parties? A. It was turned over to me, and I gave it to my mother to keep.

"Q. Was it—you say it was turned over to you; explain what was done in the way of turning it over to you. A. Well, after it was all drawn up, signed, it was handed to me.

"Q. Into your hands? A. Yes.

"Q. How long did you keep it in your personal custody? A. Well, it was—I gave it to my mother to put with the other papers; she always kept all of the papers.

"Q. What was the purpose in giving it to your mother: what was the arrangement, if any, about that? A. Well, for safe-keeping, I suppose.

"Q. Was there anything said about recording it? A. Yes; she said now to have that put on record.

"Q. Who said that? A. My mother, right there.

"Q. What did you say? A. Well, I don't remember just the words I said, now.

"Q. Did you put it on record? A. No; I didn't.

"Q. Why not? A. I just neglected it.

"Q. I understand you to say that there was a contract also drawn. A. Yes, sir. * * * Yes; there was a contract separate from the deed.

"Q. Who signed the instrument? A. My father and mother and myself.

"Q. What was done with that instrument when it was signed up? A. That was just pinned to the deed.

"Q. Now, have you ever seen those instruments since they were left with your mother for safe-keeping? A. No; I have not.

"Q. Do you know what became of them afterwards? A. Only through hearsay; I heard they were burned up.

"Q. When did you first learn that this deed had been destroyed? A. About 1913.

"Q. Did you try to get the papers afterwards for recording? A. No.

"Q. What did this contract provide that you should do in the way of maintenance and support? A. It just stated I was to take care of my father and mother their lifetime.

"Q. Now, Mr. Houck, what did you do in the way of providing for them and performing your part of the contract? A. I done the best I could.

"Q. Well, go ahead and tell the court in a general way about that. A. I provided for the house in every way.

"Q. State whether or not you furnished them the necessities of life there. A. Yes; I did. I always furnished the table.

"Q. Now who—where did you live after that contract was made? A. Lived on the home ranch.

"Q. Right on this ranch which was the property in controversy now? A. Yes; except about six months I went away to work one time.

"Q. Now, where did your mother and father live thereafter? A. They lived at the home ranch.

"Q. In the same house with you? A. Yes, sir.

"Q. How long did your father live after this transaction was entered into? A. About 18 months."

The evidence shows that his mother continued to live with him until 1916, when she left, and that the occasion of her leaving was the service of the summons in this suit. The plaintiff's further testimony follows:

"Q. I will ask you to state whether or not your mother, before you commenced this suit, whether or not she repudiated this deal that you had made. A. Yes; she did.

"Q. Was that in personal conversation with you or otherwise? A. In personal conversation.

"Q. Go ahead and state what she said now about it. A. Well, at different times she ordered me away.

"Q. And what was said about carrying out the contract so far as she was concerned? A. There was nothing said about that.

"Q. You mean she ordered you off the place at different times? A. Yes. * * *

"Q. And who was at home at the time you got home, who was making the home there? A. My brother George had the place rented.

"Q. How long before that had you discussed the matter of deeding you the premises together with the contract to take care of your father and mother? A. Never discussed it at all.

"Q. Had you ever discussed it with any of the members of the family? A. No, sir.

"Q. Had you broached the subject at all to your mother and father? A. No, sir.

"Q. You remember this Mr. Austin was your attorney, was he? A. He drew up the contract and deed.

"Q. Was he your attorney; did you hire him? A. I paid him.

"Q. What was said, who broached the subject of deeding this land to yourself, your mother and your father or yourself? A. They had me come from Nevada; that is the promise they made me, if I would come back and take care of them, they would deed me the ranch.

"Q. Who made you the promise? A. My mother and oldest brother, * * * David Elwood."

He also testified that his father was an old man, in poor health. In regard to caring for his parents, he said:

"Q. What do you mean; was that all there was to it, just that you should take care of them? A. And for the consideration—the consideration in the contract was that I should have the property.

"Q. And in case you didn't take care of them or didn't look after them, then the property was to go back to them? A. Why, I suppose so.

"Q. Is that the idea? A. Yes, sir; I suppose that is what the contract was for. * * *

"Q. Who did you say had the running of the ranch at that time? A. My brother George.

"Q. How long was his lease, when did his lease expire? A. He had the ranch for five years; he had four years more.

"Q. And did you make any objection to this lease? A. No; I didn't.

"Q. You didn't make any objection to it? A. Only that he was to furnish their table; that is what they told me; I never saw the lease; and they claimed he was to furnish their table, and he did not do it, and that is all the objections I made.

"Q. What did you do towards taking care of your father and mother from that time on? A. I provided the table and the house."

He also testified that his mother went to Portland in 1911, and was gone about 11 months, and he gave her \$15 when she left and sent her \$20 when she was coming home. Regarding any advances of money made to him by his mother, he testified on cross-examination as follows:

"Q. Have you ever repaid your mother for any of these advances she has made to you? A. She only made one, \$20.

"Q. That is all she ever made to you? A. Yes, sir.

"Q. Did you ever repay her for the \$30 or for the tombstone that she put up at your father's grave? A. No, sir.

"Q. And you never offered to repay the boy that took care of her in 1910 when you were away; you have never offered to repay them, have you? A. They have never asked me for anything. * * *

"Q. How long did Robert live with the family after you went into possession of the premises? A. He has been there until last spring.

"Q. Well, if you did, when you did leave the ranch who was there to take care of your mother? A. Well, Robert was there when I was away; he stayed there all of the time."

When the defendant Hilla A. C. Houck was seriously ill in 1914, Dr. Dickson was called from Kerby to attend her, and the plaintiff testifies that his mother paid the doctor's bill. In answer to the question, "Did she ever complain of any lack of attention?" he said, "Oh, yes; she was always complaining."

With reference to his brother George's lease, the plaintiff testified:

"A. He rented it in 1906 for five years, and he had it four years.

"Q. Then you went back to Nevada in '10, didn't you? A. Yes, sir.

"Q. So you didn't take possession of the place until you got back from Nevada, did you, Mr. Houck? A. Well, I was there all of the time.

"Q. And you say your brother had it leased until 1910? A. Yes, sir.

"Q. He run the ranch there? A. He run the ranch there, yes, sir.

"Q. So you were not in possession of the ranch at that time, were you? A. No, sir; that is, I didn't run the ranch."

Concerning the deed and contract, Mrs. Isabel Austin testified thus:

"The agreement was, as nearly as I can remember, a contract on the part of J. G. Houck to care for his father and mother during their

lifetime, while they agreed that he was to have the home farm and certain stock, I believe, in return therefor. * * * The original of the agreement was delivered, after being duly signed, to David Houck and Hilla Houck. The copy or duplicate was, I think, given to J. G. Houck."

She stated also that she witnessed the execution of the papers.

J. H. Austin testified that he was by occupation an attorney, then residing at Kerby, Or., and that:

"I drew up a deed for David Houck and his wife, Hilla A. C. Houck, in which they deeded their farm on which they were living at that time to their son, J. G. Houck. I also at the same time drew up an agreement between the said David Houck, Hilla A. C. Houck, and J. G. Houck. In this agreement it was agreed between J. G. Houck, their son, and David Houck, his father, and Hilla A. C. Houck, his mother, that for the consideration of the said deed the said J. G. Houck should take care of the said David Houck and Hilla A. C. Houck during the remainder of their lives."

The witness stated that he prepared both papers according to the instructions of the plaintiff's parents, and that the same were duly signed, witnessed, and acknowledged. Regarding the delivery of the papers, he said:

"The deed * * * was delivered to J. G. Houck by David Houck in my presence, and, I think, in the presence of Cy Ducommun and Mrs. Isabel Austin and Hilla A. C. Houck. I remember telling J. G. Houck he should have it recorded, and he said something about doing so, and handed the deed to his mother."

Cy Ducommun, a witness for the defendants, testified that he was not in Oregon, but in the state of Nevada, at the time of the alleged transaction, and that he did not witness either the alleged deed or contract.

The defendant Hilla A. C. Houck denied the execution of the alleged deed or contract and gave testimony tending to show that no deed was ever executed by either herself or her husband, and that the contract was the one set forth and alleged in the answer, by which she only agreed that, if the plaintiff would care for and support his parents during the remainder of their lives, in consideration thereof she would convey to him her undivided half interest in the land, to take effect at her death, pending which the plaintiff should have possession of the same. She further testified:

"Q. What was done with the contract or the instruments that were signed, after they were signed? A. Mr. Austin turned and handed it to me.

"Q. What did you do with it? A. I took it and put it away.

"Q. How long did you have the custody of that? A. Well, I had it from the time it was signed in—along in April, 1907—until the time that I started for Portland in 1909 or '10. * * *

"Q. What did that contract provide for? A. It provided for him to take care of me, do for me kindly and lovingly. * * *

"A. I says, 'Well, what will be done with this?' Now I am going to use his [plaintiff's] language. He says, 'I don't care what in hell becomes of it if I had my \$7½ back; I don't care if the ranch went to hell,' was his language that he used to me. * * * That was right there within 15 minutes after they drove away with the buggy—in the buggy.

"Q. Jacob Houck, then, never had this contract in his possession? A. He never had it right then. Then and there when he used that language to me, thinks I, 'Old boy, I will watch you for a while before this goes on record.' From day to day things went a little more and a little more until I could not put up with it."

The above is substantially all of the testimony concerning the execution of the deed and contract and the delivery and custody thereof.

This is a transaction between aged and infirm parents, on one side, and their 26 year old son, on the other, wherein the papers were prepared and acknowledged by an attorney employed and paid by the son. Neither of the other heirs was present at the time or had any exact knowledge that the papers were executed. Robert Houck, a brother of the plaintiff, was then living on the farm, and George Houck, another brother, had it leased at that time. Yet, according to the plaintiff's own testimony, they were not consulted and did not know anything about the transaction. There is no evidence of any friction between the parents and any of their children, that they had any preference for one over the others, or that there was any reason for preference.

Assuming that the plaintiff's testimony is true, and that he kept and performed his alleged agreement, the old folks received nothing more therefrom than the privilege of continuing to reside where they had lived for 39 years, and to have the simple necessities of life furnished them, in consideration of which the plaintiff then received a fee-simple title to and the use and enjoyment of their old home, which was of the reasonable value of \$10,000 to \$12,000. Outside of their actual household expenses, there is no evidence that the plaintiff furnished his parents money in excess of \$100 for the nine years, and there is evidence that during that period they paid out more than that amount on the maintenance and upkeep of the farm.

It must be conceded that, as owners in fee simple, the parents had a legal right to dispose of their property by deed or will, in their own discretion. But this is a suit to enforce a deed founded upon a contract. The plaintiff testified that there was a contract, that it was pinned to the deed, and that together the instruments were delivered to his mother. According to his own statements, the matter was never mentioned or discussed between them thereafter, and he

was advised in 1913 that his mother had destroyed the papers. He was told by his attorney to have the deed recorded, and the only reason which he assigns for not having done so is the statement, "I just neglected it." He further testified that he never saw the instruments after they were left with his mother for safe-keeping, and that he never tried "to get the papers afterwards for recording."

R. P. George, a landowner and neighbor of the Houcks, testified that at the time the disputed property was leased by George Houck it had an annual rental value of \$300 to \$400, and there is testimony tending to show that it yielded at least 90 tons of hay yearly, that it had a good water right, and that the cultivated land was very productive.

[1] Under all of the facts and surrounding circumstances, we think that it was not the purpose or intent of the plaintiff's parents in April, 1907, to deliver the deed or part with the title to their property. According to the plaintiff's testimony, the contract was pinned to the deed and was the consideration therefor. He also stated that if he did not take care of his parents the property was to go back to them, and that "I suppose that is what the contract was for."

[2] As to delivery, the law is well stated in *Hill v. Kreiger*, 250 Ill. 408, 95 N. E. 468:

"In the case of an ordinary deed of bargain and sale it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed passes beyond the dominion and control of the grantor, since both the grantor and the grantee cannot have control of the deed at the same time."

13 Cyc. 562, 563, says:

"It is a general rule, subject to certain exceptions herein given, that a delivery of a deed to be valid must be such as deprives the grantor of the possession and of the control of the instrument. * * * It does not necessarily follow from the fact that the grantee has possession of the deed that there has been a delivery of the instrument; for it may have come into his hands without any intent on the part of the grantor to make a delivery."

8 R. C. L. states the rule thus:

"Delivery is essential to the validity of a deed. It is the final act which consummates

the deed, is as necessary as the seal or signature of the grantor, and without it all other formalities are ineffectual and the deed is void ab initio, being at most a mere proposition to convey, which may be withdrawn at any time before acceptance by the other party. Delivery has been called the life of a deed." Page 973.

"While delivery may be by words or acts, or both combined, and manual transmission of the deed from the grantor to the grantee is not required, it is an indispensable feature of every delivery of a deed, whether absolute or conditional, that there be a parting with the possession of it and with all power and control over it, by the grantor, for the benefit of the grantee, at the time of the delivery. * * * In other words, delivery may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all authority over it or the right of recalling it; but, if he does not evidence an intention to part presently and unconditionally with the deed, there is no delivery." Page 985.

[3] The burden of proof was upon the plaintiff. He was dealing with his aged and infirm parents. The deed and contract were prepared by an attorney employed and paid by him, and by his own testimony it was an unconscionable and unreasonable agreement by which his parents were then to part with the title to all their property, in consideration of which he was to provide "the house and the table." The house was their old home, and the table was largely supplied with the products of the farm. There are strong reasons for holding that this is an instance in which the parents should have had independent advice in the preparation and execution of the deed and contract. There was nothing but a nominal consideration to support the conveyance of their property, which was of the reasonable value of at least \$10,000.

[4] We hold that there was no delivery of the deed, and that upon the record before us the plaintiff does not have any standing in a court of equity.

The decree is reversed, and the suit dismissed.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

McCRACKEN v. BAY CITY LAND CO.*

(Supreme Court of Oregon. July 29, 1919.)

1. VENDOR AND PURCHASER ¶170—TENDER—WHAT CONSTITUTES.

Plaintiff's letter inquiring what balance remained to be paid on a land contract and expressing a desire to secure a deed as soon as possible held insufficient to show a tender of amount due under the contract.

2. VENDOR AND PURCHASER ¶58—RESCISSION OF CONTRACT—INDEPENDENT COVENANT.

A vendor's agreement to clear the lots, grade street, and lay a water main held an independent covenant not authorizing the purchaser to rescind contract upon its breach.

Department 1.

Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Suit by Lee McCracken against the Bay City Land Company, a corporation. Decree for plaintiff, and defendant appeals. Reversed, and suit dismissed.

This is a suit to rescind a contract for the purchase of three lots in Central addition to Bay City, the vendee being plaintiff, and the vendor defendant. The contract, which is set out in full in the complaint, provides for monthly payments, and, inter alia, contains the following clause:

"The first party agrees to cut and grade the street at the present level in front of the said lots, and to lay a water main along the said street in front of said lots, and to clear the said lots; all of these improvements to be delivered free and without cost to the second party. This agreement is a part of the contract to which it is attached."

The last sentence of the quotation may be explained by saying that the instrument was a printed form which did not contain such a stipulation, and was added as a "rider" upon the insistent demand of the plaintiff, before he would execute the agreement. It is further alleged that plaintiff has duly performed all the conditions on his part, except that there was a balance of \$6 as principal and \$9.44 accrued interest due on September 20, 1917, and that as to these amounts he tendered and offered, in writing, to pay, and to receive a deed to the premises, and that in reply to said offer he received a letter from defendant stating that it was unable to deliver a deed to said premises until the 30th of November, as it was unable to secure a release from a trust deed covering the premises prior to that time. It is averred that this letter was the first notice plaintiff had that the property was incumbered, and that at all times prior thereto defendant had fraudulently concealed from plaintiff the

fact that the lots were covered by a mortgage or a trust deed; that immediately after receipt of such letter plaintiff, for the first time, went to Bay City and inspected the premises, thereby discovering for the first time that defendant had failed to clear the lots, grade the street, or lay the water main in front of the property. After pleading his reliance upon the terms of the contract, the freedom of the lots from incumbrance, etc., plaintiff declares that but for such covenants he would not have made the payments which were made. Then follow these paragraphs:

"That, by reason of the failure of defendant to furnish plaintiff a deed to said premises (to clear said lots from trees, stumps, etc., to grade the streets so as to make it possible for plaintiff to have a means of ingress and egress to said premises, and to lay in the street in front of and adjacent to said premises a water main for the purpose of furnishing the plaintiff water for domestic purposes), the premises described in the said contract of sale are rendered totally worthless and useless to plaintiff.

"That among other terms and conditions of said contract it is stipulated that time is the essence of said agreement, and immediately upon discovery that defendant had falsely and fraudulently concealed from plaintiff the fact that said premises were mortgaged, and that defendant would be unable to execute a deed (upon the payment of the last installment due on September 20, 1917, and upon discovery of the fact that defendant had failed and neglected to clear the lots and to grade the streets in front of and adjacent thereto and to lay the water mains along said streets in front of and adjacent to said lots), the plaintiff notified the defendant in writing that he would elect to rescind the said contract and receive back from defendant the payments on account thereof with interest, and thereupon duly tendered to defendant a quitclaim deed to said premises, which defendant refused and now refuses to accept."

These are followed by an itemized statement of the payments made, amounting to \$1,355.88, his demand therefor, and defendant's refusal.

The answer admits the execution of the contract as set up in the complaint, admits the payments as therein alleged, and, after some denials, pleads affirmatively that there was no time specified in which the improvements named in the agreement were to be undertaken and completed; that prior to and at the time of the execution thereof it was agreed between the parties that such improvements were not to be made until plaintiff was ready to go upon and occupy the land, and that notice of his intention to do so should first be given by him to defendant; that plaintiff has not gone upon the premises to use them, and has never notified defendant of any intention to do so; that, under the terms of the contract, the final installment of the purchase price, \$6, with

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 16, 1919.

accrued interest in the sum of \$9.44, became due and payable on September 20, 1917; that plaintiff has failed and refused to pay the same or any part thereof; that defendant is now, and at all times has been, ready, able, and willing, upon payment of the unpaid balance, to deliver to plaintiff a good and sufficient warranty deed, and that such a conveyance has been duly prepared and tendered to plaintiff upon payment of such balance; that defendant has at all times complied with the terms of the contract, and now is ready, able, and willing to perform all of the terms and conditions thereof.

The reply admits the tender of the deed, and denies generally the other allegations of the affirmative answer. There was a trial and a decree in favor of plaintiff, from which defendant appeals.

H. T. Botts, of Tillamook (H. T. Botts, of Tillamook, and John L. Bozorth, of Portland, on the brief), for appellant.

Wm. H. Trindle, of Salem, for respondent.

BENSON, J. (after stating the facts as above). There are two questions presented upon the appeal. The plaintiff bases his right of recovery, first, upon the theory that early in September he tendered the balance due upon his contract and demanded his deed, but that defendant replied that it would be unable to deliver the same, for the reason that it could not, prior to November 30th, secure a release of the land from the lien of a certain trust deed. The question raised upon this proposition is: Was there such a tender of payment of the purchase price as would put defendant in default by failure to make conveyance?

[1] The second proposition upon which plaintiff relies is that the agreement to clear the lots, grade the street, and lay the water main was a dependent covenant, a failure to perform which would entitle him to rescind. Considering these in the order thus indicated, we note that the evidence of a tender of the purchase price is as follows: On September 12, 1917, plaintiff wrote and mailed to defendant a letter in these words:

"Salem, Or., 9/12, 1917.

"Bay City Land Co., Portland, Or.—Gentlemen: I will be glad if you will please inform me how near finished my payments are as I have received no notice for Sept. If I am not mistaken there is not much more to pay and I'm anxious to get my deed and have it done with. Hope to hear soon and that your part of the contract is also fulfilled so I may have clear title. Let me hear at once, and also if there is any chance to sell it, and oblige, Respectfully, Lee McCracken. 2610 Maple Ave., Salem, Or."

The plaintiff testifies that he wrote another letter to defendant, a few days later, in which he inquired as to whether or not the clearing and street grading had been done,

and the water main laid, and also "that I was ready to make a payment or to complete payments on the property and finish up the payments when I found out what it was."

This constitutes all of the evidence of a tender. It will be observed that no specific sum is mentioned, and the letter does not offer to pay any sum whatever. The requirements of a sufficient tender in this respect are stated in *Hunt on Tender*, § 238, thus:

"In making a tender of money, whether the actual production be dispensed with or not, the tenderer must name the sum which he tenders. Thus, where the person who made the tender had two bank notes twisted up in his hand, inclosing four sovereigns and 19s. 8d. in change, making the precise sum intended to be paid, and the party, without opening it, informed the creditor of the amount, the tender was held good, *Best, C. J.*, said: 'If he had not mentioned the amount, I think it would not have done.' So in another case a debtor, in passing his creditor, said, 'I want to tender you this money * * * for labor you have done me,' at the same time holding in his hand a sum equal to the indebtedness, but named no sum. It was held insufficient."

The rule is stated in 38 *Cyc.* 137, thus:

"Nothing short of an offer of everything that the creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due, including all necessary expenses incurred or damages suffered by the creditor by reason of the default of the debtor, and a mistake in tendering an amount less than the sum due is the misfortune of the tenderer, and the position of the parties remains the same as if no tender had been made. Furthermore, the tenderer must name the sum which he wishes to tender, unless perhaps the exact sum and interest is tendered so that the tenderer may easily satisfy himself that the amount is correct. Where the amount due is within the exclusive knowledge of the creditor, and the creditor on demand neglects or refuses to indicate the correct amount that is due, the debtor may tender so much as he thinks is justly due, and, if less than the true amount, the tender nevertheless will be good; and the same rule obtains where the tenderer deprives the tenderer of the means of ascertaining the exact amount due."

The evidence falls far short of these requirements, and we conclude, therefore, that the plaintiff's first contention must fail.

[2] Plaintiff's second proposition is that defendant's promise to clear the lots, grade the street, and lay a water main is a dependent covenant, for the breach of which he is entitled to a rescission, and this is the conclusion reached by the trial court. The distinction between dependent and independent covenants is sometimes very shadowy, and frequently is difficult to determine. There is a dearth of authority upon the specific question as to the right of a vendee to rescind an executory contract for the sale of land upon the vendor's breach of covenant to make improvements, but we have carefully

examined all to which our attention has been directed. The case of *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823, appears to be a leading case upon the subject and contains a very full discussion of the problems involved, citing and quoting copiously from all of the available cases bearing upon the subject. This was a case wherein the plaintiff had entered into a contract with the defendant whereby he agreed to purchase certain real property for the sum of \$2,400 in installments, the first payment to be made October 22, 1906, and the last falling due on October 22, 1908. The agreement contained certain building restrictions, and the following covenant:

"Said first parties agree that they will, free of cost to said second party, put in the necessary cement sidewalks, sewer and water mains, and pave the abutting street, within one year from the date hereof."

Plaintiffs made the required payments until the time arrived for making one which became due on October 22, 1907, which was not made, and on October 23d notified defendants that they elected to rescind the contract for failure on the part of the defendants to put in the cement sidewalks, sewer and water mains, and pave the abutting streets within one year from the date of the contract, which had been executed on October 22, 1906. The action was then instituted to recover the installments paid. There were other issues raised by the pleadings, but Mr. Chief Justice Rudkin, in the opinion, says:

"Regardless of the merits of these respective contentions, we think there are other reasons why the judgment should be affirmed. The numerous covenants contained in this contract, aside from the covenant to convey and the covenant to pay the purchase price, are wholly independent of each other, and the only remedy for a breach of such covenants is an action for damages. It is sometimes difficult to determine whether covenants are dependent or independent, but we think the covenants contained in this contract in relation to building restrictions, improvements, etc., are clearly of the latter class."

In support of this conclusion, the opinion quotes from the following cases which support the same fully: 9 Cyc. 642; *Hunt v. Tibbetts*, 70 Me. 221; *Turner v. Mellier*, 59 Mo. 526; *American Emigrant Co. v. County of Adams*, 100 U. S. 61, 25 L. Ed. 563; *Tip-ton v. Feltner*, 20 N. Y. 423; *Front Street, etc., R. Co. v. Butler*, 50 Cal. 574.

In *American Emigrant Co. v. County of Adams*, supra, the rule is stated thus:

"The allegations of the bill to the effect that the Emigrant Company has not fulfilled its engagements with respect to the drainage and settlement of the land rest in covenant merely, and afford no ground for avoiding the contract.

Where covenants are mutual and dependent, the failure of one party to perform absolves the other, and authorizes him to rescind the contract. But here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was not a condition, but, as before stated, rested in covenant. In case of a breach, they would lay the foundation of an action, but nothing more."

In the state of Washington the case of *Crampton v. McLaughlin Realty Co.*, supra, has been followed in a number of cases. In *Toellner v. McGinnis*, 55 Wash. 430, 104 Pac. 641, 24 L. R. A. (N. S.) 1082, Mr. Justice Chadwick says:

"*Crampton v. McLaughlin Realty Company* has nothing in common with this case. The covenants in that contract were clearly independent under any rule."

And again, in *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 648, 103 Pac. 1106, 1107, Mr. Justice Mount says:

"In *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586 [21 L. R. A. (N. S.) 823], we held that covenants to put in sidewalks and other improvements contained in a contract for the sale of real estate were independent covenants. The rule in that case is decisive of this. In this case the promise to pay the purchase price of the land did not depend upon the promise to furnish water at stated times. The latter promise is to be performed after the purchase price is fully paid. It was an independent continuing covenant. The fact that the covenant to furnish water was to be performed before all the payments were made was a mere coincidence. The payments were not made dependent thereon."

Counsel for plaintiff contends that this court is committed to a contrary doctrine by the views expressed in *Miller v. Beck*, 72 Or. 140, 142 Pac. 603, *Potter Realty Co. v. Derby*, 75 Or. 563, 147 Pac. 548, and *Stewart v. Mann*, 85 Or. 68, 165 Pac. 590, 1169. We shall therefore give special attention to these cases.

Miller v. Beck was a case wherein there was a contract for the sale of:

"All of tracts numbered twenty-four (24) and twenty-five (25) of the Dimick homestead tracts, which said tracts are duly recorded in the office of the county recorder of said Marion county, Or.; also a right of way for road purposes along tracts 32 and 33 of said Dimick homestead tracts, until such time as the 20-foot road along the front of said tracts numbered 24 and 25 shall have been opened."

The right of way along the front of tracts 32 and 33 was subsequently closed, and the vendor refused to open one along the front of tracts 24 and 25. Upon these facts this court held that the vendee was entitled to rescind, saying, by Mr. Justice Burnett:

"Miller engaged to buy, and the company obligated itself to sell, not only the two lots, but

also 'a right of way for road purposes along tracts 82 and 83 until * * * such time as the 20-foot road along the front tracts numbered 24 and 25 shall have been opened.'"

It was held that those facts justified rescission. A mere statement of the facts differentiates it from the instant case.

Potter Realty Co. v. Derby was a case wherein the plaintiff had undertaken to create a summer resort city. It was an action brought to recover delinquent installments of the purchase price. From the contract itself it appears that the improvement of the entire town site, to the extent of \$100,000 per year until the very extensive improvements therein described should have been fully completed, was the principal consideration. The record discloses that no such improvements had been made, that the 'only market value that the land had or could have depended entirely upon the completion of such improvements, and that the plaintiff was an insolvent company, totally unable to perform. There was no question of rescission in the case, and the decision was based upon the language of the contract itself, wherein it was agreed that in the event of default in payment of any installment of the purchase price all payments theretofore made should be forfeited to the seller, and the contract should become void as to both parties without notice. This court simply held both parties to the exact terms of the contract as thus expressed, permitting the seller to keep all the payments it had received, but denying it the right to collect any more, and so the case does not decide the question which now confronts us.

The case of Stewart v. Mann does not in any manner discuss the problem which we are considering. The situation there was one wherein the vendee insisted, not upon a rescission, but upon an abatement in the purchase price because the fruit trees upon the land had not been cared for as stipulated in the contract, which demand was answered, by the assignee of the original vendor, by returning to the purchaser the payments received subsequent to the assignment, and repudiating all obligations under the contract. This court rendered a decree awarding plaintiff a decree for the return of his payments, because the vendor had repudiated the contract. These cases therefore are of no assistance in the consideration of the present case. The facts here are substantially like those in Crampton v. McLaughlin Realty Co., supra, and the evidence discloses that an expenditure of \$200 in a very short time would supply the improvements for which the contract calls, and the breach is one that may be readily compensated in damages. We think it is clearly an instance

of an independent covenant, for which there can be no rescission. The decree is reversed, and one will be entered dismissing the suit.

MCBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

NICKELL v. BRADSHAW et al.

(Supreme Court of Oregon. July 29, 1919.)

1. PLEADING, \S 403(3)—CURE OF DEFECT BY SUBSEQUENT PLEADING.

Where complaint correctly set forth note sued upon, except that it omitted one phrase, but answer set forth note correctly and reply admitted such portion of answer, *held*, that pleadings, construed together, referred to note introduced in evidence.

2. BILLS AND NOTES \S 537(7)—PRESENTMENT—SUFFICIENCY OF EVIDENCE.

Conflicting evidence *held* to make a jury question whether note sued upon was in a bank's possession for presentment on day note fell due, as required by L. O. L. \S 5904, or in plaintiff's lock box in bank.

3. BILLS AND NOTES \S 405—PRESENTMENT—SUFFICIENCY.

Under L. O. L. \S 5905, 5920, relating to presentment of negotiable instruments for payment, a note payable at a bank is sufficiently presented if it is in bank at date of maturity ready to be delivered by bank to the proper person upon payment being made.

4. BILLS AND NOTES \S 527(1)—PAYMENT—AUTHORITY.

Possession at time and place of payment of a note properly indorsed is prima facie evidence of authority to receive payment.

5. BILLS AND NOTES \S 155—NEGOTIABILITY—TIME FOR PAYMENT.

Under L. O. L. \S 5834, 5837, defining negotiable instruments, etc., a note payable five years from date and containing the clause, "due if ranch is sold or mortgaged," is not rendered nonnegotiable by quoted words.

6. BILLS AND NOTES \S 129(1)—TIME FOR PAYMENT—CONSTRUCTION.

Where a note payable five years from date contains the clause, "due if ranch is sold or mortgaged," the quoted clause is not self-executing, but merely confers option upon holder to treat debt as due if contingency occurs.

7. BILLS AND NOTES \S 468—COMPLAINT—TIME FOR PAYMENT.

Where a note payable five years after date contained a clause making it due if the maker's ranch was sold or mortgaged, a plaintiff relying upon expiration of five-year period need not allege or prove that ranch had not been sold.

8. EVIDENCE \S 441(11)—PAROL EVIDENCE—CONTEMPORANEOUS AGREEMENT.

Parol evidence that indorser and indorsee of a note agreed that indorsee would enforce pay-

ment only from maker is incompetent because contradicting the written contract of indorsement.

9. BILLS AND NOTES ¶498—BURDEN OF PROOF—NOTICE OF DISHONOR.

The holder of a note has burden of proving that notice of dishonor was mailed within the time prescribed by L. O. L. § 5937.

10. BILLS AND NOTES ¶526—NOTICE OF DISHONOR—SUFFICIENCY OF EVIDENCE.

Evidence that written notice of dishonor was postmarked during afternoon of following day does not establish a compliance with L. O. L. § 5937, requiring deposit in post office in time to go by mail on day following day of dishonor, etc., since there is no proof regarding time of outgoing mails.

Department 1.

Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by Belle Nickell against R. H. Bradshaw and Effie May Terrill. From an involuntary judgment of nonsuit against the last-named defendant, the plaintiff appeals. Affirmed.

Belle Nickell brought this action against R. H. Bradshaw, as the maker, and against Effie May Terrill, as an indorser, of a promissory note. Bradshaw made no appearance, and there was a judgment against him for the amount of the note; but as between Belle Nickell and Effie May Terrill there was an involuntary judgment of nonsuit against Belle Nickell. The plaintiff appealed.

On August 9, 1910, R. H. Bradshaw delivered to Effie May Terrill his promissory note which reads as follows:

"\$2,000. Medford, Oregon, Aug. 9th, 1910.

"Five years from date without grace, I promise to pay to the order of Effie May Terrill for value received, with interest from date, payable annually at the rate of 6 per cent. per annum, until paid, principal and interest payable in U. S. gold coin, at Farmers' & Fruit Growers' Bank of Medford, Oregon; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum of money as the court may adjudge reasonable as attorney's fees in such suit or action.

"R. H. Bradshaw.

"Due if ranch is sold or mortgaged."

Charles Nickell is the husband of Belle Nickell, and Charles E. Terrill is the husband of Effie May Terrill. On March 26, 1912, Belle Nickell traded 160 acres of land, owned by her, for the note held by Effie May Terrill. The land was valued at \$1,800, and Belle Nickell and her husband executed and delivered to Effie May Terrill a note "for \$400 for the difference." This note signed by the Nickells was afterwards paid by them. All the negotiations for the "trade" were conducted by Charles Nickell as the agent of Belle Nickell and by Charles E. Terrill as

the agent of his wife. The inference to be drawn from the record is that all the negotiations for the "trade" as well as the consummation of it were carried on in Medford. Effie May Terrill resided in Brownsboro, Jackson county, and was not present during any of the negotiations nor at the close of the transaction. When the Bradshaw note was delivered to Charles Nickell, as the agent of his wife, there was an indorsement on the back of the paper showing the payment of interest to August 9, 1911, and immediately beneath that writing the name "Effie May Terrill" was written. The undisputed evidence is that Effie May Terrill placed the note in her lock box in a Medford bank and that it remained there until it was delivered to Charles Nickell. The uncontradicted testimony of Effie May Terrill is that, although the name upon the back of the note was her genuine signature, she had written her name on the note some time before the negotiations for the "trade."

On July 24, 1915, Charles Nickell and his wife were in Berkeley, Cal., and on that date the former, writing from Berkeley, addressed a letter to Charles E. Terrill, inquiring as to the whereabouts of Bradshaw and saying that "his note will soon be due." Nickell returned to Medford shortly after writing to Terrill and did not receive an answer from Terrill until after he had returned to Medford. Not knowing the whereabouts of Bradshaw, about ten days or two weeks before August 9, 1915, and while still in Berkeley, Nickell wrote two letters to Bradshaw, addressing one to him at Medford and the other to him at Brownsboro, telling him that "the note would become due on a certain date and to go and pay it." Charles Nickell testified that he did not present the note to Bradshaw personally, but that "I just left it at the bank where he should pay it and told him about it being there." Charles Nickell stated on direct examination that the note "has been in mine and my wife's" possession since it was received from Charles E. Terrill; and upon being recalled the witness was asked by counsel for plaintiff whether he made demand upon Bradshaw for payment the next day after the note became due; and he answered thus:

"Yes, the next day. This note was at the bank (Farmers' & Fruit Growers' Bank) there all of the time, and it was only withdrawn some time afterwards from the bank, and in fact he was notified to appear at the bank and pay it."

Charles Nickell was further asked: "You say this note was at the Farmers' & Fruit Growers' Bank up to the time it became due?" and he answered, "Yes."

On August 10, 1915, Charles Nickell wrote, and Belle Nickell signed, a letter addressed

to Effie May Terrill at Brownsboro, as follows:

"You are hereby notified that the note drawn in your favor by R. H. Bradshaw under date of August 9, 1910, for \$2,000.00, payable at the Farmers' & Fruit Growers' Bank at Medford, Oregon, five years after date, with interest at 6 per cent. per annum, and subsequently indorsed by you and sold and transferred to me by you before maturity for a valuable consideration, was dishonored and not paid by said R. H. Bradshaw, the maker, at maturity, after due presentation.

"I now make demand upon you that you pay said note and accrued interest at the Farmers' & Fruit Growers' Bank at Medford, Oregon, at once.
Belle Nickell.

"Dated this 10th day of August, 1915."

This letter was deposited in the post office in Medford and was received by Effie May Terrill at Brownsboro.

The complaint alleges that R. H. Bradshaw gave his promissory note to Effie May Terrill on August 9, 1910, and that afterwards, before the maturity of the note, the latter indorsed it to the plaintiff; that "at the maturity thereof" the note was "duly presented to the said defendant, R. H. Bradshaw, the maker thereof, for payment and payment thereof demanded; but the same was not paid nor was any portion thereof, of all which due notice was given to the said defendant, Effie May Terrill, the said indorser thereof, and payment thereof demanded of the said defendant, Effie May Terrill, the said indorser." The complaint sets out a purported copy of the note sued upon; but a comparison of the complaint with the promissory note executed by Bradshaw discloses that the recitals in the complaint agree with the original note, except that the complaint omits the words, "Due if ranch is sold or mortgaged."

Effie May Terrill denied all the allegations of the complaint except as "specifically alleged" in the answer. In passing it is proper to add that the denials were based, in part, on the theory that the complaint recited a note different from the one which the respondent had transferred to the plaintiff. The answer recites the execution and delivery of the note from Bradshaw to Effie May Terrill, and this pleading contains an accurate copy of the whole note. The answer also contains two separate defenses. In the first separate defense it is stated, in substance, that the Bradshaw note was delivered to and accepted by the plaintiff upon an agreement by her—

"To look entirely to the defendant Bradshaw for the payment of the same, without any claim upon this defendant for liability for any portion of said note, principal or interest, or attorney's fees. * * * That in said transaction plaintiff accepted said note as the obligation of the defendant Bradshaw only, relieving this defendant from any liability thereon in the

event of nonpayment, and without any other understanding, legal, implied or otherwise, that this defendant would become the guarantor or indorser thereof."

In the second separate defense it is recited that, when Bradshaw gave the note to Effie May Terrill, he was the owner of a ranch in Jackson county, "of large acreage and of great value, and so long as said ranch remained the property of the said Bradshaw and was not too largely mortgaged or incumbered said note was easily collectible out of said ranch; that for said reason it was stipulated as a part of said transaction that if said ranch should be sold or mortgaged said note should mature, so that this defendant might protect herself in the collection of said note."

Effie May Terrill further alleged that, at the time of the transfer of the note to Belle Nickell, the Bradshaw ranch was mortgaged, but that the "incumbrance was small as compared with the value of said ranch and had been put on by the consent of this defendant, as this defendant advised plaintiff at the time of the sale of said note."

The second separate defense concludes with the following paragraph:

"That thereafter on or about the 18th day of January, 1913, the defendant Bradshaw sold said ranch to Frederick T. Lewis, of which fact the plaintiff had knowledge, and on or about the time of said transaction and for more than one year prior to any notice of nonpayment to this defendant and for more than one year prior to any demand upon this defendant for the payment of said note or any part thereof. By the terms of said note and by reason of said transaction the said note * * * became due and owing more than one year prior to any notice of nonpayment or demand for payment by plaintiff on defendant."

The reply opens by explaining that the words, "due if ranch is sold or mortgaged," were inadvertently omitted from the complaint. The reply denies that the Bradshaw note was transferred to the plaintiff upon an agreement by her to look to Bradshaw only for payment of the note; and this denial is followed by an affirmative allegation that it was agreed that—

"The plaintiff should not look entirely to the said defendant R. H. Bradshaw for the payment of the said note, * * * but that the said defendant Effie May Terrill should indorse the last described note unrestrictedly."

The plaintiff admits the sale to Frederick T. Lewis, but attacks the second separate defense by averring that the words, "due if ranch is sold or mortgaged," were intended to give Effie May Terrill "the option only to declare the said note due in the event the said defendant Bradshaw should sell or mortgage the ranch referred to in said promissory note"; that Effie May Terrill waived her right to exercise the option to

declare the note due by consenting on October 8, 1910, to a conveyance of the north half of the ranch from Bradshaw to Mrs. M. D. Harbaugh for \$4,000 and by consenting to the execution of a mortgage in 1911 on the south half of the ranch for \$3,120 by Bradshaw to H. M. McFarland.

W. D. Fenton, of Portland (James E. Fenton, of Portland, and W. E. Crews, of Medford, on the brief), for appellant.

A. E. Reames, of Medford, for respondent Effie May Terrill.

HARRIS, J. (after stating the facts as above). [1] The respondent argues that the note introduced in evidence is not the instrument described in the complaint and upon which the action is brought. The note recited in the complaint is an exact copy of the instrument received in evidence, except that the words, "due if ranch is sold or mortgaged," are omitted from the former. The answer denies all the allegations of the complaint, but this denial is qualified by the words, "except as hereinafter specifically alleged." Immediately following this qualified denial is paragraph 1, in which it is affirmatively alleged that on August 9, 1910, R. H. Bradshaw made and delivered to Effie May Terrill his promissory note. This allegation is then followed by an exact copy of the note which was introduced in evidence. In the reply the plaintiff expressly admits the allegations in paragraph 1 of the answer, and this admission is then followed by an explanation to the effect that through inadvertence the words, "due if ranch is sold or mortgaged," were omitted from "the copy of said promissory note as set out in the complaint of plaintiff herein." A mere statement of the facts makes it obvious that the complaint and the reply, on one hand, and the answer, on the other, refer to the same note, and that the note referred to is the instrument received in evidence.

[2] Assuming that the note became due on August 9, 1915, and not before that date, then, in order to make Effie May Terrill liable as an indorser, Belle Nickell, the holder, was obliged to present the note for payment on August 9, 1915, for section 5904, L. O. L., provides that—

"Where the instrument is not payable on demand, presentment must be made on the day it falls due." 8 C. J. 533, 534, 548, 549.

[3, 4] The plaintiff insists that she offered sufficient evidence to warrant a finding that the note was, on August 9, 1915, in the hands of the bank for delivery to the maker upon payment being made by him. Effie May Terrill strenuously contends that there is an utter want of evidence to show that the note was in the hands of the bank for collection, and that the most that can be claimed for the evidence is that the instrument was in the bank in the plaintiff's lock box. It is true

that Charles Nickell stated that the note had been "in mine and my wife's possession since it was received from Charles E. Terrill." The quoted answer of the witness cannot in fairness be construed alone and by itself, but it must be interpreted in connection with the remainder of the testimony given by the witness, and when so construed there was sufficient evidence, if believed by the jury, to sustain a finding that the bank had the note in its actual possession on the date when it became due with authority to receive payment and surrender the note to the maker. The substance of the testimony of Charles Nickell is that he left the note in the bank; that about ten days or two weeks before the note became due he wrote to Bradshaw telling him that the note was in the bank and "to go and pay it." The jury could have fairly and reasonably construed the words of Nickell to mean that the bank had actual possession of the note with authority to surrender it upon payment.

However, it is argued that, even though it is held that the bank had possession of the note with authority to surrender it upon payment being made, nevertheless no presentment for payment was made. This argument is based upon the language of section 5905, L. O. L., where it is said:

"Presentment for payment, to be sufficient, must be made * * * to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made."

If Belle Nickell had retained actual possession of the note and if she had gone to the bank with it on August 9, 1915, for the purpose of presenting it, then, if Bradshaw was not present, she would have been obliged to have presented the note to some person at the bank for payment. But it must be remembered that the note was payable at the Farmers' & Fruit Growers' Bank of Medford, and there was evidence to show that the instrument was in the hands of the bank for collection; and consequently it would have been an idle, empty, and vain ceremony if some person connected with the bank had presented the note for payment to some other person connected with the bank when the person making presentment had as much authority as an agent of the bank to pay the note as the person to whom presentment was made. The negotiable instruments law (sections 5905 and 5920, L. O. L.) simply redeclares the rule, which generally prevailed prior to the adoption of the statute, that when a note is made payable at a bank a sufficient presentment occurs if the instrument is actually in the bank at maturity, ready to be delivered by the bank to any person who is entitled to it upon payment. *De la Vergne v. Globe Printing Co.*, 27 Colo. App. 308, 148 Pac. 923, 924; *Stewart v. Soenksen*, 173 Ill. App. 1, 3; *Kewanee National Bank v. Ladd*, 175 Ill. App. 151,

155; *Norwood National Bank v. Piedmont Publishing Co.*, 106 S. C. 472, 478, 91 S. E. 866; *Doherty v. First National Bank of Louisville*, 170 Ky. 810, 813, 186 S. W. 937; *Crawford's Ann. Neg. Inst. Law* (1916 Ed.) 150; *Eaton & Gilbert on Com. Paper*, 452, 549; 3 R. C. L. 1206. See, also, *Nelson v. Grondahl*, 13 N. D. 363, 100 N. W. 1093; *Eaton & Gilbert on Com. Paper*, 449; *Havlin v. Continental National Bank*, 253 Mo. 292, 301, 161 S. W. 741; 8 C. J. 558.

Section 5905, L. O. L., declares that presentment "must be made by the holder, or by some person authorized to receive payment on his behalf"; and the defendant contends that, even though it be assumed that the note was in the actual possession of the bank, yet there was no evidence that any officer of the bank had authority to receive payment. In addition to the testimony of *Charles Nickell*, there is the circumstance of the signature of the defendant on the back of the note. Possession at the time and place of payment, when indorsed as this note was, is *prima facie* evidence of authority to receive payment. 8 C. J. 565; *Selover on Neg. Inst.* (2d Ed.) 246.

[5] It is contended that the note sued upon is a nonnegotiable instrument. This contention proceeds upon the theory that the words, "due if ranch is sold or mortgaged," made the time of payment so uncertain that it cannot be said that the note was payable "at a fixed or determinable future time." Section 6017, L. O. L., defines a "negotiable promissory note" as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer." Speaking of instruments generally, section 5834, L. O. L., declares that an instrument to be negotiable must, among other things, "be payable on demand, or at a fixed or determinable future time." The meaning of "fixed future time" is expressed in section 5837, L. O. L., thus:

"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

The three sections of our Code to which attention has been directed correspond with sections 184, 1, and 4 of the uniform negotiable instruments law which has been adopted by all the states of the Union except Georgia and Texas. *Utah State National Bank v. Smith* (Cal.) 179 Pac. 160, 161. The chief object of the uniform negotiable instruments law was, as its name implies, to

accomplish uniformity, so that a citizen of one state could know the law of every state by acquiring a knowledge of the law of his own state. Although in some of the states slight differences in phraseology may occasionally be observed, or sometimes, but rarely, omissions may be noted, or a small number of material changes might be specified, yet for the most part not only the subject-matter but also the phraseology and the sections of the original draft are exactly the same in the states which have adopted the uniform negotiable instruments law. In the main, the uniform negotiable instruments law is only a legislative declaration of the rules of the law merchant; and, indeed, the concluding section of the statute provides that—

"In any case not provided for in this act the rules of the law merchant shall govern." Section 6025, L. O. L.

While most of the rules of the law merchant were thoroughly established and were the same in all American jurisdictions, still the subject of negotiable instruments presented many phases upon which appellate courts differed; and generally, but not always, the uniform negotiable instruments law solved these differences by adopting whatever rule was supported by the weight of authority; and hence it is accurate to say that the uniform negotiable instruments law for the most part redeclares all the uniformly accepted rules of the law merchant and, in most instances where there was a difference of judicial opinion, adopts whatever rule was supported by the weight of authority. 8 C. J. 47. Legislation has succeeded in establishing a substantially uniform code of rules governing negotiable instruments. Uniformity in legislation upon the subject of negotiable instruments may be said to be an accomplished fact, but perfect and exact uniformity in the construction and application of all those same rules is only an iridescent dream. Courts sometimes differ now, just as they sometimes differed before the adoption of the uniform negotiable instruments act, in the application of a given rule governing negotiable instruments, although the rule itself may be accepted and agreed upon by all. An examination of reported decisions dealing with instruments analogous to the one presented here and rendered after as well as before the adoption of the uniform negotiable instruments law affords concrete illustration of the variant views sometimes expressed in the application of a given rule.

The provisions of the negotiable instruments law (sections 6017, 5834, and 5837, L. O. L.) are only declaratory of the law merchant as it existed in most jurisdictions; and hence judicial opinions expressed before the enactment of the statute are not without weight in the solution of the problem cou-

fronting us. *Rossville State Bank v. Hesel*, 84 Kan. 315, 113 Pac. 1052, 33 L. R. A. (N. S.) 738; 3 R. C. L. 907; 8 C. J. 135; *Eaton & Gilbert on Com. Paper*, 213. If the words, "due if ranch is sold or mortgaged," are omitted from the instrument, it concededly becomes a negotiable promissory note within the meaning of section 6017, L. O. L., because it contains a promise to pay "five years from date," which is, speaking as of the date of the note, a fixed future time. If, on the other hand, the words, "five years from date," are erased, the paper is admittedly transformed into a nonnegotiable instrument, because it then becomes payable "if ranch is sold or mortgaged," which, if standing alone and viewed by itself, was at the time of the execution of the instrument a "contingency" within the meaning of section 5837, L. O. L. We are not permitted, however, to cancel any word found in the instrument, and hence the whole of the paper must be considered in determining whether the instrument is or is not negotiable. *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777, 780. It will be observed that the writing does not in express terms say that the debt becomes due if the ranch is sold or mortgaged before "five years from date," and yet such is the obvious intent and meaning of the whole writing. The debt becomes due at all events "five years from date," and the debt cannot extend beyond that fixed, certain, and definite period because the moment the five-year period ends the debt is due and any other interpretation of the writing would completely nullify the words "five years from date"; but, if the ranch is sold or mortgaged prior to the expiration of that fixed future time, then the promisor agrees to pay the debt at the time of such sale or mortgage. *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356.

The words, "due if ranch is sold or mortgaged," do not extend the date of payment, but upon the contrary they serve only to accelerate the maturity of the debt. Stated broadly, the overwhelming weight of authority is to the effect that, where a note is made payable on a definite day and also contains a conditional promise to pay at an earlier time, the instrument is not rendered nonnegotiable by the acceleration clause. *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542; *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888; *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; *Smith v. Nelson Land & Cattle Co.*, 212 Fed. 56, 128 C. C. A. 512; *White v. Hatcher*, 135 Tenn. 609, 188 S. W. 61; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159; *Utah State National Bank*

v. Smith (Cal.) 179 Pac. 160; *First National Bank v. Barrett*, 52 Mont. 359, 157 Pac. 951; *Siegel v. Chicago Trust & Sav. Bank*, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51; 3 R. C. L. 908; *Selover on Neg. Inst.* (2d Ed.) 70; *Eaton & Gilbert on Com. Paper*, 220. See, also, *Page v. Ford*, 65 Or. 450, 469, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048. The books contain a variety of cases involving acceleration clauses. More common illustrations are found in instruments which provide that a default in the payment of interest or in the payment of an installment shall mature the debt. Other familiar examples are furnished by adjudications where a series of notes have been given for a single debt with a provision in each note that default in the payment of any one shall mature all the unpaid notes. While nearly all the courts have decided that a default in the payment of interest or in the payment of an installment or a failure to pay one of a series of notes is such an acceleration clause as does not destroy the negotiability of an instrument, yet there are recorded instances where courts have held that acceleration clauses of the kind mentioned impair the negotiability of instruments otherwise negotiable.

As already stated, the general principle has been firmly established, in despite of occasional dissenting voices, that an acceleration clause does not necessarily destroy the negotiability of an instrument. The chief difficulty, however, is encountered whenever an attempt is made to formulate a rule by which to determine the validity of all acceleration provisions; and it is probably impossible to formulate, even in the most general language, any rule which will include all acceleration provisions that have been held sufficient, and at the same time serve as a safe and certain guide in all jurisdictions. This difficulty is neither greater nor less now than it was previous to the adoption of the negotiable instruments law. For example, there is a class of cases dealing with instruments having provisions to the effect that if at any time the holder of the note deems himself insecure he may declare the debt due; or to the effect that the holder may, if he deems himself insecure, call upon the maker for additional security when the value of the security given at the time of the execution of the writing becomes impaired, and if the maker fails to respond with additional security the holder may declare the debt due. The adjudications assignable to this class are divided in their views; but the majority of the cases decided under the provisions of the negotiable instruments law, as well as the majority of those decided in jurisdictions where the negotiable instruments law had not yet been adopted, have ruled that this kind of a condition in an acceleration clause renders the instrument

nonnegotiable. *Reynolds v. Vint*, 73 Or. 528, 144 Pac. 526; *Western Farquhar Mach. Co. v. Burnett*, 82 Or. 174, 178, 161 Pac. 384; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1; *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870; *First National Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Carroll County Savings Bank v. Strother*, 28 S. C. 504, 6 S. E. 313; *Klinton v. Studebaker Bros. Co.*, 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159; *First National Bank v. Russell*, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A, 203. Contra: *Empire National Bank v. High Grade Oil Refining Co.*, 260 Pa. 255, 103 Atl. 602; *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777; *Kennedy v. Broderick*, 132 C. C. A. 381, 216 Fed. 137, L. R. A. 1915B, 472. The cases holding that an instrument is not negotiable if it contains a clause giving the holder the right to declare the debt due if he deems himself insecure are based primarily upon the objection that the date of maturity is placed wholly under the control of the holder, is completely dependent upon his whim or caprice, and is independent of any act done or omitted by the maker; and, if there is the further stipulation that the maker will furnish added security when called upon, then there is, of course, an affirmative promise of the maker to do an act in addition to his promise to pay money. *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870, 874; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1; *White v. Hatcher*, 135 Tenn. 609, 612, 188 S. W. 61.

It is apparent from what has already been said that some jurisdictions go further than others in their approval of acceleration clauses; and consequently a rule containing language as broad as the rule in some jurisdictions would be too broad for others, and a formula which is only broad enough for the latter would not be broad enough for the former. In this jurisdiction the holding in *Reynolds v. Vint*, 73 Or. 528, 144 Pac. 526, and in *Western Farquhar Mach. Co. v. Burnett*, 82 Or. 174, 161 Pac. 384, condemns acceleration clauses which are entirely under the control of the holder and completely dependent upon his whim or caprice independent of any act of the maker; but, since neither of those decisions condemns all acceleration clauses, we have no hesitancy in declaring that we prefer to keep company with the majority of the other jurisdictions by giving approval to certain kinds of acceleration clauses. What we deem to be the better rule is best expressed by language found in *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542, where a note, payable "twelve months after date (or before, if made out

of the sale of W. S. Coffman's Improved Broadcast Seeding Machine)," was held to be negotiable. In concluding the opinion the court there said:

"The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time, or the event, for its ultimate payment, must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day."

The principle which was expressed in *Ernst v. Steckman* was subsequently reiterated and applied by the Supreme Court of the United States in the leading and oft-cited case of *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 288, 10 Sup. Ct. 999, 34 L. Ed. 349. Further exemplification of this principle may be found in the following precedents where the facts in some instances were exactly like and in all instances were analogous to the facts presented here: *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Elliott v. Beech*, 8 Manitoba, 213; *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888. The ruling in *Reynolds v. Vint*, 73 Or. 528, 144 Pac. 526, is not inconsistent with the adoption of the principle stated in *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542; *White v. Hatcher*, 135 Tenn. 609, 612, 188 S. W. 61; *First National Bank v. Russell*, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A, 203; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159, 161; *Joergenson v. Joergenson*, 28 Wash. 477, 481, 68 Pac. 913, 92 Am. St. Rep. 888; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, 395, Ann. Cas. 1912D, 1; *Clark v. Skeen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337. The note signed by Bradshaw conforms with the requirements of section 5837, L. O. L., and is a negotiable promissory note. *Utah State National Bank v. Smith* (Cal.) 179 Pac. 160; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

[6] The respondent has argued that the debt represented by the note automatically became due when the conveyance was made to Frederick T. Lewis on January 18, 1913; but the answer is that the thoroughly established and indeed almost universal, if not the universal, rule is that the acceleration clause is not self-executing, but it merely confers an option upon the holder to treat the debt as due. *Belloc v. Davis*, 38 Cal. 243, 251; *White v. Hatcher*, 135 Tenn. 609, 616, 188 S. W. 61; *Clark v. Skeen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep.

337; *First Nat. Bank v. Parker*, 28 Wash. 234, 237, 68 Pac. 756, 92 Am. St. Rep. 828; *Keene Five Cent Savings Bank v. Reid*, 123 Fed. 221, 59 O. C. A. 225; *Gillette v. Hodge*, 170 Fed. 813, 814, 95 O. C. A. 205; *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 268, 284, 10 Sup. Ct. 909, 34 L. Ed. 349.

[7] There is no evidence indicating or even intimating that the plaintiff exercised or attempted to exercise the option which the note conferred upon the holder to declare the note due in the event of a sale or mortgage of the ranch. Inasmuch as the plaintiff is relying upon the "general" date of maturity specified in the instrument, and since the acceleration clause was not self-executing, it was unnecessary for the plaintiff to affirm a negative by pleading or proving it. *Dobbins v. Oberman*, 17 Neb. 163, 165, 22 N. W. 356; *Walker v. Woolen*, 54 Ind. 164, 165, 23 Am. Rep. 639.

[8] One of the further and separate defenses interposed by Effie May Terrill is based upon the allegation that the note was delivered to and accepted by the appellant upon an agreement "to look entirely to" Bradshaw for payment without any claim upon the respondent "for liability for any portion of said note." Through cross-examination of witnesses for the appellant, the respondent succeeded in introducing parol evidence in support of the defense last mentioned. The direct examination justified the cross-examination which was conducted by the respondent and permitted by the court (*Speer v. Smith*, 83 Or. 571, 575, 163 Pac. 979), and consequently the only remaining question arising out of the cross-examination is whether this testimony was competent for any purpose. The appellant insists that the testimony was incompetent because it varied the terms of a written contract. The respondent relies upon an ingenious argument. The respondent endeavors to apply a principle discussed in *Colvin v. Goff*, 82 Or. 314, 161 Pac. 568, L. R. A. 1917C, 300. The argument of the respondent is, in substance, that the note on its face contained two contracts, one between the maker and the payee and the other between the indorser and indorsee; that, while there was a manual transfer of the paper for the purpose of effecting a delivery of the contract between the maker and payee, nevertheless the seeming contract between the indorser and indorsee "was never delivered except in the sense of a physical delivery"; and that therefore the respondent is "not seeking to vary the terms of a written contract, to wit, the contract of the indorser, but to show that this written contract was never delivered."

There is a divergence of judicial opinion as to whether or not the implications and intendments which the law attaches to a blank indorsement of negotiable commercial paper make such blank indorsement the equivalent of a complete written contract

which cannot be varied by parol evidence. 8 Cyc. 264; 3 R. C. L. 974; 8 O. J. 1038; *Crawford's Ann. Neg. Inst. Law* (Rev. Uniform Ed.) 133. In this jurisdiction, however, it has been the settled rule for nearly 40 years that parol evidence cannot be received to vary or contradict the contract which the law writes over a blank indorsement when made after the delivery of a promissory note to the payee. *Smith v. Caro*, 9 Or. 278; *Carroll v. Nodine*, 41 Or. 412, 415, 69 Pac. 51, 93 Am. St. Rep. 743; *Smith v. Bayer*, 46 Or. 143, 147, 79 Pac. 497, 114 Am. St. Rep. 858. To this general rule there are certain exceptions which are specified in *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353. See, also, *Smith v. Caro*, 9 Or. 278, 287; *Moll v. Roth Co.*, 77 Or. 593, 599, 152 Pac. 235; *Jones v. Albee*, 70 Ill. 84. The rule relied upon by the respondent is not available to her. The facts which she herself admits effectively prevent her from shielding herself with that rule. The manual transfer of the note was in no sense executory, but upon the contrary it was a completed and wholly executed act. There was no stipulation preventing the manual transfer from becoming a completed delivery with all the attending rights and obligations. When placed in the hands of the appellant, the note bore the blank indorsement of the respondent. It is conceded by the respondent that she intended to transfer her ownership in the note. The transfer of ownership was not made contingent upon the happening of some event. The transfer was a finality. The contract of transfer, whatever the contract may have been, was executed and completed. The appellant says that the terms of the contract are to be found in the signature written on the back of the note; while the respondent argues that, when the ownership of the note was transferred to the appellant, the latter accepted the instrument upon an agreement different from that which the law writes into the blank indorsement of the respondent. In the last analysis, the contention of the respondent is only an effort to vary and contradict the written contract of indorsement, and hence the parol testimony relating to any oral contemporaneous agreement was incompetent. The respondent has not brought herself within either of the first three exceptions noted in *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353, 355; and, if there was an equity bringing the respondent in the fourth class of exceptions, "it must be set up as an equity provable in equity, to bar an apparent legal liability." The defense urged by the respondent does not involve the question of waiver, as did the case of *Moll v. Roth Co.*, 77 Or. 593, 600, 152 Pac. 235.

[9, 10] Both Brownsboro and Medford are in Jackson county. The letter which Charles Nickell wrote for the purpose of giving notice of dishonor was deposited in the post

office at Medford and addressed to the respondent at Brownsboro, where she lived. The postmark on the envelope in which the letter was mailed indicates that it was postmarked at the Medford post office at 3:30 p. m. on August 10, 1915. Charles Nickell testified that he deposited the letter in the Medford post office, but he did not state the time of the deposit further than to explain that he deposited the letter on the date shown by the envelope. The respondent was called as a witness for the plaintiff, and stated that she received the letter, but she did not remember the date of its receipt. There is not a word of evidence showing the distance between Medford and Brownsboro. There is not a syllable of testimony telling about the mail service between the two post offices. The record is utterly barren of any evidence showing whether there were one or more mails or any mail leaving Medford for Brownsboro on August 10th, or, if there was any mail for Brownsboro on that day, whether it was before or after 3:30 p. m. The most that we can say from the record is that the letter was deposited at some time in the Medford post office on August 10th and postmarked at 3:30 p. m., and that afterwards the respondent received the letter in due course of mail. For aught that we can ascertain from the record, there was a mail leaving Medford for Brownsboro at noon on August 10th, and, if there was a mail leaving at that hour and no other mail leaving on that day, then, in the absence of some excuse sanctioned by the law, the notice of dishonor was not mailed in time. The statute which governs this phase of the controversy provides that—

"Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: (1) If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter. * * * " Section 5937, L. O. L.

The negotiable instruments law prescribes a definite time for mailing notice of dishonor. If there was only one mail on August 10th, and if that mail left at a convenient hour prior to 3:30 p. m., the notice mailed by the appellant was too late. If there was no outgoing mail at all for Brownsboro on that day, then, of course, the letter was deposited in time. The liability of an indorser of a negotiable promissory note is contingent, and, among other things, the liability is conditioned upon giving notice of dishonor within the time specified by the statute. The burden is upon the holder to prove that the notice was mailed within the time prescribed by law; it is not enough merely to show that the notice was deposited in the post of-

fice on the day following the day of dishonor, but it must also be shown that the notice was deposited "in time to go by mail the day following the day of dishonor" if there was a mail at a convenient hour on that day. Strict proof is required. There is an utter want of evidence concerning outgoing mails, and consequently the judgment of involuntary nonsuit was properly rendered. *United States v. Barker*, Fed. Cas. No. 14,519; *First National Bank v. Miller*, 139 Wis. 126, 120 N. W. 821, 131 Am. St. Rep. 1040; *Downs v. Planters' Bank*, 1 Smedes & M. (Miss.) 261, 40 Am. Dec. 92; *Marks v. Boone*, 24 Fla. 177, 4 South. 532; *Richardson v. Kulp*, 81 N. J. Law, 123, 78 Atl. 1062; *Com. Bank v. Strong*, 28 Vt. 316, 67 Am. Dec. 714; *Corbin v. Planters' National Bank*, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673; 8 C. J. 655, 1016, 1055; *Eaton & Gilbert on Com. Paper*, 507.

The judgment is affirmed.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

SMITH v. HEADLEE et ux.

(Supreme Court of Oregon. July 29, 1919.)

1. MORTGAGES ⇐32(2)—ABSOLUTE DEED—INTENT.

A deed absolute in form, or any other conveyance, must be construed to be a mortgage subject to redemption, where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate only by way of security.

2. MORTGAGES ⇐36—ABSOLUTE DEED—BURDEN OF PROOF.

The burden of proof rests upon one claiming that a deed absolute in form is a mortgage to show the real character of the transaction; the presumption existing that a deed absolute on its face is what it purports to be.

3. MORTGAGES ⇐32(5) — ABSOLUTE DEED — CHARACTER OF INSTRUMENT—SECURITY.

A deed absolute on its face is a mortgage if a pre-existing debt in relation to which it was given was not extinguished, or if a new debt was intended to be created and the conveyance was given as security therefor.

4. MORTGAGES ⇐38(1) — ABSOLUTE DEED — EVIDENCE.

In action to have a deed absolute in form declared a mortgage, evidence held to show that the deed was executed only as security for a pre-existing debt and for advances to be made.

Department 2.

Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Action by John J. Smith against J. R. Headlee and wife. Decree for plaintiff, and defendants appeal. Affirmed.

Plaintiff instituted this suit to have a deed executed by plaintiff to defendant J. R. Headlee, which is absolute on its face, declared to be a mortgage. A decree was rendered in favor of plaintiff, from which defendant appeals.

The facts in relation to the transaction are substantially as follows: On the 26th day of December, 1912, the plaintiff, John J. Smith, gave to defendant J. R. Headlee a note for the sum of \$100, loaned to plaintiff by Headlee, and executed a mortgage on 60 acres of land described in the complaint to secure the same. Smith was then in poor health, needing money to pay his expenses in the hospital, where he went and remained for a time, after which he returned to his home on the land. The mortgage was never recorded. About February 25, 1913, the plaintiff was compelled to return to the hospital, and desired an additional loan from J. R. Headlee with which to meet his expenses. On that date he executed to Mr. Headlee a warranty deed to the premises to secure the payment of \$100 and interest mentioned in the mortgage, and also as security for any sums of money the defendant J. R. Headlee might expend for the benefit of plaintiff in paying his hospital fees, for medical services, and taxes on the land. Mr. Headlee at that time agreed to pay his expenses for a period not exceeding one year. The note and mortgage were not surrendered or cancelled, but were retained by J. R. Headlee. The plaintiff testifies that at the time of the execution of the deed it was understood and agreed that upon the repayment by the plaintiff of the sum of \$100 mentioned in the mortgage, and the payment of the sums of money defendant J. R. Headlee might pay for the benefit of the plaintiff to Mrs. Landfare for hospital expenses and to Dr. Sproat, together with payment for medicine for the plaintiff, and any taxes on the real property paid by Headlee, the defendant J. R. Headlee and his wife, Cora Headlee, would reconvey the real estate described in the complaint; at the time of the execution of the deed, Mr. Smith sent for Mr. Headlee and they went to the office of the notary public; that he told Mr. Headlee that he needed more money, and they talked about making him out better security. Smith said, "Well, if you have to have it, why I have to give it." The notary public made out the deed, and Mr. Headlee was to pay the expenses to Mrs. Landfare and the doctor. Smith states:

"A. Well, I demanded a bond for a deed security to show that I could redeem the place after I would get the money. He says, 'Any time that you get the money and principal, why

you can have your place, I don't want it.' * * *

"Q. Any time you get the money and interest, the principal and interest, he would deed the place back to you, did he say that? A. Yes; that is what he did."

It appears that the plaintiff is illiterate and signed the deed by making his mark; that Headlee was to keep up the taxes and insurance on the place; that Mr. Headlee did not want to give a bond for a deed, as he did not want any expense, in case Smith failed to make payment; that Mr. Headlee said to Smith:

"Any time you bring me the money, principal and interest, I will turn these papers over to you." "Deed me the land back. Deed it back again just the way it was."

Mr. N. F. Norem, the notary public who drew the deed, stated in substance that after the deed was signed they wanted some understanding besides the deed with regard to the land, or with regard to the payment of the doctor, and also Mrs. Landfare, just exactly the kind of contract he did not remember, but it was something in regard to the land, and he did not feel as though he wanted to make up the contract, and he referred them to an attorney. He further stated:

"Well, it seems that Mr. Headlee, in case that Mr. Smith was to die or would not be able to redeem his land, why, he didn't want any trouble with any of Mr. Smith's relations, that he wanted it absolutely complete, he wanted to have the complete ownership of the property, of the land, without having to foreclose a mortgage or something of that kind, or any trouble."

Mr. J. J. Johnson, the attorney with whom the parties consulted, testified to the effect that they brought the deed to him; that at the time nothing was reduced to writing between Headlee and Smith. As he remembered, Mr. Headlee stated that Mr. Smith already owed him some money in the neighborhood of \$100; they anticipated that Mr. Smith had to have treatment by the doctor and go to the hospital. Smith had no means to pay this expense, and he was to transfer this property to Headlee. Headlee was to take care of this expense for one year, after which time it was optional with Headlee as to what he might pay. Then Smith wanted some kind of a contract that he could buy this property back if he got well and wanted the property, and "Mr. Headlee wanted to know what effect that would have upon the title that he would get." He states:

"I explained to both of them that if they took the deed simply as security for whatever money Mr. Headlee might advance that it would be a mortgage, and that he might as well increase the mortgage he already had, there was no need of taking a deed which would be no more or less than a mortgage, and if he gave a contract to purchase the land at a reasonable figure,

the probability would be that either Mr. Smith in the future or some of his heirs, in case it became their part, might try to construe that contract into making the deed a mortgage, so in any event he would have taken a risk if he took that contract."

Mr. Headlee said, "If there was to be any question of a mortgage in this deal that he wasn't going to have anything more to do with the transaction;" that he explained to them that it must be an absolute conveyance; that he explained to Mr. Smith that, if he delivered the deed to Mr. Headlee under the agreement that he was to convey him this property, and Headlee obligates himself to pay whatever expenses there may be for a year, "and relieve you of this indebtedness that you already owe him," that the land would be Headlee's.

Dr. James Sprout testified in corroboration of plaintiff as to what occurred at the notary public's office; that he was at the attorney's office only a portion of the time while the parties were there.

W. A. Harris, of St. Helens, and W. M. Cake, of Portland (Harris & Gore, of St. Helens, on the brief), for appellants.

Daniel Needham, of Lewiston, Idaho, and A. W. Mueller, of Portland (Needham & Needham, of Lewiston, Idaho, and A. W. Mueller, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). A careful reading of the testimony, fragments of which we have referred to, shows that the deed executed by the plaintiff to defendant J. R. Headlee was for the purpose of securing the payment of \$100 loaned by Headlee to Smith with interest thereon, and any further sums of money paid by defendant J. R. Headlee as expenses for plaintiff, together with any taxes and insurance premiums on the real property paid by Headlee, and that it was understood and agreed between the parties that, when the plaintiff paid defendant Headlee such sums with interest, he should "have his land back," that is, Headlee and his wife would reconvey the land to plaintiff, and that the deed, although absolute on its face, was in effect a mortgage.

It appears from the record that, at the time of the execution of the deed, the plaintiff desired and was practically compelled to have some financial assistance in order for him to receive medical attention and proper care, and that he applied to the defendant Headlee who was his friend and neighbor for help. He was perfectly willing to secure the payment of all that he then owed Headlee as well as all future advances Headlee agreed to make and should make. It seems that it was agreeable to both that when Smith should repay Headlee in full Smith should have his land back. In case he did

not recover his health so as to be about again, and failed to make such payment, Headlee did not want to have the deed in such a condition that he would have to foreclose, or so that any of Smith's heirs could make trouble for him. At no time did Headlee seem unwilling to agree to reconvey the land if Smith paid him in full. On this point, he does not dispute the plaintiff as to the substance of what was said in regard thereto. Indeed, when the matter was broached by plaintiff's attorneys, defendant Headlee offered to reconvey the land to plaintiff upon the payment of \$850, which was more than the plaintiff was willing to pay, and more than the trial court found to be due from plaintiff to defendant Headlee. It is fair to conclude that defendant made this offer for the purpose of showing that he was ready to carry out the agreement made at the time of the execution of the deed.

The trial court carefully ascertained the amount due from plaintiff to Headlee, and fixed the same as \$575.04. No error is assigned in this respect.

The story is an old one. Headlee, while he was satisfied to have Smith rest assured that the land would be deeded back to him if he made payment, was not willing to make such agreement in writing, and, in case Smith failed to pay, then he desired to have the deed an absolute one. He was advised by an attorney as to what the law was in regard to a deed given as security, but he did not seem willing to follow such advice. He undertook, like many others, to have the deed absolute, when in reality it was given as security, and for no other purpose, and was in effect a mortgage.

It is a maxim of equity that "Once a mortgage always a mortgage." By this is meant that the character of a transaction involving the conveyance of property is fixed at its inception, and if at that time the conveyance is intended to operate by way of security and as a mortgage, a mortgage it must remain with all the incidents thereof despite express stipulations to the contrary in the instrument of conveyance looking to the abrogation of the mortgagor's equity of redemption. A court of equity never deviates from this doctrine. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will submit to ruinous conditions, waiving the equity of redemption allowed him on breach of his obligation, in the expectation and hope of repaying the loan at the stipulated time and thus preventing forfeiture. It is axiomatic that a conveyance cannot be a mortgage unless given to secure the performance of an obligation. Conversely, if the conveyance is intended to secure an obligation, it will be construed in equity as a mortgage and as nothing else. The form or letter of an instrument of conveyance is not conclu-

sive of its character, but its purpose is the decisive factor; and if that be security, then the instrument, irrespective of its form, must be construed to be a mortgage. The question is one of intention to be decided from a consideration of the whole transaction, and not from any particular feature of it. Therefore the characterization of the transaction by the parties may be fairly disregarded. 19 R. C. L. p. 244, par. 7.

[1] From the controlling principle that a conveyance is a mortgage irrespective of its form, if designed to secure the performance of an obligation, it results that a deed, though absolute in form and unqualified by any accompanying agreement for a reconveyance of the property or a defeasance, must be construed to be a mortgage subject to redemption where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate by way of security and in no other mode. This rule is frequently enunciated and applied. 19 R. C. L. p. 261, par. 29.

[2] There can be no question but that the burden of proof rests upon one whose claim is founded upon the theory that the real character of the transaction is different from that which is imported by the language of the deed of conveyance. The presumption exists that a deed absolute on its face is what it purports to be. *Harmon v. Grants Pass Banking & Trust Co.*, 60 Or. 69, 118 Pac. 188; *Beall v. Beall*, 67 Or. 33, 128 Pac. 835, 135 Pac. 185; *Parrish v. Parrish*, 83 Or. 486, 54 Pac. 352. Plaintiff has borne that burden by proving the allegations of his complaint.

[3] In order to determine whether a deed absolute on its face is in effect a mortgage, the test is: Was a debt created, or was a pre-existing debt continued, and was the instrument designed as security? If the pre-existing debt was not extinguished, or if a new debt was intended to be created and the conveyance was given as security therefor, then it should be declared to be a mortgage. *Bickel v. Wessinger*, 58 Or. 98, 113 Pac. 34; *Caro v. Wollenberg*, 68 Or. 420, 427, 136 Pac. 866; *Grover v. Hawthorne Estate*, 62 Or. 77, 114 Pac. 472, 121 Pac. 808; *Reilly v. Cullen*, 159 Mo. 322, 60 S. W. 126.

[4] In the case at bar there was a pre-existing debt owing from plaintiff to defendant J. R. Headlee of \$100, which was not extinguished at the time of the execution of the deed. Headlee retained the note given as evidence thereof, and also kept the mortgage. There was also a new obligation, indefinite in amount, from Headlee to Smith, created in making the arrangements for the payment of medical services and hospital expenses, etc. The whole transaction plainly shows that the deed was given as security

to Mr. Headlee for the several amounts. The testimony fully sustains the findings of the trial court. We fully concur in such findings.

Finding no error in the record, the decree of the lower court is affirmed.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

SPEXARTH v. SHERMAN, County Treasurer.
(Supreme Court of Oregon. July 29, 1919.)

1. TAXATION \S 526—PAYMENT—TIME—CONSTITUTIONALITY OF STATUTES.

It was within the power of the Legislature to pass L. O. L. \S 3682, as amended by Laws 1913, p. 334, \S 20, requiring taxpayers to pay their taxes on April 1st, but permitting them to then pay one-half of the sum due and allow the remainder to run until September 1st, by paying a sum equivalent to 1 per cent. a month on the unpaid balance.

2. APPEAL AND ERROR \S 1107—DISPOSAL OF CAUSE—STATUTORY AMENDMENTS.

Where an action was brought in 1914 to restrain a county treasurer from collecting penalties under L. O. L. \S 3682, as amended by Laws 1913, p. 334, \S 20, and a demurrer to the complaint was sustained, and an appeal was taken to the Supreme Court, and pending the appeal the act of 1913 was amended by Laws 1915, p. 184, \S 1, so as to eliminate the penalties, and Laws 1915, p. 298, an act of general amnesty and forgiveness as to penalties incurred, was enacted, the demurrer will be sustained by the Supreme Court, but the clerk of the circuit court, where the taxes without the penalties were tendered, will be ordered to pay to the county treasurer the amount so tendered and paid into court, and the proper authorities will be ordered to accept the same in full payment of taxes.

In Banc.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by A. G. Spexarth, to restrain W. A. Sherman, County Treasurer of Clatsop County, from collecting penalties upon taxes. Decree for defendant, and plaintiff appeals. Affirmed.

This was a suit to restrain the treasurer of Clatsop county from collecting certain penalties upon taxes not paid on April 1, 1914, and arises out of the following facts:

Section 3682, L. O. L., as amended by section 20, c. 184, Laws 1913, reads as follows:

"Sec. 3682. When Taxes Payable. Taxes legally levied and charged in any year shall be paid before the 1st day of April following. If the taxes against any particular parcel of real property, or the taxes on personal property

charged against any individual, firm, corporation, or association, are not paid before said 1st day of April, penalties shall be charged on such taxes and added to and collected with the same, as follows:

"1. A penalty of one per cent. on all taxes paid on or after said 1st day of April and before the 1st day of May following.

"2. A penalty of two per cent. on all taxes paid on or after the said 1st day of May and before the 1st day of June following.

"3. A penalty of three per cent. on all taxes paid on or after the said 1st day of June and before the 1st day of July following.

"4. A penalty of four per cent. on all taxes paid on or after the said 1st day of July and before the 1st day of August following.

"5. A penalty of five per cent. on all taxes paid on or after the said 1st day of August and before the 1st day of September following."

The plaintiff was assessed for the year 1913 in the sum of \$1,945.04, due on April 1, 1914, and on said date elected to pay one-half of said sum, leaving the sum of \$972.52 unpaid. On August 12, 1914, he tendered to the defendant, as tax collector, the remaining half, and demanded a receipt in full of his taxes for 1913, which defendant refused to give, claiming that plaintiff should pay an additional 5 per cent. as penalty. The plaintiff brought this suit to compel the defendant to accept the sum tendered and issue the receipt. A demurrer to the complaint was sustained, and plaintiff, refusing to plead further, the suit was dismissed, from which order he appeals.

J. J. Barrett, of Astoria, for appellant.

MCBRIDE, C. J. (after stating the facts as above). [1] The law, although harsh, is, in our judgment clear. Taxpayers were required to pay their taxes on April 1st, but were permitted to pay one-half the sum due and allow the remainder to run until September 1st, by paying a sum equivalent to 1 per cent. a month on the unpaid balance. If not then paid the tax became delinquent, and still further penalties were added. The purpose of the large penalty, or interest, required to be paid on that moiety of the taxes not paid on April 1st was evidently to induce taxpayers to pay up promptly, and it was entirely within the power of the Legislature to pass such an act. Therefore, on August 12, 1914, plaintiff should have tendered to defendant \$48.02, in addition to the principal sum due, and the demurrer was properly sustained.

[2] The act of 1913, *supra*, was amended by section 1, c. 156, Gen. Laws 1915, so as to eliminate the objectionable features of the previous act, and at the same session chapter 223 was enacted, which was an act of general amnesty and forgiveness as to all penalties incurred under the act of 1913, *supra*; so that in any event the amount brought into court at the commencement of this action

would satisfy the demands of the last statute on the subject.

Owing to the death of counsel for appellant and the removal from the state of the counsel for respondent, this case has not been brought up for hearing at an earlier date.

The demurrer will be sustained, and the clerk of the circuit court will pay over to the county treasurer the amount tendered and paid into court, and the proper authorities will receipt to him and to plaintiff for the tax of 1913, and the same will be marked paid on the tax roll. Neither party will recover costs.

HINKSON v. KANSAS CITY LIFE INS. CO.*

(Supreme Court of Oregon. July 29, 1919.)

1. INSURANCE ~~§~~186(3) — AUTHORITY OF AGENT TO RECEIVE PREMIUMS—INSTRUCTIONS.

An instruction relative to authority of a general state agent of an insurance company to accept payment of premiums, "but you are further instructed that, if the officers had an opportunity to inform themselves of the facts and circumstances * * * and failed to do so, it would be equivalent to such knowledge," was erroneous, being too broad; the mere opportunity to acquire knowledge not being equivalent to knowledge.

2. INSURANCE ~~§~~668(8) — AUTHORITY OF AGENT—PAYMENT OF PREMIUMS.

Where an insurance company ratified the unauthorized act of a general state agent in accepting notes in payment of premiums and granting extensions, it became a question of fact as to whether the company, by such acts and conduct, had authorized and empowered the general agent to make and accept other premium notes and grant other extensions.

3. INSURANCE ~~§~~668(8) — AUTHORITY OF AGENT—QUESTION FOR JURY.

In an action against an insurance company to recover premiums paid, where insurance company had canceled the policies, whether defendant's general state agent had apparent authority to accept premium notes and grant extensions, contrary to the provisions of a life policy, *held* for the jury.

4. INSURANCE ~~§~~349(1)—LIFE INSURANCE—FAILURE TO PAY PREMIUMS.

Where the premium on a life insurance policy is not paid when due, and the payment thereof is not waived or extended by the insurer, the insurer may cancel the policy and retain premiums paid.

5. INSURANCE ~~§~~349(1) — LIFE INSURANCE — FAILURE TO PAY PREMIUMS—LAPSE OF POLICY.

If a renewal premium was paid or extended by the execution of a premium note, and such note was not paid at maturity or at time to which it was extended, if extended, the insurer could cancel the policy.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 16, 1919.

6. INSURANCE — 364 — FAILURE TO PAY PREMIUMS.

A policy of life insurance automatically lapses without any further action on the part of the insurer, if the insured fails to pay a premium when the same becomes due, and within the time allowed by the terms of the policy.

7. INSURANCE — 364 — LIFE INSURANCE — TIME.

Time is of the essence of a life insurance contract, and if insured fails to perform any condition on the date when it is due to be performed, then, without any further notice or act of the insurer, the policy lapses automatically, where no leeway or days of grace are allowed the insured.

8. INSURANCE — 186(3) — INSURANCE AGENT'S AUTHORITY — RECEIVING PREMIUMS.

To establish that an agent outside of the home office of the insurance company had authority to accept renewal premiums on behalf of the company, it must be proved that either such agent was actually authorized by insurance company, or by his contract from the home office, or that the insurance company represented or held out the agent as having the authority; and also that the insured knew of and relied on the representations.

9. INSURANCE — 186(3) — AUTHORITY OF AGENT — RATIFICATION OF UNAUTHORIZED ACT.

No payment of premiums to other than an authorized agent of an insurance company, or one held out as having authority, can be considered as a valid premium payment, unless the same was actually received by and consented to and ratified by the insurer.

10. INSURANCE — 76 — AGENCY — PROOF — DECLARATIONS OF AGENT.

A declaration or statement made by an agent of an insurance company to the effect that he is authorized to collect premiums is of no effect and not binding upon the company.

11. TRIAL — 296(1) — INSTRUCTIONS — CONSTRUCTION.

It was not prejudicial error to give an incorrect instruction, where, in view of the other instructions given and the testimony in the case, the jury could not have been misled.

12. INSURANCE — 198(5) — WRONGFUL CANCELLATION OF POLICY — RECOVERY OF PREMIUMS — AMOUNT.

If an insurance company wrongfully declared a policy forfeited and refused to accept a premium when duly tendered, the insured may consider the policy at an end and bring an action to recover the just value of the policy, in which case the measure of damages is the amount of premiums paid with interest on each from the time it was made.

13. INSURANCE — 90 — LIMITATION OF AUTHORITY — VALIDITY.

Provisions in a life insurance policy to effect that agents shall not have authority to

collect renewal premiums, and that company shall not be responsible for act of agent in accepting notes and extending payment thereon, are valid and binding between the insurer and the insured.

14. INSURANCE — 372 — LIMITATION OF AUTHORITY OF AGENT — WAIVER.

Provisions in a policy of life insurance limiting authority of agent and providing that agent has no authority to accept renewal premiums or accept notes, or grant extensions, etc., may be waived or modified by the insurer.

In Banc.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Consolidated actions by Andrew H. Hinkson against the Kansas City Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

In April, 1917, plaintiff filed his complaint in case No. 10810, alleging that the defendant is a Missouri life insurance corporation, duly licensed to transact business in this state; that on March 31, 1914, plaintiff made application for a \$10,000 policy with an annual premium of \$400; that at the time of the application he paid the first premium, in consideration of which the defendant agreed that, if it did not deliver the policy, it would return the money; that defendant has never delivered the policy, but has retained the payment; and that at the time of the application the defendant, through L. V. Rawlings, its agent, executed its receipt for the payment, a copy of which is attached to the complaint as Exhibit A.

The defendant admits its corporate nature and the application for the policy, that it has never delivered the policy, and that Rawlings was its duly authorized agent, but denies the \$400 payment or that it agreed to return the money. As a further and separate answer it alleges that at the time the application was made the plaintiff delivered to Rawlings his promissory note for \$400, which was held by Rawlings until final action should be taken on the application; that, after the application was made, the plaintiff, without any valid excuse or reason, did not present himself for medical or physical examination; and that no part of the note has ever been paid. In his reply the plaintiff specifically denies all of the new matter in the answer.

On August 24, 1917, the plaintiff commenced action No. 10811, in which he alleges that at his request the defendant issued its \$5,000 policy No. 45,064 payable to the wife of plaintiff, by the terms of which the plaintiff should pay the annual premium of \$184.10 in advance on December 8th of each year, with one month's grace. The complaint states that:

"The first year's premium only may be paid to the agent. All subsequent premiums are due and payable in advance at the home office of the company without notice. However, they may be paid to an authorized agent of the company on or before the date when due, but only in exchange for a receipt signed by the president, vice president, secretary, or assistant secretary and countersigned by such agent. Upon failure to pay any premium on or before the date when due, or upon failure to pay any premium note when due, this policy will become null and void without any action or notice by the company, and all rights shall be forfeited to the company, except as hereinafter provided. No agent has power on behalf of the company to modify this contract, to extend the time of payment of the premiums, to waive any forfeiture, to bind the company by making any promise or representation, or to deliver any policy contrary to the provisions of section 1 hereof. These powers can be executed only by the president, vice president, secretary, or assistant secretary of the company, and will not be delegated."

It is further averred that:

"L. V. Rawlings was the general agent of the defendant corporation in Oregon and had charge of all of its business in Oregon, and as such general agent had the power from the defendant corporation to waive and modify each and all of the foregoing quoted conditions of the said policy, and the said defendant corporation, through its said general agent, did waive or modify all of the said stated conditions of the said policy, except as herein expressed."

It is then alleged that the plaintiff paid the defendant the annual premium of \$184.10 on December 8th of the years 1909, 1910, and 1911; that on December 8, 1912, he executed to the defendant his note for \$184.10, with interest at 6 per cent., for an extension of time to June 8th following within which to pay the premium which became due on December 8, 1912; that before the maturity of the note the defendant granted a further extension and on July 2, 1913, the plaintiff paid the note with accrued interest, amounting to \$190.18; that on December 12, 1913, he paid the yearly premium which became due on December 8th of that year; and that by the terms of the policy no further premium would be due until December 8, 1914. The plaintiff says that he has paid to the defendant the sum of \$920.50 in premiums on the said policy, all of which the defendant accepted through its general agent, Rawlings, and still holds and retains.

It is contended in the complaint that the plaintiff had fully kept and performed all of the terms and conditions of the policy except those which were waived or modified, until March 20, 1914, when the defendant notified him that it had rescinded and canceled the policy; at which time the plaintiff asked for a return of the premiums which he

had paid, and the defendant refused to make payment. The plaintiff alleges that he is the owner and holder of the policy, and offers to return it to the defendant.

For a further and separate cause of action the plaintiff alleges that on December 8, 1909, on like terms and conditions, the defendant issued to him its certain other policy, No. 45,065, for \$5,000, upon which he paid like annual premiums of \$184.10 for the years 1909, 1910, 1911; that on December 8, 1912, to procure an extension to June 8, 1913, he executed his premium note bearing 6 per cent. interest; that before the maturity thereof he obtained a further extension to July 2, 1913, when he paid the principal and interest, amounting to \$190.18; that on December 8, 1913, another premium became due, and he paid it four days later; and that no further premium fell due until December 8, 1914. It is further alleged that on March 20, 1914, this policy was wrongfully canceled; that the defendant accepted, through its agent, and now retains, all of the payments made on account of annual premiums, amounting to \$926.68; and that the plaintiff has tendered the policy and demanded a return of his premiums.

The defendant admits the execution of policy No. 45,064 and the terms and conditions therein stated, as alleged. "Defendant further admits that L. V. Rawlings was the general agent of the defendant corporation in Oregon;" that "premiums were paid on said policy, carrying the same until December 8, 1912"; and that plaintiff "executed notes to this defendant becoming due December 8, 1913." All other material allegations of the complaint are denied, and as a further and separate answer the defendant alleges that, among other things, the policy provides that, if the annual premiums were not promptly paid when due, the policy should lapse, and "the premium payments made thereon should be forfeited to the company," without any further right on the part of the insured, the beneficiary, or their assigns, against the corporation; that all premiums should be payable in advance at the home office, although they might be paid to an authorized agent before maturity, but only in exchange "for a receipt signed by the president, vice president, secretary, or assistant secretary and countersigned by such agent"; that "the plaintiff paid premiums on said policy and kept the same in force until the 8th day of December, 1912"; that thereafter the plaintiff executed his note payable June 8, 1913, for the amount of the premium due on December 8, 1913; that no part of said note has ever been paid; that since December 8, 1912, the plaintiff has not made any payments on the policy; and that by reason thereof it has lapsed, and all payments made thereon have been declared forfeited to the company.

A similar answer was made to the plain-

(183 P.)

tiff's second cause of action, on policy No. 45,065, and to each answer he filed a general denial.

On August 24, 1917, the plaintiff commenced another action, No. 10,812, in which it is alleged that on February 14, 1911, the defendant issued to him its certain other \$5,000 policy, No. 51,753, by the terms of which the annual premium of \$192.65 was to be paid in advance on February 14th of each year. It is averred that this policy also contained the same terms and provisions set forth and alleged by the plaintiff in his complaint in case No. 10811; that L. V. Rawlings was the general agent of the defendant; and that as such he had power to waive or modify and did waive and modify all of the provisions above quoted. It is then alleged that the plaintiff paid the premium of \$192.65 on February 14, 1911; that on February 14th of the year following, when the second premium was due, he was granted an extension of time to March 20, 1912, when he made the payment, and it was accepted by the defendant as of February 14, 1912; that, when the premium of February 14, 1913, became due, the plaintiff was granted another extension within which to make payment; that he paid the same on July 2, 1913, with interest, amounting to \$120.49; that on January 13, 1914, he paid the defendant \$69.02, which discharged the premium in full to that date and was so accepted by the defendant; that on the latter date he made a further payment of \$192.65 for the premium falling due on February 14th of that year; that by the terms of the policy no further premium became due until February 14, 1915; and that the plaintiff paid to the defendant \$766.66 in premiums upon the said policy, all of which the latter accepted through its general agent and now holds and retains.

It is next alleged that the plaintiff performed his part of the contract except as to the said conditions which were waived or modified as stated; that on March 20, 1914, the defendant wrongfully canceled the policy; and that by reason thereof the plaintiff offered to return it and demanded a refund of the amounts paid by him as premiums, which the defendant refused.

As another cause of action the plaintiff alleges that on December 30, 1911, for value the defendant issued to him its certain other policy, No. 58,193, for \$10,000, and that the premium thereon was \$393.20, payable annually in advance on December 30th. In like manner the terms and conditions of the policy are pleaded; also that Rawlings was the general agent of the company with authority to waive; and that he did waive or modify the conditions above noted. The plaintiff claims that he paid the annual premium on December 30, 1911, and alleges that when the second premium became due on December 30th of the year following he

executed a ninety-day note therefor, which was extended and paid with accrued interest on December 12, 1913; that when the third premium fell due he paid it within the one-month period of grace, on January 30, 1914; that the amounts so paid aggregated \$1,202.01; and that all of such payments were made and accepted through the general agent of the defendant. Like allegations are made as to the cancellation of the policy in March, 1914, plaintiff's ownership of the policy, and his demand for a return of the premiums.

By way of answer to the first cause of action in case No. 10812, on account of policy No. 51,753, the defendant admits the execution and delivery of the policy and the amount of the annual premium, that the policy contained the provisions alleged in the complaint, that "L. V. Rawlings was the general agent of the defendant corporation in Oregon," that payment of the first annual premium was made as stated and continued the policy in force until May 14, 1912, with a quarterly payment, but specifically denies all other material allegations of the complaint and pleads the same affirmative defense as to nonpayment and forfeiture.

As to the second cause of action, on policy 58,193, the defendant admits the payment of the first premium, that on December 30, 1912, the plaintiff executed his note to the defendant for \$393.20, and that the same was extended. As a further and separate answer it admits the execution of the note maturing March 30th, and that it was renewed and extended until September 30, 1913.

The reply traversed all material allegations of both answers.

On November 7, 1917, the court made an order that the different cases should be consolidated, "the various actions to be tried as separate causes of action in the same case, and all the questions involved in the three cases to be submitted to the jury in this one trial."

When the plaintiff rested his case in chief, the defendant moved to strike out all the evidence introduced by the plaintiff, "on the ground that the same had not been connected up with the company, but that all payments shown were made to L. V. Rawlings, who was without authority to receive the same for the company." The defendant also moved for a nonsuit, "on the ground that plaintiff by his own evidence had failed to establish a case against the defendant for recovery of the claim sued for." The motions were overruled.

After both parties had rested, the defendant moved for a directed verdict, "except as to case No. 10810, on the ground that there was no evidence at all showing authority in Rawlings, either to accept premium payments on behalf of defendant or to extend the time for their payment." This motion also was overruled, and an exception allowed.

The jury returned a verdict against the defendant for \$5,504.82, the full amount of plaintiff's claim. At the same time it made and returned the following special verdict on questions submitted to it by the court:

"Question 1: How much is plaintiff entitled to recover in case No. 10810?"

"Answer: We, the jury, answer that the plaintiff is entitled to recover \$487.20 in case 10810.

"Question 2: How much is the plaintiff entitled to recover in case No. 10811?"

"Answer: We, the jury, answer that the plaintiff is entitled to recover \$2,477.86 in case 10811.

"Question 3: How much is the plaintiff entitled to recover in case No. 10812?"

"Answer: We, the jury, answer that the plaintiff is entitled to recover \$2,539.76 in case 10812."

A single judgment was entered on the verdict, for the full amount. The defendant then filed a motion for judgment notwithstanding the verdict, or, in the alternative, that the judgment be set aside and a new trial be granted, for the reason that there was no competent evidence upon which to base the verdict, that it was against the law of the case, and for errors which occurred at the trial, to which exceptions were duly taken. The motions were overruled, and the defendant appealed, making 45 different assignments of error, claiming that the court erred in the admission of any testimony concerning the payment of premiums to Rawlings and the extension and acceptance of overdue premiums by him, because he had no authority to accept payments or to grant such extensions, and his unauthorized acts were never ratified or approved by the company; that all of the evidence introduced by the plaintiff as to payments to Rawlings or extensions thereof should have been struck from the record; that the court erred in overruling the motion for a nonsuit and in refusing to direct a verdict for the defendant on cases 10811 and 10812, and in giving a number of different instructions and refusing to give certain other instructions requested by the defendant.

The vital questions are whether L. V. Rawlings was authorized to accept payment of premiums after they became due, to take notes for such premiums, to grant extensions of time for the payment of such premium notes, or to accept payment thereon, whether as such agent he had the power from the defendant to waive or modify the written provisions in the policies as to how, when, and to whom the premiums should be paid, and whether there was sufficient evidence to submit the case to the jury.

P. W. Cookingham and Guy C. H. Corliss, both of Portland (Wood, Montague, Hunt & Cookingham, of Portland, on the brief), for appellant.

H. E. Slaterry, of Eugene, for respondent.

JOHNS, J. (after stating the facts as above). It appears from the corporate records of the home office of the company that the following cash payments were made on plaintiff's policies:

No. 45,064.

December 13, 1909.....	\$184 10
January 6, 1911.....	48 80
January 30, 1911.....	48 80
February 6, 1911.....	89 27
January 18, 1912.....	95 75
July 26, 1912.....	48 80
October 21, 1912.....	48 80

No. 45,065.

December 13, 1909.....	\$184 10
January 6, 1911.....	48 80
January 30, 1911.....	48 80
February 6, 1911.....	89 27
January 18, 1912.....	95 75
July 26, 1912.....	48 80
October 21, 1912.....	48 80

No. 51,753.

February 25, 1911.....	\$192 65
April 9, 1912.....	51 10

No. 58,193.

December 30, 1911.....	\$393 20
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It is alleged and admitted that "L. V. Rawlings was the general agent of the defendant corporation in Oregon." The plaintiff testified that all of his payments were made to Rawlings, and there is no claim or pretense that he ever made any payment in strict accord with the specific terms and provisions of the policy. It appears from the records kept at the defendant's home office that the plaintiff made his last payment on policy 45,064 on October 21, 1912, which extended that policy to December 8th of the same year, and at the same time he made payment on policy 45,065, extending it to the same date; that on policy 51,753 the last payment was made on April 9, 1912, keeping that policy in force until May 14th of the same year; and that on policy 58,193, the annual premium was paid on December 30, 1911, extending that policy to the same date in 1912.

"For failure to pay premiums" all of the plaintiff's policies were canceled on March 20, 1914. There is nothing in the record which tends to show that the home office of the company directly notified the plaintiff at any time prior to March 20, 1914, that he was in default in the payment of any of his premiums, and, so far as the record discloses, its letter of that date was the first communication which the home office mailed to the plaintiff.

The files of the insurance commissioner of the state of Oregon show that between September 25, 1909, and February 10, 1914, at different times the defendant made a number of applications for agents' licenses au-

thorizing representatives to do life insurance business for it in this state; that each application for such licenses is dated and signed by "L. V. Rawlings, Secretary or Manager"; and that, based upon these applications, licenses were issued to a number of different individuals as agents of the company. It is undisputed that Rawlings had authority to, and did, appoint all of such agents; further, that Edith P. Richardson was appointed cashier of the company by the home office; and that her office was in Portland, in the same room with that of Rawlings.

Several checks issued by the plaintiff to and in favor of L. V. Rawlings were introduced in evidence for the purpose of showing payments of the respective premiums on the different policies. These checks were indorsed by "L. V. Rawlings" and "L. V. Rawlings, General Agent."

It is shown by the records of the home office of the defendant that the total amount of payments which the defendant admits receiving as premiums on the different policies was \$1,765.59, paid on and between December 13, 1909, and October 21, 1912. It appears from the dates of such payments that extensions from time to time must have been granted by some one. The annual premium on policy 45,064, which should have been paid on December 8th of each year, was \$184.10, with one month's grace allowed, and a premium which should have been paid on December 8, 1910, was paid as follows: January 6, 1911, \$48.80; January 30, 1911, \$48.80; February 6, 1911, \$89.27. Payments for the next year's premium were made as follows: January 18, 1912, \$95.75; July 26, 1912, \$48.80; October 21, 1912, \$48.80. The same payments on the identical dates were made on policy 45,065. A quarterly payment of \$51.10 was made on policy 51,753 on April 9, 1912, by which that policy was extended to May 14, 1912. The plaintiff and the defendant agree as to the time and amount of these payments.

It is expressly provided in the policies that "all subsequent premiums are due and payable in advance at the home office of the company without notice"; that "they may be paid to an authorized agent of the company on or before the date when due, but only in exchange for a receipt signed by the president, vice president, secretary, or assistant secretary and countersigned by such agent"; that "upon failure to pay any premium on or before the date when due, or upon failure to pay any premium note when due, this policy will become null and void, without any action or notice by the company"; and that "no agent has power on behalf of the company to modify this contract, to extend the time of payment of the premiums, to waive any forfeiture, or to bind the company by making any promise or representation."
* * * These powers can be executed only

by the president, vice president, secretary, or assistant secretary of the company and will not be delegated." Yet, in the face of such provisions, it appears from its own records that the defendant did accept the payment of a number of premiums after they became due and payable, and that extensions of time must have been granted the plaintiff for the payment of such premiums. He testifies that all of these payments were made to Rawlings. In 4 Words and Phrases, p. 3048, it is said:

"A general agent is one who is employed to transact every business of a particular kind. * * * A general agent is an agent who is empowered to transact all the business of his principal of a particular kind or in a particular place. * * * A general agency exists when there is a delegation to do all acts connected with a particular trade, business, or employment. * * * General agency implies authority in the agent to act generally in all the business usually conducted by the principal. * * * The terms 'general agent' and 'special agent' are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent."

As to policy 45,064, the plaintiff alleges that on December 8, 1912, to procure an extension to June 8, 1913, he executed his promissory note to the defendant for \$184.10; that before the maturity of the note he obtained a further extension to July 2, 1913, at which time he paid the note with accrued interest; and that on December 8, 1913, another annual premium became due, which he paid four days later. Similar allegations are made concerning policy 45,065. As to policy 51,753, the plaintiff alleges that when the second premium became due on February 14, 1912, an extension was granted him until March 20, 1912, at which time the premium was paid; that when the third annual premium became due on February 14, 1913, the defendant granted an extension to July 2, 1913, when the plaintiff paid a part of the premium, and was granted a further extension to January 30, 1914, when he paid that premium in full; that on the same date he also paid in full the premium which would become due on February 14, 1914, and by reason thereof the policy would remain in force until February 14, 1915. The defendant denies all of such payments, but in its answers alleges and admits, as to policy 45,064, that "the plaintiff executed notes to this defendant becoming due December 8, 1913, * * * which note was drawn to mature June 8, 1913," and that "this note was extended and renewed until December 8, 1913." Identical admissions and allegations were made by the defendant as to policy 45,065. As to the second premium on policy 58,193, the defendant admits and alleges that "on the 30th day of December, 1912, plaintiff executed and de-

livered to the defendant his note for \$393.20, bearing 6 per cent. interest, and that the time of payment was extended"; also that the plaintiff "gave his note maturing March 30, 1913. Such note was renewed and extended until September 30, 1913." The defendant denies all other extensions and the execution of any other or different notes.

While it appears from the records in the home office of the defendant that policies 45,064 and 45,065 became subject to forfeiture on December 9, 1912, policy 51,753 on May 15, 1912, and policy 58,193 on January 1, 1913, it is significant that the only direct communication from the defendant to the plaintiff was on March 20, 1914, when the defendant first notified him that the policies were canceled for nonpayment of premiums, and that on May 25, 1914, for the first time the defendant, through its president, notified its policy holders that it had "discontinued the collection of renewal premiums" through its Portland office, and that:

"We will not recognize the receipt of any agent as evidence of the payment of a renewal premium. We, therefore request that in the future renewal premiums be paid either direct to this office or in accordance with the premium notice which will be mailed you on or about the premium due date. The payment of renewal premiums to the Portland office, or any agent representing the Portland office, is confusing, and might possibly be the means of your policy becoming delinquent. Mr. L. V. Rawlings has no authority to collect, receive, or accept renewal premiums."

[1] The instructions are very full and exhaustive, covering 30 typewritten pages. Complaint is made of the following charge on the subject of defendant's knowledge of the acts and conduct of Rawlings as its agent:

"But you are further instructed that, if the officers of the company had an opportunity to inform themselves of the facts and circumstances relative to the payment of the premiums, and failed to do so, it would be equivalent to such knowledge."

It is apparent that this instruction is substantially copied from the opinion of this court in *Cranston v. West Coast Life Insurance Co.*, 72 Or. 116, 130, 142 Pac. 762, which cites *Reinhard on Agency*, § 410. The trial court was justified in giving the instruction, but such portion of that opinion was founded upon the authority of an agent to deliver a policy. It is somewhat broad when applied to the particular facts in this case, and is not sustained by the weight of authority. 1 *Mechem on Agency* (2d Ed.) § 403, reads thus:

"It must be kept in mind also that, where the law thus requires knowledge, it is ordinarily actual knowledge, and not merely the opportunity for acquiring knowledge, which is demanded. * * * The principal, where nothing has oc-

curred to put him on his guard, is not bound to distrust his agent; he has the right to assume that the agent will not exceed his authority or practice fraud or commit crime; and he is not obliged, before accepting the benefits of an authorized act, to inquire whether, in performing it, the agent has not in some way violated his trust."

Section 404 of the same volume is as follows:

"At the same time, however, the principal cannot be justified in willfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his failure to do so can only be explained upon the theory that he preferred not to know what an investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred. In such a case he will either be charged with knowledge, or with a voluntary ratification with all the knowledge which he cared to have."

Further quotations from this text are here set down:

"The facts, moreover, may be so patent that for the principal to profess ignorance would merely be to stultify himself. They may be so obvious that the principal, as a reasonable man, cannot be heard to say that he was ignorant of them. The duty to know them may be so interwoven with the proper conduct of the principal's business that he must, as an ordinary business man, be presumed to know them. This latter rule is constantly applied in the case of the directors of corporations, especially of banks, who are ordinarily presumed to know that which the proper performance of their duties would disclose." Section 406.

"It must also be kept in mind that the existence of actual knowledge may be found by inference like any other fact. This is not 'imputed' knowledge or 'presumptive' knowledge; but the fact of knowledge may be found, like any other fact, either from direct evidence, or from the existence of other facts and circumstances from which the fact of actual knowledge may properly be inferred, as in other cases. Any duty of the agent to inform his principal might be taken into account in determining the fact." Section 406.

"It is a fundamental rule that, if the principal elects to ratify any part of the unauthorized act, he must, so far as it is entire, ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him, and reject it as to the residue. He cannot take the benefits and repudiate the obligations; and this rule applies not only when his ratification is express, but also when it is implied, if the requirement of knowledge is satisfied. * * *" Section 410.

"It is, moreover, as has been seen, a rule of quite universal application that he who would avail himself of the advantages arising from the act of another in his behalf must, so far as it is entire, also assume its responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that any portion of the act was unauthorized. * * *" Section 435.

In 25 Cyc. we find the following:

"The company is chargeable with knowledge or notice possessed by its officers or which should be in their possession in the ordinary performance of their duties." Page 863.

"If, by its course of dealing with insured, or by its general course of business known to him, the company misleads him into believing that the strict terms of the policy as to payment of premiums will not be insisted upon, it cannot afterward take advantage of a forfeiture thus induced." Page 867.

The following excerpts are taken from 31 Cyc.:

"Knowledge is not to be imputed to a principal by reason of the mere fact that he had reasonable opportunity to acquire such knowledge." Page 1256.

"As a general rule the fact of agency cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency." Page 1662.

The case was tried by the plaintiff on the theory that Rawlings was the general agent of the defendant; that the plaintiff made all of his payments to him as alleged in the complaint; that by its actions, conduct, and course of business the company had waived and modified the specific terms and provisions of the policy as to where, when, and to whom the premium payments should be made, and by whom extensions should be granted; that the plaintiff relied thereon; and that the defendant wrongfully canceled his policies, by reason of which he was entitled to recover the amount of the premiums which he paid, with interest. The defendant relied upon the specific terms of the policies, and denied any waiver or modification thereof, the authority of Rawlings to receive renewal payments or grant extensions for such payments, that plaintiff had made payments other than those shown by the corporate records of the home office, that the defendant had received any notes other than those admitted, that Rawlings had any authority to take or receive premium notes, grant extensions thereon, or that he was authorized to collect such notes, but alleged affirmatively that the plaintiff was in default as to his premiums, and that by reason thereof the defendant had the right to and did cancel his policies.

[2] Rawlings was a general agent, and assuming, as we must for the purposes of this opinion, that the plaintiff had all of his dealings with and made all of his payments to Rawlings, and the defendant having admitted that the plaintiff executed to it the four notes specified above and was granted the extensions thereon, coupled with the fact that

the first direct communication to the plaintiff from the defendant's home office was on March 20, 1914, long after such notes were executed and such extensions were granted, it must follow that Rawlings took and accepted the notes and allowed the extensions. It would then become a question of fact as to whether such acts were approved and ratified by the home office. If this course of business was ratified by the company as to a given number of premium notes, it would then be a question of fact as to whether the company by its acts and conduct had authorized and empowered Rawlings, as its agent, to take and accept other premium notes and grant other extensions, as the plaintiff alleges, and as to whether the plaintiff was justified in dealing with the agent upon the assumption that he had such authority.

The recent case of *Sykes v. Sperow*, 179 Pac. 488, after noting the hopeless conflict of authorities, makes this statement:

"Where the agent in question was the general agent of the company, created under the statute of the state as its only authorized agent, and being the only representative of the company within the state, we hold the better rule, and the one sustained by the weight of authority, to be that such a corporation cannot, by a general clause like the one in question, so limit the power of such general agent that he cannot waive a provision like this, as to the mere method or manner of giving notice of the default of the subcontractor to the defendant company."

2 Joyce on Insurance (2d Ed.) § 439, lays down the rule that:

"Any agent with general or unlimited powers, clothed with an actual or apparent authorization, may, either orally or in writing, waive any written or printed condition in the policy, notwithstanding such restrictions."

Section 455 of the same volume says:

"Whenever a principal accepts the benefits of his agent's unauthorized acts with knowledge of all the material facts, he ratifies the same. Silent acquiescence with full knowledge of the material facts may amount to a ratification if continued for an unreasonable length of time, and third persons have acted in reliance upon and have been prejudiced by such acquiescence, especially where an agent, not a stranger, has exceeded his authority. In many cases a ratification will be inferred from the mere habits of dealing between the parties. Hence the policy of the company in dealing with its general agent in the matter of premiums had an important bearing upon the question at issue."

On the subject of ratification of an agent's acts by the principal, 1 Mechem on Agency (2d Ed.) reads thus:

"Ratification may briefly be defined as the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent." Section 847.

"Ratification, moreover, differs from estoppel, though they are often very closely associated. Estoppel requires that the party alleging it shall have done something or omitted to do something, in reliance upon the other party's conduct, by which he will now be prejudiced if the facts are shown to be different from those upon which he relied. Ratification requires no such change of condition or prejudice; if the principal ratifies, the other party may simply avail himself of it. As soon as ratification takes place, the act stands as an authorized one, and not merely as one whose effect the principal may be estopped to deny. If there be ratification, there is no occasion to resort to estoppel." Section 349.

"Ratification is an approval of a previous act or contract, which thereby becomes the act or contract of the person ratifying. It is not a contract to assume such liability. In the case of contracts, ratification is an affirmance of a contract already made, as it was made, and as of the date when it was made; and it is neither the making of a new contract to be bound by the old one, nor the making of a new contract in the terms of the old one." Section 350.

"The question seems to be this: From the failure to dissent under the circumstances, would the ordinary intelligent man be justified in inferring that the principal assented? Like other similar questions, this would be for the jury, unless reasonable men could fairly draw only one inference from the facts, and in that case the court may decide it." Section 453.

In *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59, Mr. Chief Justice Shaw says:

"It seems to be now well settled * * * since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest, and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and, generally, by those legal and equitable considerations, which affect the rights of natural persons."

From 31 Cyc. we quote the following:

"Ratification of the acts of an agent need not in most cases be express, but may be implied from the acts and conduct of the principal, and, generally speaking, a ratification may be implied from any acts or conduct on the part of the principal reasonably tending to show such an intention on the part of the principal to ratify the acts or transactions of the alleged agent, particularly where his conduct is inconsistent with any other intention, or where it appears that he has repeatedly recognized and approved similar acts done by the agent. * * * Where an agency has been shown to exist, the facts will be liberally construed in favor of the approval by the principal of the acts of the agent, and very slight circumstances and small matters will sometimes suffice to raise the presumption of ratification. Ratification is, however, a matter of intention, express or im-

plied, on the part of the principal, and in order to establish an implied ratification there must be some acts or conduct upon his part which reasonably tend to show such intention. * * * It is also the rule that as between the principal and third persons dealing with an agent less is required to constitute a ratification than is required between the principal and the agent." Pages 1263-1266.

"As a general rule the principal, upon learning of the unauthorized act of his agent, if he does not intend to be bound thereby, must within a reasonable time repudiate it." Page 1275.

"It is a well-settled rule, subject to certain exceptions, that a ratification relates back to the time when the unauthorized act was done and makes it as effective from that moment as though it had been originally authorized, and that therefore upon ratification the parties to all intents and purposes stand in the same position as though the person assuming to act as agent had acted under authority previously conferred." Page 1283.

In regard to premiums paid and accepted when past due, 14 R. C. L. says:

"To warrant a recovery where a premium is not paid when due, it is necessary to prove: (1) The course of dealing between the insured and the insurer in reference to the acceptance of overdue payments amounting to a custom or habit; (2) that by reason of this course of dealing the insured was justified in believing that the insurer would not insist on a forfeiture for failing to pay subsequent premiums; (3) that the insured believed he could postpone the payment of premiums without risking a forfeiture; and (4) that he acted on this belief, and therefore did not pay the premium at its maturity." Page 1184, § 361.

"The cases are numerous which hold that the acceptance of a premium after the time when it should have been paid is a waiver of the forfeiture which might have been enforced because it was not paid when due. This rule applies, according to the better opinion, where the premium is received after it is due by an agent without power to waive forfeitures and is afterwards received and retained by the insurer without inquiry." Page 1189, § 367.

"It is also a settled rule of law that, where an insurer has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it receives a premium on the policy, it is estopped to take advantage of the forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums." Page 1190, § 367.

[3] As the defendant admitted the payment of a large number of premiums in cash, and as the plaintiff testified that all of such payments were made to Rawlings, it then became a question of fact as to whether the plaintiff was justified in paying the disputed and undisputed premium notes to Rawlings as the defendant's general agent. The admitted facts, together with all the other evidence and surrounding circumstances, were sufficient to take the case to the jury, and there

was no error in overruling the motion for a nonsuit and for a directed verdict.

[4-11] Under exhaustive instructions the theory of the defendant was submitted to the jury, which was charged that—

If the company "did not hold out Rawlings to the public as possessing authority to collect premiums or renewals, or if the defendant did not know that Rawlings was collecting premiums, if he was collecting renewal premiums, or if by the exercise of ordinary prudence and caution could not have known, then the defendant would be entitled to a verdict at your hands. * * * If Rawlings collected renewal premiums or extended the time of payment for renewal premiums, and if the defendant received and collected such premiums with full knowledge of all the facts, then the defendant would be liable."

If it found that Rawlings did collect renewal premiums, and the defendant had no knowledge of irregularity and received the money in good faith from the Portland office, through its cashier there, the jury was instructed to return a verdict for the defendant. Other parts of the charge follow:

"If you find from the evidence that any premium on any of the policies covered by this suit was not paid when due, and that the payment of such premium was not waived or extended by the defendant, then you are to find for the defendant on the particular policy on which the premium was not paid."

"If any renewal premiums were paid or extended by the execution of premium notes, and any such note was not paid at maturity, or at the time to which they were extended, if they were extended, then the policy on which said note was given lapsed, and the plaintiff cannot recover thereon."

"If at any time the insured failed to pay a premium when the same became due and within the time allowed by the terms of the policy, or if the insured failed to pay any premium note when the same became due, and there was no extension of time or waiver of the payment of either the premium or the note, then the policy upon which said premium or premium note would have applied forthwith automatically lapsed without any further action on the part of the company. * * *

"You are instructed that time is of the essence of an insurance contract, and if the insured fails to perform any condition on the date when it is due to be performed, then without any further notice or action by the company the policy lapses automatically, and no leeway or days of grace are allowed the insured."

"In order to establish that an agent outside of the home office had authority to accept renewal premium payments on behalf of the company, the plaintiff must prove either that such agent was actually authorized by instructions or by his contract from the home office to make the collections of such renewal premiums, or that the defendant company represented and held out the agent as having the authority to collect renewal premiums, and also that the plaintiff in this case knew of and relied on the representations by the company as to the authority of the agent. No payment made to other

than an authorized agent as defined by this instruction can be considered as a valid premium payment as against the company, unless the same was actually received by, consented to, and ratified by the home office of the company."

"Any declaration or statement made by any agent of the company to the effect that such agent is authorized to collect premiums is of no effect, and not binding upon the company."

"If Rawlings did not have actual express authority to collect renewal premiums, then payments made by Hinkson to Rawlings on renewal premiums are not valid as against the company, unless the company affirmatively held Rawlings out to Hinkson as having this authority, or unless the premiums were turned over to, accepted and ratified by, the company, and then official receipt issued, signed by an officer."

While the instruction as to the defendant's opportunity for knowledge is not sustained by the weight of authority, in view of all the other instructions which were given and the testimony in the record, we are of the opinion that it was not prejudicial, and that the jury was not misled. On principle we are of the opinion that the instructions of the trial court last above quoted were correct.

[12] The verdict was for the full amount of each alleged payment, with accrued interest. Upon the theory that the policies were in force until such time as they were canceled and that the plaintiff had the benefit of insurance, the defendant claims that it was entitled to a reduction or an offset. 2 Bacon on Benefit Societies and Life Insurance (3d Ed.) § 376, lays down this rule:

"If a company wrongfully declares the policy forfeited and refuses to accept the premium when duly tendered, and to give the insured the customary renewal receipt, evidencing the continued life of the policy, the assured has his choice of three courses: He may tender the premium and wait until the policy becomes payable by its terms and then try the question of forfeiture; or he may sue in equity to have the policy continued in force; or he may elect to consider the policy at an end and bring an action to recover the just value of the policy, in which case the measure of damages is the amount of the premiums paid with interest on each from the time it was made."

This is sustained by 4 Ann. Cas. 124, and 9 Ann. Cas. 606.

[13, 14] The defendant assigns as error the refusal of the trial court to give a number of its requested instructions. In so far as they were correct they were embodied in the charge given. The defendant contends that—

"The limitation of authority and the provisions relating to the payment of premiums are valid and constitute a part of the contract between plaintiff and defendant."

That is the law and is sustained by the authorities which it cites. In legal effect the trial court so instructed the jury. But those authorities also lay down the rule that such limitations may be waived or modified by the company. We have examined the record with

much care. The instructions were comprehensive, and, with the single exception noted, were fair to the defendant.

The record presents a peculiar case. On December 8, 1909, the defendant issued to the plaintiff two life insurance policies of \$5,000 each, which the defendant admits remained in force until December 8, 1912. On December 30, 1911, it issued to the plaintiff another policy, for \$10,000, upon which the first premium was paid. It also admits that the plaintiff executed a number of extension premium notes in favor of it on such policies. Yet the fact remains that the first personal, direct communication from the home office to the plaintiff was on March 20, 1914, four years, three months, and twelve days after the first policy was issued to him. On May 25, 1914, through a circular letter, the defendant notified its policy holders that it had "discontinued the collection of renewal premiums" through its Portland office, and that Rawlings had no authority to collect, receive, or accept annual renewal premiums. So far as the record shows, this was the first notice of that nature which ever issued from the home office of the company to its policy holders.

There is ample evidence to sustain the verdict. The defendant's theory was fully and fairly submitted to the jury under proper instructions.

The judgment is affirmed.

ELLIS et al. v. CITIZENS' NAT. BANK OF PORTALES. (No. 2193.)

(Supreme Court of New Mexico. Nov. 21, 1918.
On Motion for Rehearing, July 8, 1919.)

(Syllabus by the Court.)

1. BANKS AND BANKING — 260(4), 261(3) — GUARANTY BY NATIONAL BANK — ULTRA VIRES—ESTOPPEL.

A contract of guaranty of the paper of a third person to which a national bank holds no title, and concerning which the contract of guaranty is not necessary or incidental to the transfer of title to the instrument, and the loan is for the benefit of a third person, is beyond the power of the bank, as conferred by the National Banking Act, is ultra vires, and no suit can be maintained upon any such guaranty, and in no case is the bank estopped from pleading ultra vires of such a contract.

2. BANKS AND BANKING — 258, 260(4)—NATIONAL BANK—BORROWING MONEY—GUARANTY—ULTRA VIRES.

A national bank, however, has the power to borrow money, and to issue evidence of indebtedness therefor, and where a bank puts forward a third party as a borrower, and the bank guarantees the repayment of the loan, and all the proceeds of the loan go to the bank, and are

converted to its own use, such contract of guaranty is not ultra vires, and suit can be maintained upon the contract.

On Motion for Rehearing.

3. APPEAL AND ERROR — 835(2)—ORIGINAL BRIEF—PETITION FOR REHEARING.

On appeal, a party must present all questions in his original brief which he desires the court to consider, and he will not be permitted to present new points in a petition for rehearing.

Appeal from District Court, Roosevelt County; Richardson, Judge.

Action by John Ellis and William I. Shriver, joint administrators of the estate of George Ellis, deceased, against the Citizens' National Bank of Portales, New Mexico. Judgment for defendant dismissing the complaint and plaintiffs appeal. Reversed and remanded with direction to enter judgment for plaintiffs.

George L. Reese and James A. Hall, both of Portales, for appellants.

Reid, Hervey & Iden, of Roswell, and T. E. Mears, of Portales, for appellee.

ROBERTS, J. Only a brief statement of the facts in this case will be necessary, in view of the full statement made in the case of *Ellis v. Stone*, 21 N. M. 730, 158 Pac. 480, L. R. A. 1916F, 1228. That cause of action was instituted against Lula Stone, executrix of the estate of James P. Stone, deceased, upon a guaranty of a loan made by Ellis to W. W. Humble. The latter relied upon as constituting the guaranty is set out in full in the reported case. It is there held that the letter constituted a guaranty, but further held that it was not the individual undertaking of Stone; consequently, it would necessarily follow that it was the undertaking of the bank. This cause of action was instituted against the bank by the administrators of the estate of Ellis to recover on the guaranty. The bank received all the benefits from the loan, Humble getting no money, but simply receiving credit on the past-due note which he owed the bank.

The appellee bank answered the complaint, alleging that the guaranty was beyond the power of the bank and ultra vires, admitting that the complaint stated a cause of action in the alternative for money had and received, but as to this cause of action pleaded the statute of limitations. The court held that the suit could not be maintained upon the guaranty, and that as to the action for money had and received the statute of limitations had run. Judgment was entered for the appellee, dismissing the complaint.

If the suit can be maintained upon the written guaranty, concededly the statute has not run against the cause of action. On the

other hand, if no cause of action is sustainable on the written guaranty, the statute has run against the action for money had and received. This, therefore, presents the only real question for determination in the case.

[1] On behalf of appellee it is contended that a contract of guaranty of the paper of a third person, to which a national bank holds no title, and concerning which the contract of guaranty is not necessary or incidental to the transfer of title to the instrument, is beyond the powers of the bank, as conferred by the National Banking Act (Act Cong. June 3, 1864, c. 106, 13 Stat. 99), is ultra vires, and no suit can be maintained upon any such guaranty, and that in no case is the bank estopped from pleading its ultra vires to any suit brought thereon. The section of the National Banking Act defining the powers of national banks is as follows:

"To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title." Section 8 (1 U. S. Compiled Statutes, § 9661).

Many authorities are cited by appellee holding that a national bank has no power to guarantee the debt of another, and that its act in so doing is ultra vires, when such loan is for the benefit of a third person, and that the bank is not estopped from setting up the ultra vires character of the act, even though the contract has been executed on the part of the party receiving such guaranty. *Bowen v. Needles National Bank*, 94 Fed. 925, 38 C. C. A. 553; *Commercial National Bank et al. v. Pirle*, 82 Fed. 799, 27 C. C. A. 171, 49 U. S. App. 596; *First National Bank of Moscow v. American National Bank of Kansas City, Mo.*, 173 Mo. 153, 72 S. W. 1059; *California National Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526; *Fidelity & Deposit Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782; *Norton v. Derry National Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Citizens' Central National Bank v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; *Rankin v. Emigh*, 218 U. S. 27, 30 Sup. Ct. 672, 54 L. Ed. 915.

It is beyond question that the cases referred to sustain the contention of appellee, and many other cases might be cited to the same effect, but these cases do not reach the point involved in this case, and are distinguishable in this: In all these cases the bank did not receive the proceeds obtained in the transaction in which the guaranty was given.

Consequently, a national bank being precluded from loaning its credit to another, its attempt to do so is beyond its power.

[2] That a national bank has the power to borrow money is not questioned, and is liable in an action for money so borrowed, whatever may be the nature of the obligation given for the loan. The question always is, "Was it a loan to the bank and did it receive the benefits?"

In the present case all the benefits of the transaction accrued to the bank. Stripped of form, the transaction was simply this: The bank was hard pressed for money. Humble owed it past-due obligations which he was unable to meet. It put him forward as a borrower for the purpose of procuring money, and gave a written guaranty for the repayment of the loan to be made to Humble. The proceeds of the loan were all received by the bank and converted to its use. Under such circumstances we think, beyond question, that the contract was not ultra vires, and that the bank is liable on the same. The case of *People's Bank of Belleville v. Manufacturers' National Bank of Chicago*, 101 U. S. 181, 25 L. Ed. 907, while not exactly on all fours with the present case, clearly demonstrates, in our judgment, the liability of the bank on the guaranty in question here. The only difference between the two cases being that in the *People's Bank of Belleville v. Manufacturers' National Bank of Chicago* the notes in question passed through the bank. The court said:

"A few remarks will suffice to give our view of the law touching the rights of the parties.

"The National Banking Act (13 Stat. at L. 99; R. S. § 5136 [U. S. Comp. St. § 9661]) gives to every bank created under it the right 'to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits,' etc. Nothing in the act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly, a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences.

"The doctrine of ultra vires has no application in cases like this. *Merch. Bk. v. St. Bk.*, 10 Wall. 77 [U. S.] 604 [19 L. Ed. 1008].

"All the parties engaged in the transaction and the privies were agents of the defendant.

If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. These facts conclude the defendant from resisting the demand of the plaintiff. Whart. Ag. § 89; Big., Estop. 423; R. R. Co. v. Howard, 7 Wall. [74 U. S.] 392 [19 L. Ed. 117]; Kelsey v. Bk., 69 Pa. 426; Steamboat Co. v. McCutchen, 13 Pa. 13. A different result would be a reproach to our jurisprudence.

"Whether, if the guaranty were void, the fund received by the defendant as its consideration moving from the plaintiff could be recovered back in this action upon the common count is a point which we do not find it necessary to consider. See U. S. v. Bk., 96 U. S. 33 [24 L. Ed. 647]."

Other cases following and approving the rule are *Davenport v. Stone*, 104 Mich. 527, 62 N. W. 722, 53 Am. St. Rep. 467; *Auten v. U. S. National Bank*, 174 U. S. 148, 19 Sup. Ct. 628, 43 L. Ed. 920; *Thomas v. City National Bank of Hastings*, 40 Neb. 505, 58 N. W. 943, 24 L. R. A. 263; *Cochran v. U. S.*, 157 U. S. 297, 15 Sup. Ct. 628, 39 L. Ed. 704; *Creditors' Claim & Adjustment Co. v. Northwestern Loan & Trust Co.*, 81 Wash. 247, 142 Pac. 670. The case of *Appleton v. Citizens' Central National Bank*, 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. (N. S.) 543, Id., 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, is very instructive.

It is true in this case the Supreme Court of the United States sustained a recovery upon the theory of money had and received, but the guaranteeing bank did not receive all the proceeds of the loan, and a recovery was allowed to the extent of the money which went to the credit of the bank. The court refused to pass upon the question as to whether the suit could have been maintained upon the contract. The Court of Appeals of New York used this significant language:

"The plaintiff has been defeated on the theory that the execution of the guaranty by the defendant bank was ultra vires, and not binding upon it; and upon this ground the judgments below are sought to be sustained. Had the guaranty been limited to the amount which the bank, under its agreement with Samuels, was to receive out of the loan, we should be entirely clear that it was within the legitimate powers of the bank under the decisions of the Supreme Court of the United States, in *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. Ed. 907; *Cochran v. United States*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704. It was there held that a contract of guaranty of paper held by it was within the implied powers of a national bank, and this though, as in the later of the cases cited, the note was not made to the guaranteeing bank, but directly to the order of another bank to which the guaranty was made. We think, however, that the defendant's power to guarantee was limited by the extent of its interest in the subject-matter of the guaranty. To allow a

bank to guarantee the payment by one of its debtors of a larger sum, in order that the bank might receive or retrieve a lesser sum, would be to permit it to enter upon every hazardous speculation, and authorize very wild and unsafe banking. The learned counsel for the appellant frankly conceded on the argument that a recovery should be limited to the amount received by the defendant. It is insisted, however, that the contract of guaranty must be deemed either good or bad as an entirety, and cannot be upheld in part and rejected in part. I am not willing to concede this claim; but it is unnecessary to discuss it, for its determination is not necessary to the decision of the case."

A very instructive note follows the case of *Creditors' Claim, etc., Co. v. Northwestern Loan, etc., Co.*, Ann. Cas. 1916D, p. 551.

For the reasons stated, we conclude that the contract of guaranty was not ultra vires, and this suit could not be maintained thereon. This being true, it follows that the trial court was in error in holding that the action could only be maintained for money had and received, and that the statute of limitations had run against the same. The judgment of the district court will therefore be reversed, and the cause remanded, with instructions to enter judgment for the appellant for the amount found to be due; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

On Motion for Rehearing.

ROBERTS, J. Appellee has filed a motion for rehearing in which he contends: First, that the opinion of this court is contrary to the decisions of the federal courts construing the National Bank Act. As to this proposition it is sufficient to say that we are satisfied with the original opinion.

The second proposition urged is that the evidence in the record as to whether appellant relied upon the guaranty of the bank is conflicting; that the court made no finding upon this proposition, but as judgment was entered for appellee, it is to be presumed that this question was resolved against appellant, and that by reason of the record the decision by this court is in conflict with the case of *Dalley v. Foster*, 17 N. M. 654, 134 Pac. 206, to the effect that in case of special findings silence upon a material point must be regarded as a finding against the party having the burden of proof. Appellee, however, is precluded from raising this contention on rehearing. In its original brief, it presented but three questions for the consideration of the court, which were stated as follows:

First, the instrument in question is not a guaranty; second, the instrument, if a guaranty of the bank, is ultra vires; third, the statute of limitations has barred any action by the plaintiff for money had and received.

[3] The uniform rule in appellate courts

is that a party must present all questions in his original brief, which he desires the court to consider, and he will not be permitted to present new points in a petition for rehearing. *Elliott on Appellate Procedure*, § 557.

In the case of *Literary Society v. Garcia*, 18 N. M. 318, 136 Pac. 858, this court refused to consider on rehearing the question as to whether appellants waived their objection to the amended complaint by filing an answer to it because the point had not been raised on the first hearing of the case.

In the case of *Dow v. Irwin*, 21 N. M. 576, 157 Pac. 490, L. R. A. 1916E, 1153, appellee attempted to raise a new question in his motion for a rehearing. The court said:

"In civil cases it is a well-recognized rule that questions not advanced on the original hearing will not be considered on the petition for a rehearing."

In the case of *State v. Williams*, 22 N. M. 337, 161 Pac. 334, and *State v. McKnight*, 21 N. M. 14, 153 Pac. 76, it was held that the appellant could not raise on motion for rehearing new questions not presented in his original brief.

In 4 C. J. p. 633, it is said:

"The mere fact that the court has overlooked certain point presented by the record is not sufficient to authorize a rehearing, however, unless it further appears that its attention was called to the point in question by the briefs or arguments of counsel."

In the original opinion filed in this case there certainly is no legal principle enunciated which conflicts in any way with the case of *Dailey v. Foster*. Appellee brings forward for consideration a portion of the record not called to the attention of the court in its original brief, and asks the court at this time to consider this question and to deny the relief awarded appellant. Under all the authorities the question is not available on rehearing.

For the reasons stated, the motion for rehearing will be denied; and it is so ordered.

PARKER, C. J., concurs.

RAYNOLDS, J., being absent did not participate.

KENDRICK v. HEALEY et al. (No. 949.)
(Supreme Court of Wyoming. Aug. 18, 1919.)

1. APPEAL AND ERROR ¶529(1)—RECORD—ENTRY OF JUDGMENT.

Record on appeal certified to by clerk as containing true copy of judgment "entered in Journal 4, at page 4," and containing the original paper signed by court, preceded by statement that it was entered by court, "which judgment is as follows," and having upon it notation

that it was entered upon the court journal, *held* to identify such writing as that entered on journal as the judgment.

2. APPEAL AND ERROR ¶624 — RECORD — TRANSCRIPT—TIME FOR FILING.

Order extending time for filing of record on appeal *held* to include extension of time for preparing and filing transcript of the testimony, under Sess. Laws 1917, c. 32, §§ 4, 5, and section 6 as amended by Sess. Laws, c. 15.

3. APPEAL AND ERROR ¶612(5) — TRANSCRIPT—CERTIFICATE.

Clerk's certificate that "foregoing transcript is a true and correct transcript of all the testimony offered at the trial of the above-entitled cause," *held* sufficient compliance with Sess. Laws 1917, c. 32, § 5, requiring transcript to be certified to "as containing all the testimony offered at the trial"; the words used being an exact equivalent of words of statute.

4. APPEAL AND ERROR ¶612(3)—RECORD—CERTIFICATE OF JUDGE—DATE OF.

That certificate of judge to record was dated prior to certificates of clerk did not affect appeal; it being sufficient, under statute requiring record to "be certified to by the judge and clerk," that each certifies record to be true and correct within time for filing it, without regard to order in which they make certificates.

5. APPEAL AND ERROR ¶605—"RECORD"—CERTIFICATES OF JUDGE AND CLERK.

Certificates of judge and clerk to record on appeal are not a part of the "record," within Sess. Laws 1917, c. 32, § 6, as amended by Sess. Laws 1919, c. 15, requiring "whole record to be paged and numbered consecutively."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Record.]

6. APPEAL AND ERROR ¶640 — RECORD — PAGING.

Requirement that record be paged and numbered consecutively, under Sess. Laws 1917, c. 32, § 6, as amended by Sess. Laws 1919, c. 15, is not jurisdictional, for noncompliance with which appeal could be dismissed.

7. APPEAL AND ERROR ¶656(1) — RECORD —NUMBERING OF PAGES—OMISSION—CORRECTION.

Failure, through oversight, to number page in record, as required by Sess. Laws 1917, c. 32, § 6, as amended by Sess. Laws 1919, c. 15, can be cured, in Supreme Court, without withdrawing record, by giving page number of preceding page and one-half, as 408½.

8. APPEAL AND ERROR ¶744 — RECORD — SPECIFICATIONS OF ERROR.

The serving of specifications of error prior to filing of record on appeal was not ground for dismissal of appeal.

9. APPEAL AND ERROR ¶624 — FILING OF RECORD—EXTENSION OF TIME.

Order extending time for filing of record may be made in chambers during vacation of court, and becomes effective upon the signing by judge within the original 70 days from the date of entry of judgment, even if not entered on the journal for some time thereafter.

10. APPEAL AND ERROR — 649 — RECORD —
WITHDRAWAL—AMENDMENT.

Record on appeal may, on proper showing and seasonable application, be withdrawn for amendment in accordance with the facts; but application to withdraw must definitely set forth specific amendment sought to be made, and must make it appear to court that amendment will cure substantial defect.

Appeal from District Court, Johnson County; James H. Burgess, Judge.

Action by John B. Kendrick against Patrick Healey, Jr., and Alexander Healey, co-partners doing business under the firm name of Healey Bros. Defendants appeal. On plaintiff's motion to dismiss appeal and defendant's motion to withdraw record for amendment. Both motions denied.

E. E. Enterline, of Billings, Mont., and Hill & Griggs, of Buffalo, for appellants.

Metz & Sackett, of Sheridan, and Robert B. Rose, of Buffalo, for respondent.

BLYDENBURGH, J. This case comes to this court by direct appeal, under the provisions of chapter 32, Session Laws of 1917, before it was amended by chapter 15, Session Laws of 1919, and was heard on the motion of plaintiff and respondent to dismiss the appeal and the motion of defendants and appellants to withdraw the record on appeal for amendment.

The motion of plaintiff to dismiss, as drawn, purports to state 12 different grounds, but they may be summarized under the following heads: That the notice of appeal was given prior to the date of the entry of the judgment; that there is no certified copy of the journal entry of the judgment, verdict, etc., in the record, and therefore no proof of when the judgment was entered, if at all; that the transcript of the testimony was not filed within the time required by the statute, and no order was made extending the time; that the certificate to the transcript of the testimony does not comply fully with the requirements of the statutes; that the certificate of the judge is dated prior to the certificates of the clerk, and therefore the judge does not certify to what is contained in the certificates of the clerk; that the record on appeal is not paged and numbered consecutively as required by the statute; that the specifications of error were served prior to the filing of the record on appeal.

As to the statement that the notice was served prior to the entry of judgment, the record shows the contrary. The notice is dated November 28, 1917, the acceptance of service of the notice November 30, 1917, and the date of the entry of the judgment, according to the certificate of the clerk, was November 23, 1917.

As to the statement that there is no certi-

fied copy of the journal entry of the judgment in the record, this court, in the case of *Hahn v. Citizens' State Bank*, 25 Wyo. 467, 171 Pac. 889, 172 Pac. 705, decided that the record on appeal must show the entry of a judgment on the journal of the court and the date thereof, and that the proper way to show this was by a certified copy of the journal entry, and that a form of judgment signed by the judge and filed with the clerk appearing in the record, when nothing appeared to show that it had been entered on the journal, was not sufficient to give this court jurisdiction of the case on appeal. As such a form of judgment signed by the trial judge appears in the record on appeal in this case, counsel for respondent argued that the cases are similar, and that there is no showing here of the entry of the judgment in this case. While the original paper signed by the judge appears in the record of this case, it is preceded by the words:

"And be it further remembered that thereafter on November 23, 1917, the following judgment was entered by the court, which said judgment is as follows, to wit:"

And this paper has upon it the notations of the clerk that it was filed in district court, Fourth judicial district, Johnson county, Wyo., November 23, 1917, A. W. Kennedy, clerk, and that it is entered on the court journal. In addition to this the certificate of the clerk at the end of the record on appeal reads as follows:

"Certificate of Clerk.

"State of Wyoming, County of Johnson—ss.: I, A. W. Kennedy, clerk of the district court of the Fourth judicial district of the state of Wyoming in and for the county of Johnson, do hereby certify that the above and foregoing record on appeal contains true copies of the order of the court, verdict of the jury, and judgment, given, made, returned, and entered in said cause as follows, to wit: * * * Of the judgment entered November 23, 1917, filed November 23, 1917, and entered in Journal 4, at page 4, said copy of judgment being found on pages 51 and 52 of the record on appeal.

"In witness whereof I have hereunto set my hand and affixed the seal of said court this May 13, 1918.

"[Seal.] A. W. Kennedy, Clerk of Court."

[1] This certificate shows as fully as possible that the identical paper is a true copy of the entry on the journal and the date of the entry, and could not show more completely what the entry really was if a separate copy had been used instead of the paper which was the original paper from which the entry was made. There is nothing in the statutes that requires certificates to certified copies to be attached or immediately follow the entry certified, so long as the identity of the record is shown.

As to the ground that the transcript of

the testimony was not filed within 70 days after the entry of the judgment, and no order was made and entered extending the time in which to make or file such transcript, it is admitted that the record does contain an order extending the time for preparing the record. This order appears in the record on appeal, and shows that it was made in chambers by the trial judge on January 15, 1918, and by the indorsement on the back that it was filed in the office of the clerk of the trial court on January 18, 1918, and entered on court journal No. 7, on page 13. Sections 4 and 5 of chapter 32, S. L. 1917, provide:

"Sec. 4. The appellant shall be entitled as a matter of right to seventy days after the entry of the judgment or order appealed from within which to prepare and file with the clerk of the district court a record for the appeal, which time may be by the court or the judge thereof, extended or enlarged for cause shown.

"Sec. 5. Whenever the party appealing desires to review the ruling of the district court on the admission or exclusion of evidence, or questions the sufficiency of the evidence to sustain the verdict, finding, judgment, or decision, or alleges that the verdict, finding, judgment or decision is contrary to law, the party appealing shall cause to be prepared by the official court reporter a complete transcript of all the testimony offered at the trial, with each question consecutively numbered, and showing all rulings of the court in admitting or excluding evidence, or in directing or refusing to direct a verdict for either party, which transcript of the testimony and rulings of the court shall be certified to by the official court reporter as being true and correct, and as containing all of the testimony offered at the trial, with the rulings of the court in admitting or excluding evidence, or in directing or refusing to direct a verdict for either party. When the record of the testimony offered at the trial, and the rulings of the court to be included therein are prepared and certified as provided in this section, the same shall be filed with the clerk of the district court within seventy days from the date of the entry of the order or judgment appealed from, or within the time as extended by the court or judge."

[2] It is also evident from section 6 that the transcript of the testimony is a part of the record on appeal, and the extension of time mentioned in section 6 is that referred to in section 5. The time given for preparing the transcript and the filing of the record on appeal are the same, to wit, 70 days after the entry of the judgment, and an extension of time given for filing the record on appeal must include any part of the record. If it were considered that a special order were necessary to obtain the extension for filing the transcript, then to make it effective an additional order would also be necessary extending the time for filing the record. We are of the opinion that under this statute an order extending the time for filing the record on appeal includes an extension

of time for preparing and filing the transcript of the testimony, and we so hold. That this was the intention of the trial judge in the present case is evident from the order itself extending the time, which is as follows:

"Now on this day, it having been made to appear, by the above-named defendants, to Hon. James H. Burgess, at chambers at Sheridan, Wyo., that the said defendants will be unable to prepare and file with the clerk of the district court of Johnson county, Wyo., a record for the appeal in said cause, owing to the fact that Charles L. Carter, official court reporter of said district, is unable to transcribe the testimony and evidence within the 70 days after the entry of the judgment, as required by section 4 of chapter 32, Session Laws of Wyoming 1917, and it further appearing to the said judge that the said defendants have fully paid the fees required for the transcription of said testimony and evidence, and it further appearing that the time to prepare and file with the clerk of the said district court a record for the appeal should be extended, and that good cause has been shown for such extension; it is therefore considered and ordered by the said judge, at chambers at Sheridan, Wyo., that the said defendants be, and they hereby are, given until the 18th day of May, 1918, within which time to prepare and file with the clerk of the district court of Johnson county, Wyo., a record for the appeal in said cause.

"Done at Chambers at Sheridan, Wyo., this 15th day of January, 1918.

"James H. Burgess, Judge."

The certificate to the transcript is as follows:

"I, Charles L. Carter, official court reporter for the Fourth judicial district of Wyoming, do hereby certify that the above and foregoing transcript is a true and correct transcript of all the testimony offered at the trial of the above-entitled cause, with the rulings of the court in admitting or excluding evidence, and that attached to said transcript are all of the exhibits offered as a part of such testimony.

"In witness whereof I have hereunto set my hand this 28th day of February, A. D. 1918.

"Charles L. Carter, Official Court Reporter,
"Fourth Judicial District."

[3] It is contended that this does not comply with the statute, as it does not contain the words "as containing all the testimony offered at the trial with the rulings of the court in admitting or excluding evidence." We hold the certificate to be an exact equivalent to the language that is claimed to be omitted. The English language will not admit of a different construction.

[4] As to the ground that the certificate of the judge is dated prior to the certificates of the clerk, we hold that in no way affects the appeal. The statute provides:

"The whole record shall be paged and numbered consecutively, and shall constitute the record on the appeal, and shall be certified to by the judge and clerk of the district court as true and correct."

If the order of the words have any effect or significance at all the clerk should certify after the judge; but it is evident that the certificate of the judge is based on his personal knowledge as having presided at the trial, while that of the clerk is as to what appears from the records of his office. So long as each certifies that the record is true and correct and each certificate is within the time for filing the record on appeal, that is sufficient. Nor does the judge certify that the certificate of the clerk is true and correct, but that the record on appeal is true and correct.

[5-7] The claim that the record on appeal is not sufficiently paged and numbered is based on the fact that the sheet on which appears the certificate of the clerk appears after the last page of the record, numbered 409, and before the page on which appears the other certificate of the clerk and the judge, which is numbered 410. In the first place, from section 6 it is evident that the certificates of the clerk and judge are not a part of the record that is required to be consecutively paged and numbered, and this requirement as to numbering is not a jurisdictional one for which the appeal could be dismissed, and if it were an oversight in a page strictly a part of the record, it could be cured here without withdrawing the record by placing the figures 409½ upon the unnumbered page.

[8] In regard to the claim that "the specifications of error were served prior to the filing of the record on appeal," this matter was considered in the case of *Hahn v. Citizens' State Bank et al.*, supra, and in that case this court said:

"The reason for holding a notice of appeal premature when filed or served before the entry of the order or judgment appealed from does not necessarily apply with the same force to the filing and serving of specifications of error. The purpose of an assignment or specification of errors is to point out the specific errors claimed to have been committed by the court below and relied on for a reversal, for the information of opposing counsel and the reviewing court. 8 C. J. 1329. If, under our statute, an appeal has been properly taken from a judgment or order duly entered, and within the time allowed, and the record is in such condition as will permit of the references thereto required by the statute or rules, there would seem to be no substantial reason for denying the right to file and serve specifications of error before the record is filed, or for construing the statutory provision limiting the time for filing and serving the specifications as meaning anything more than limiting the time beyond which the specifications may not be filed or served. * * * We fail to see any good reason for holding that the specifications may not then be properly filed and served, although before the record itself is or can be filed. In view of the purpose of the specifications of error, and the other provisions of the statutes, the provision of section 8 that the specifications shall be filed

and served within ten days after the record is prepared and filed, should, in our opinion, be construed as prescribing only the limit of time beyond which such specifications may not be filed or served; following the rule for the interpretation of such a provision referred to above in discussing the provision limiting the time for taking an appeal. That seems to us to be the fair and reasonable interpretation of the words of the limitation in section 8 as applied to the subject-matter, viz. the filing and serving of specifications of error."

This disposes of that question and all of the grounds urged in the motion to dismiss.

The appellants have filed a motion to withdraw the record on appeal for amendment: (1) To show that the order extending the time for filing the record on appeal, which appears in the record on appeal and as quoted above, is a proper copy of the order made by the trial judge as appears from the record of the court; (2) to show that said order was made, as appears on its face, at chambers on January 15, 1918, and was filed in the office of the clerk of the trial court on January 18, 1918, and was entered of record in the journal of said court on January 18, 1918; (3) to number the page between 409 and 410 as 409½. And, generally, "in any manner this court may deem necessary to have the cause reviewed on the merits, providing the true facts warrant such amendment."

[9] As was said above, the original order referred to appears in the record on appeal signed by the trial judge, and shows when and where made, and the indorsements thereon by the clerk show when and where it was filed and entered. There is nothing in the statute of 1917 that requires the order extending the time for filing the record to be entered or any time limit dating from the entry or anything which makes the entry jurisdictional. The order may be made in chambers by the judge during the vacation of the court, and, in our opinion, becomes effective upon the signing by the judge within the original 70 days from the date of the entry of judgment, even if not entered on the journal for some time thereafter. The certificate of the judge and clerk that the record in which appears this order is true and correct is all that is necessary to authenticate it. What was said above as to the sheet between page 409 and the page upon which appears the number 410 disposes of any necessity for withdrawing the record on the third ground stated in the motion.

[10] While a record on appeal may, upon proper showing and reasonable application, be withdrawn for amendment in accordance with the facts, we have decided that such application would be denied where the amendment would not cure the defects, or, if so amended, the record would show that it was not filed within the statutory time

after entry of judgment, so that this court would remain without jurisdiction. *Goodrich et al. v. Big Horn County Bank et al.*, 174 Pac. 191.

No application to withdraw the record can be considered unless the specific amendment sought to be made is definitely set forth, and it is made to appear to this court that such amendment will be effective to cure some substantial defect. So an application stated in such general terms, and without specific showing and proof of the truth of the matters, where it is sought to amend the record, as is stated as to the last ground of the motion to withdraw the record, cannot be considered by this court.

The motion to dismiss will be denied. As we hold that no amendment to the record is necessary in this case, and no good purpose would be served by withdrawing the record, the application to withdraw the record will also be denied.

BEARD, C. J., and POTTER, J., concur.

ROGERS v. STATE. (No. A-2707.)

(Criminal Court of Appeals of Oklahoma. Jan. 21, 1919. Rehearing Denied Aug. 9, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 822(1), 1130(2)—TRIAL—APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.

Where counsel for plaintiff in error incorporate in their brief only detached parts of a paragraph of the court's instructions as alleged error, and do not present the entire paragraph of the court's instructions, and treat it in its relation to the entire charge, this court will not review such an alleged assignment of error, as the charge of the court must be considered as a whole and not piecemeal.

2. CRIMINAL LAW \S 1178—APPEAL—CONSIDERATION OF ASSIGNMENT OF ERROR—INSTRUCTIONS—EVIDENCE.

Unless an inspection of the entire record shows some fundamental error not assigned, only such errors as are argued in defendant's brief will be considered, as errors not argued will be regarded as abandoned.

3. INSTRUCTIONS.

The instructions given by the court in this case are free from prejudicial error, and the evidence fully supports the verdict of the jury, and all the errors argued in defendant's brief are without merit.

Appeal from District Court, Pontotoc County; Tom D. McKeown, Judge.

Jim Rogers was convicted of manslaughter in the first degree, and he appeals. Affirmed.

B. C. King and Crawford & Bolen, all of Ada, and Jean P. Day and Prulett, Sniggs & Patterson, all of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Jim Rogers, hereinafter designated defendant, was, jointly with Crocket Daggs, indicted for the murder of Mrs. Mary Harrison, tried separately, convicted of manslaughter in the first degree, and sentenced to imprisonment in the penitentiary at hard labor for a term of 20 years. To reverse the judgment rendered, the defendant prosecutes this appeal.

Crocket Daggs was jointly indicted with the defendant in this case, tried separately, convicted of manslaughter in the first degree, and his conviction affirmed by this court (*See Crocket Daggs v. State*, 12 Okl. Cr. 289, 155 Pac. 489, a companion case to this case), and the facts in the said Daggs Case being identical with the facts in this case, renders it unnecessary to recite them.

Very many errors are assigned in the petition in error in this case, but only the following errors are stated in defendant's brief: (1) The court erred in overruling the motion for a new trial; (2) the court erred in overruling the demurrer to the indictment; (3) the verdict is contrary to the law and evidence; (4) the court erred in its instruction to the jury in paragraphs 12 and 13 of its instructions.

[1, 2] But the only error argued at all in defendant's brief is the error of the court in giving the said paragraphs 12 and 13 of said instructions, and therefore all other errors assigned must be abandoned. Paragraphs 12 and 13, as set out in defendant's brief, read as follows:

"(12) The court instructs you that if you find from the evidence in this case, beyond a reasonable doubt, that during the row, or after the same had subsided between Mart Lancaster and Long Conley and others, that Jim Rogers and Crocket Daggs, acting together in a common design to aid Mart Lancaster by fighting, and you believe beyond a reasonable doubt that in pursuance to said design on the part of the said Jim Rogers and Crocket Daggs, etc.

"(13) The court further instructs the jury that to constitute a person an aider and abettor he must be aware of his companion's designs, and must participate in the crime," etc.

The record discloses that all of paragraphs 12 and 13 of the instructions of the court are not correctly copied in the defendant's brief, parts of same being omitted, and therefore only parts of said paragraphs 12 and 13, respectively, are submitted for consideration, and this cannot be legally

done as in order to review a paragraph of an instruction, the entire paragraph must be presented, however, we have carefully considered respectively the said paragraphs 12 and 13 of said instructions as they are shown by the record to have been given, and when thus considered, said paragraphs of said instructions are free from error.

Notwithstanding, the demurrer to the indictment is not argued in the defendant's brief, we have carefully considered the indictment, and find that, while there are a surplus of averments therein, the indictment is sufficient, and the court did not err in overruling the demurrer thereto.

In the well-considered case of *Daggs v. State*, supra, it is said by Presiding Judge Doyle, and the statement is equally applicable in the instant case, approved, and adopted herein, that:

"The evidence shows that the crime in question was committed under circumstances indicating on the part of the perpetrator a depraved mind and a wanton and reckless disregard for human life. Upon the whole case, we are satisfied that the verdict was neither against the weight of evidence, nor against law; that the trial was conducted in substantial conformity with the law, and the result was such as the jury might properly reach upon the evidence."

[3] Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

HILL v. BUCKHOLTS et al. (No. 9609.)
(Supreme Court of Oklahoma. July 29, 1919.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION §69—FORCED HEIRS—DEVISE OF WIFE'S INTEREST.

Under section 8341, Rev. Laws 1910, husband and wife while married each becomes the forced heir of the other to the extent of one-third of the property owned by each, respectively, which interest cannot be bequeathed by the owner from said heir, and where the property is real estate the estate of the owner therein is meant whether it be the fee or a lesser estate. Further held that where the will of the husband bequeathed to his wife one-third of his real estate, and the remaining two-thirds to certain of his children, naming them, and all of such real estate to H., "to have and to hold the same, upon trust, for the wife and children, one-third to the wife and one-ninth to each of said children, in the proportions aforesaid, and to take possession, management, and control of said real estate, and to rent the same, on any terms and in any manner as he in his discretion shall deem for the best interest of my estate, and to ex-

ecute and deliver good and sufficient contracts therefor, during the term until my youngest child then living shall become of age, and as soon as practical after that event to be conveyed in fee, an undivided one-third interest to my said wife and one-ninth interest to each of my said named children, and each of their heirs and assigns forever," and during the trust period receive the rents, issues, and profits therefrom, and to apply the net income to the use of the wife and children in the proportions aforesaid, further held that the trust provision was an infringement of the rights of the wife, and in contravention of the statute in relation to her as forced heir, and therefore void as to her.

2. WILLS §215—PROCEEDINGS TO PROBATE—JURISDICTION TO CONSTRU.

In proceedings to probate a will under Rev. Laws 1910, §§ 6210, 6211, the only issue triable is the factum of the will, or the question of *devisavit vel non*. Under this issue the court had no jurisdiction to construe the will or try the validity of any devise therein.

3. JUDGMENT §713(3) — RES ADJUDICATA — WHAT CONSTITUTES.

In order to make a matter *res adjudicata*, there must be a concurrence of the four conditions following, namely: (1) Identity in the thing sued for (or subject-matter of the suit); (2) identity of the cause of action; (3) identity of persons or parties to the action; (4) identity of the quality in the persons for or against whom the claim is made.

4. DESCENT AND DISTRIBUTION §71(3) — DEATH OF HUSBAND—ACTION BY WIFE AS FORCED HEIR—PETITION—SUFFICIENCY.

Petition of the plaintiff examined, and held that the same stated a cause of action in favor of the plaintiff, and it was error to have sustained a demurrer thereto.

Error from District Court, Garvin County; F. B. Swank, Judge.

Action by Mrs. Mattie Hill against W. E. Buckholts, trustee, and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Blanton & Andrews, of Pauls Valley, for plaintiff in error.

R. E. Bowling, of Pauls Valley, for defendants in error.

JOHNSON, J. This is a proceeding in error prosecuted by the plaintiff in error, Mattie Hill, on a transcript of the record coming from the district court of Garvin county, Okl.

On the 19th day of January, 1913, John T. Hill, a resident of Garvin county, Okl., died testate, leaving surviving him the plaintiff in error, Mattie Hill, his widow, and seven children, two of whom, under the terms of his will, were practically disinherited.

By the terms of his last will and testament he devised all his property, real and personal, to a trustee, A. R. Hickam, to be held by the said A. R. Hickam as trustee un-

til his youngest child, Ruth Hill, then six years of age, should arrive at her majority, at which time his said trustee was authorized and directed to convey an undivided one-third interest in said property to the plaintiff in error, Mattie Hill, and the remaining two-thirds to certain surviving children. This will was duly probated by the county court of Garvin county, Okl., and the order admitting the same to probate remains in full force and effect.

On the 18th day of March, 1914, there was an order made in the said cause distributing the estate of the said John T. Hill to the devisees mentioned in said will in the proportion of one-third thereof to the plaintiff in error and the remaining two-thirds to the other devisees mentioned therein.

On November 14, 1916, the plaintiff in error, Mattie Hill, filed her petition in the district court for Garvin county, Okl., complaining of the defendant in error W. E. Buckholts, and the other defendants in error mentioned in said petition as the remaining devisees and legatees of the said John T. Hill under the terms of said will as defendants. In this petition she sought a recovery of her undivided one-third interest in and to all the real and personal estate of the said John T. Hill.

The trustee, W. E. Buckholts, filed a demurrer to this petition, and predicated his objections to the petition upon two grounds: The first that the petition did not state facts sufficient to entitle plaintiff to recover said interest in the personal property; and the second that the said petition did not state facts sufficient to entitle plaintiff to recover said interest in the real estate of the said John T. Hill. The first ground of the demurrer being overruled, the question of the right to the personal property is not involved in this action. The second ground of the demurrer being sustained, and the plaintiff in error being thereby denied of her right to recover her interest in the real estate at this time, she appeals to this court.

The petition of the plaintiff in error, omitting the style of the action, is in words and figures as follows:

"Now comes the petitioner, Mattie Hill, and respectfully represents and shows to the court that she is a resident of Pauls Valley, Garvin county, Oklahoma, and that the defendants and each of them are residents of Garvin county, Oklahoma, and service of process can be had upon them in said action, and that the lands and tenements sought to be partitioned and secured by this proceeding are largely situated in Garvin county, Oklahoma, and that administration on the estate of John T. Hill, deceased, was had in said Garvin county, Oklahoma; that W. E. Buckholts is trustee of said estate under a trust proceeding pending in the district court of Garvin county, Oklahoma.

"For her cause of action petitioner says that on the 11th day of November, 1902, she was married to John T. Hill in what is now Garvin

county, Oklahoma, and thereafter they lived together as husband and wife until the date of his death; that the said John T. Hill died testate, a resident of Garvin county, Oklahoma, on the 19th day of January, 1913; that thereafter the will of the said John T. Hill, deceased, was offered for probate in the county court of Garvin county, Oklahoma, and that by order and decree of said court said will was admitted to probate, and that the probate thereof, and the validity of said will, was sustained by the district court of Garvin county, Oklahoma, and the Supreme Court of the state of Oklahoma, upon proceedings had therein contesting said will.

"Petitioner says that a copy of said will, and the order of the county court of Garvin county, Oklahoma, admitting said will to probate, are attached hereto, marked 'Exhibits A and B,' respectively, and made a part of this petition.

"Now this petitioner says that she is the surviving widow of the said John T. Hill; that as such the said John T. Hill could not will from her more than two-thirds of his said estate; that under and by virtue of the terms of said will this petitioner is entitled to an undivided one-third interest in all the estate of the said John T. Hill, deceased; and that her right to take said property is adjudicated and determined by the orders of the county court of Garvin county, Oklahoma, admitting said will to probate, and under the further administration of said estate.

"Now, petitioner says that under the terms of said will it is sought to prohibit her from having possession of said property and alienating the same for a period of about 12 years and a period of about 8 years from this date, and this petitioner says that the provision of said will seeking to prevent the alienation, management, possession, and control of said property by this petitioner is void and without force and effect as to her, and that she is entitled to the possession of the said property and the control thereof, and the right to dispose of the same at will.

"This petitioner says that administration upon the estate of the said John T. Hill, deceased, has been closed in the county court of Garvin county, Oklahoma, and that a copy of the order of said county court finally closing and disposing of said estate is hereto attached marked 'Exhibit C,' and made a part of this petition.

"This petitioner says that thereafter, and without the consent of this plaintiff, there was appointed in the district court of Garvin county, Oklahoma, a trustee authorized and empowered and authorizing him to take charge of all the property of the said John T. Hill, deceased, and to manage, direct, and control said property; that W. E. Buckholts, one of the defendants herein, was appointed such trustee; and that as such trustee the said W. E. Buckholts is now in possession of said property, and refuses to permit her to manage, control, or occupy said property belonging to her, and is now demanding the right to manage, control, and use of said property for a period of eight years yet to come.

"Petitioner says that at the time of the death of the said John T. Hill he left surviving him seven children, James A. Hill, William Riley Hill, John Edgar Hill, Euda Polk, Susie Hill, now Peevey, Harry Vernon Hill, Tom Hill, and

Ruth Hill; that by the terms of the will of the said John T. Hill the said James A. Hill and the said Euda Polk took no interest in the property now in the hands of W. E. Buckholts as trustee, and took no interest in any of the property belonging to John T. Hill, deceased, and are not interested in this proceeding, except that to the said James A. Hill there was willed a certain note and the sum of \$1.00, which said money and property have been tendered to the said James A. Hill by the executor under the will of John T. Hill, deceased; that said note so willed to the said James A. Hill was a note executed by the said James A. Hill to John T. Hill, deceased; that said note is without value, and that the same is not in the hands of the trustee, W. E. Buckholts, and that he is not asserting any right or claim thereto, and that the said James A. Hill has no claim in the property sought to be recovered in this action.

"This petitioner says that Tom Hill died unmarried, intestate and without issue, in Garvin county, Oklahoma, on the 27th day of January, 1913, and that under and by virtue of the terms of the will of John T. Hill, deceased, that the interest which the said Tom Hill took in said property reverted to and became the property of William Riley Hill, John Edgar Hill, Susie Hill, now Peevey, Harry Vernon Hill, and Ruth Hill.

"Further, this petitioner says that at the time of the death of the said John T. Hill, deceased, he owned an estate of the value of about \$60,000.00, and that an inventory of said estate of John T. Hill was filed by the executor under the will of John T. Hill, deceased, and that the property belonging to the said John T. Hill, deceased, as disclosed by said inventory, is as follows:

"(A minute description of the real estate belonging to the estate of John T. Hill, consisting of business property and residences in the city of Pauls Valley, Oklahoma, and about 1,200 or 1,500 acres of real estate situated in Garvin county, Oklahoma, a lot of live stock and other personal property of the aggregate value of about \$20,000.00, and notes and accounts of the value of about \$8,000.00 or \$10,000.00.)

"Now this petitioner says that under the facts above set forth, under the terms of the will of J. T. Hill, deceased, and under the law in force at the time of his death, that she is entitled to an undivided one-third interest therein, and is entitled to have the same partitioned and set aside to her, and the possession, control, management, use, and right to dispose of the same decreed to her by this court."

Exhibit C to the plaintiff's petition is a copy of the decree of distribution made by the county court of Garvin county in the matter of the administration of the estate of John T. Hill, deceased, on the 18th day of March, 1914, and in the matter of the distribution of said estate is was ordered as follows:

"It is further ordered, adjudged, and decreed by the court that all the estate of the late John T. Hill which remains unadministered be, and the same is hereby, distributed and vested in the legatees mentioned in his will in the following proportions, to wit:

"Mrs. Mattie Hill, an undivided one-third interest, and John Edgar Hill, William Riley Hill, Harry Vernon Hill, Susie Hill, and Ruth Hill, an undivided two-fifteenths interest each.

"It is further ordered, adjudged, and decreed by this court that Mrs. Mattie Hill is the absolute owner of an undivided one-third interest in and to all of said property belonging to the estate of the said John T. Hill, and that each of the following parties, John Edgar Hill, William Riley Hill, Harry Vernon Hill, Susie Hill, and Ruth Hill, is the owner of an undivided two-fifteenths interest therein, and that they are hereby vested with absolute title in and to said property in said proportion, and the same is hereby distributed to them to have and to hold unto them and their heirs in said proportion."

It will be seen from the allegations of the plaintiff's petition that her cause of action is one for the recovery of a one-third interest in the property of her deceased husband, John T. Hill, and for partition, and that the demurrer of the defendant challenged the sufficiency of the petition—first, as to the personal property; and, second, as to the real estate sought to be recovered. And it appears from the record that the trial court overruled the demurrer of the defendant as to the first paragraph thereof, and sustained the same as to the second paragraph thereof. And it is from the action of the court in sustaining the demurrer as to the second paragraph thereof that this appeal is prosecuted.

The only assignment of error which the plaintiff in error makes for the reversal of this case is the following:

"The court erred in sustaining the second ground or paragraph of the special demurrer filed by the defendant W. E. Buckholts to her petition, wherein the said defendant Buckholts demurred to all that part and portion of the plaintiff's petition in which this plaintiff in error sought to recover and have set apart to her certain portions of the real estate of her late husband, John T. Hill."

And in support thereof says:

"By the above assignment of error but two questions are presented for consideration. The first is whether or not the husband can by his last will and testament devise away from his wife more than two-thirds of the property. The second is whether or not the will in the case at bar gives to the wife as much as one-third of the property of the deceased."

"By section 8341 of the Revised Laws of Oklahoma of 1910 it is provided: 'Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed may be disposed of by will; Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; Provided, further, that no person who is prevented by law from alienating, conveying, or incumbering real property while living shall be allowed to bequeath same by will.'"

The defendant's answer to this contention of the plaintiff is stated in his brief as follows:

"The only question raised in this case is whether the will in question is valid in the face of our statute (section 8341, Revised Laws 1910, supra). The plaintiffs in error on this point plead as follows:

"For her cause of action petitioner says that on the 11th day of November, 1902, she was married to John T. Hill in what is now Garvin county, Oklahoma, and thereafter they lived together as husband and wife until the date of his death; that said John T. Hill died testate, a resident of Garvin county, Oklahoma, on the 19th day of January, 1913; that thereafter the will of the said John T. Hill, deceased, was offered for probate in the county court of Garvin county, Oklahoma, and that by an order and decree of said court said will was admitted to probate, and that the probate thereof and the validity of said will sustained by the district court of Garvin county, Oklahoma, and the Supreme Court of the state of Oklahoma, upon proceedings had therein contesting said will."

"Petitioner says that a copy of said will, and the order of the county court of Garvin county, Oklahoma, admitting said will to probate, are attached hereto, marked 'Exhibits A and B,' respectively, and made a part of this petition. * * * Now, petitioner says that under the terms of said will it is sought to prohibit her from having possession of said property and alienating the same for a period of about 12 years and a period of about 8 years from this date, and this petitioner says that the provision of said will seeking to prevent the alienation, management, possession, and control of said property by this petitioner is void and without force and effect as to her, and that she is entitled to the possession of the said property and the control thereof, and the right to dispose of the same at will. * * * Now, we submit that is exactly what the plaintiff in error received under this will. The will is quoted in full in the brief of the plaintiff in error, and under paragraph two provides, among other things, as follows: * * * In the portion following, to wit: 'One-third to my wife, Mattie Hill, and one-ninth to each of my said children, William Riley Hill, John Edgar Hill, Harry Vernon Hill, Susie Peevey, and Ruth Hill'—following the statute exactly.

"So far they don't complain. The part they complain of is the trust feature of the will, wherein the real property is to be held by a trustee till the children become of age; then the real question is whether or not the will in question bequeathed to the wife, the plaintiff in error, one-third of the property."

The foregoing excerpts from the briefs of counsel, we think, clearly state the issues of law involved in this appeal. On account of the large amount involved in this litigation, and the importance of the legal question to be determined, we think that so much of the history of the controversy between the parties and their exact status herein, as the same is disclosed by the records of this court, is called for at this point, in order that a clear understanding may be had by all as to the issues involved and herein determined.

John T. Hill died January 19, 1913, leaving surviving him James A. Hill, a son by his first marriage; William Riley Hill, John Edgar Hill, Harry Vernon Hill, Susie Hill, Euda Polk (née Hill), and Thomas J. Hill, children by his second marriage, and Mattie Hill, his wife, and Ruth Hill, a child of his third marriage; and leaving an estate, consisting of real and personal property, of the total appraised value of \$72,048.42. Prior to his death he had executed a will, wherein A. R. Hickam was named as trustee, in which he devised his property to said trustee, with directions to manage and control the real estate, to rent the same on any terms and in any manner as he in his discretion shall deem for the best interest of my estate, and collect the rents thereon, until his youngest child should become of age, and then to convey in fee simple to the wife and children then living the real estate in the proportion therein named; and said will contained an additional stipulation that, in the event of the death of any of the heirs therein named, the part that would have fallen to said heir should be distributed according to the directions in said will, and contained the further provision for the disposition of the personal property and for the maintenance and education of the minors. This will was admitted to probate on February 7, 1913, in the county court of Garvin county, and letters testamentary were issued to the trustee therein named, who qualified and entered upon the discharge of his duties.

On April 24, 1913, certain of the heirs filed a petition in the district court of Garvin county, in which they sought to have said will declared void by reason of the trust provisions therein contained (and, failing in this, sought to have the property conveyed by said will declared to be the property of the deceased accumulated by him during coverture with his second wife, and as a result of the management and control of the property of the plaintiff), and sought to have an accounting with the estate of said John T. Hill, and to have set aside and delivered to them from said estate such real and personal property as might be found to be due them. To this petition the executor, and trustee, A. R. Hickam, and defendants Mattie Hill and Ruth Hill, filed demurrers, challenging the sufficiency of the allegations in the fourth paragraph thereof; and defendant James A. Hill joined in the presentation of said demurrer. At the hearing upon the demurrers the same were sustained, and the trust provisions of the will held to be valid, and from the ruling of the court upon this demurrer an appeal was taken, and petition in error and case-made attached thereto were filed in this court on July 13, 1913, being Case No. 5411; which judgment was affirmed by this court (54 Okl. 441, 153 Pac. 1185).

But while the above appeal was pending in

this court on, to wit, February 24, 1914, all the heirs except James A. Hill filed in the district court in said cause application for judgment according to the stipulation therein contained; and upon the filing of this stipulation James A. Hill filed demurrer to said application, which demurrer was by the court heard on the 25th day of February, 1914, and overruled; from which the said James A. Hill appealed to this court by a petition in error filed in this court on April 24, 1914, which error was reviewed by this court; and thereafter, on May 18, 1914, a judgment rendered reversing and remanding the cause, with directions for further proceeding in accordance with the opinion of this court in said cause (49 Okl. 424, 152 Pac. 1122).

The defendants further say in their brief:

"For argument we will say that we do not disagree with plaintiff in error as to what is meant by the statutes they plead, that no man while married shall bequeath more than two-thirds of his property from his wife; but we say the will in this case meets absolutely the requirement of this statute, and had plaintiff in error attacked the will at the proper time and in the proper way her contention could not be sustained on account of the nature of the will, in that it created an active trust, the title to the property passing to the trustee, and the will giving to plaintiff in error one-third of the estate as required by the statute they plead. It is no objection to the creation of a trust that the enjoyment of the beneficiary of the possession of the property is postponed, especially where the beneficiary has every other right of ownership, she enjoys the income from the property, and can dispose of it by will or otherwise if she desires, as the title to the property must be conveyed to her on the date her daughter Ruth is eighteen years of age. We say that she has no other and further remedy in the courts. She has accepted the terms of the will, the will has been probated without a contest on her part, the matters involved have been adjudicated."

(1) As to whether the plaintiff's petition stated a cause of action depends primarily upon the construction to be placed upon section 8341, Rev. L. 1910. The validity of this section is conceded by the parties. We think that under its provisions the husband and wife while married each becomes the forced heir of the other to the extent of one-third of the property owned by each, respectively, which interests cannot be bequeathed by the owner from said heir, and, where the property is real estate, the estate of the owner therein is meant, whether it be the fee or a lesser estate. We think this construction is well supported by the authorities. The Supreme Court of Texas in the case of *Budd v. Fisher*, 17 Tex. 426, had for its construction a statute of that state similar in import, the same being Hart. Dig. art. 3263, which was the statute of that state on wills; and by the thirteenth section thereof parents were pro-

hibited from disinheriting their children unless for just causes, which were specified; but by the fifteenth section parents might dispose of the one-fourth of their estates by last wills or donation in last sickness. The syllabus of that case is as follows:

"A provision in a will to the effect that all the property of the testator shall be kept together for the support, education, etc., of his family, until the youngest child shall arrive at the age of twelve years, and under no pretext to be sold, except, etc., is an infringement of the rights of forced heirs who are adults, and, on application of such forced heir, will be set aside; but only as to the three-fourths of the estate, if the other heirs so require. It seems that a like provision, with the qualification that as each heir became of age his share should be set apart to him, might be held not to be an infringement of the rights of forced heirs."

The opinion of the court was delivered by Hemphill, C. J., and in the discussion of the principles involved in the body of the opinion it is said:

"But to the question for consideration, viz. whether the provision requiring the property to be kept together until the youngest child should attain the age of twelve years is an infringement of the legal rights of the plaintiff, Isabella, as forced heir of the deceased. * * * The law, as thus arranged, invests children with the quality of forced heirs, and an absolute right to a portion of the estate of a deceased parent, a right independent of the intentions of the testator as they may be expressed by his last will and testament. Can the parent impose any restrictions or conditions on the enjoyment or right in this property which the law has thus removed beyond his testamentary power, and declared that the child shall not be excluded from such portion of the inheritance? If so, the law might, by contrivance, be evaded, and the right of children, though guaranteed by law, virtually defeated. If the heir may be postponed and delayed in the possession and enjoyment of his property for eleven years, he may be for twenty. One or more life estates might be interposed, and yet, as the child would have the remainder, it might, according to this view, be said that there was no infringement of the law, for that only prohibited entire disinheritance. But such, it is conceived, is not the true view and intent of the statute. The prohibition against disinheriting a child, to be effectual and to accomplish the purposes of protection for which it was designed, must include every act which would defeat not only the right, but which would obstruct the beneficial enjoyment of the property secured to the heir by the law. To deprive a child, after marriage or majority, of his property for eleven years, would be a most serious encroachment on his rights. Under this will the property is to be kept together for the benefit of the family. In most cases married or adult children would constitute no part of the family, and they would, under such provisions, lose all benefit from the property. Life is uncertain. It might very probably end before the lapse of eleven years; and thus a forced heir might live for eight or ten years in poverty and distress, excluded from property

which belongs to him as forced heir, and of which he is deprived, not by an open disinherison, but by a scheme of postponement, which is really equivalent, and which must consequently be regarded as a mere fraud and evasion of the law, and consequently ineffectual and void. Whether such provision might not be good, where all the heirs are minors, and would manifestly operate to their advantage, need not be discussed. There would be great difficulty in sustaining it under any aspect. The children might have different guardians, and after fourteen they would have the right to choose guardians for themselves, and, if these were to insist on the delivery of the property, it might be difficult to refuse, under the law, such demand. But where some of the heirs are adults there is no question but that such provision is in contravention of their legal rights. The parent has the power to dispose of the one-fourth, and those representing the minors in this case may, if they deem it advantageous, have the decree so made as to retain the one-fourth together until the time limited in the will for distribution."

In that case, as in this, the will had been admitted to probate by the county court, and this was an action brought by a daughter of the deceased, joined by her husband, in the district court of Fayette county, praying that the pretended will be declared null and void, and the estate distributed according to law, with the will annexed.

In the case of Succession of Jno. A. Turnell, 32 La. Ann. 1218, the Supreme Court of Louisiana had under consideration the construction of a will and a statute of that state similar to the one under consideration here, and the syllabus is as follows:

"The testator cannot impose charges or conditions on the legitimate portion of the forced heir, and therefore cannot order that that portion shall, together with the rest of his estate, remain undivided in the hands of his executors during a certain number of years."

In the opinion of the court by Fenner, J., it was said:

"The decedent left, as forced heirs, two sets of grandchildren, who may be designated as the Blakeley children and the Hutchison children. Each set of children were, under the law, entitled, as a legitimate or forced portion, to one-fourth of his estate. He left a testament, by the terms of which, with the expressed intention of complying with the requirements of the law, he bequeaths to the Hutchison children exactly one-fourth of his estate, and gave the balance thereof to the Blakeley children. He then directs as follows: 'All of my property shall be kept together, and be administered by my executors for five years after my death, when the same shall be sold, and the proceeds thereof be invested by my executors in U. S. bonds, and as my grandchildren severally arrive at the age of twenty-one years they shall receive their share. Until the property be divided in the above proportions among my said grandchildren, the revenues therefrom shall be paid to them half yearly.' * * * Treating this will, as it has been treated by counsel on both sides in their arguments, as a will confer-

ring upon the petitioning minors no right or advantage whatever over and above their legitimate portion, and considering their present action as a waiver of all other rights and advantages which might, under any possible construction of the will, accrue to them thereunder, we find no difficulty in reaching the conclusion that their demand herein is well founded, and that the conditions imposed in the clauses of the will, so far as they affect the legitimate of the petitioners, are, and should be, declared null and void."

In the case of Kine v. Becker et al., 82 Ga. 563, 9 S. E. 828, the Supreme Court of Georgia had under construction a statute of that state similar to ours, and the syllabus to the case is as follows:

"Under Code Ga. § 2419, enacting that no person leaving a child shall devise more than one-third of his or her estate to any charitable institution to the exclusion of such child, and unless a will containing such devise is executed at least 90 days before testator's death the devise shall be void, a devise is 'to the exclusion of such child' if it vests the child with an estate for life, remainder to her issue, if any, in fee, and in default thereof in trust for a charitable purpose, and is therefore invalid."

The clause of the will under construction was as follows:

"(2) I give, devise, and bequeath unto my beloved daughter Mary Elizabeth Kine all my undivided half interest in the real and personal property of the estate of my late husband, Wm. Kine, and all other property owned (except lot 21, Currietown ward, and improvements, city of Savannah), for and during the term of her natural life; and should my said daughter marry, and have issue or children at her death, then in fee-simple to said children; or, if she should die leaving no children, then to whosoever may be the Roman Catholic Bishop of Savannah, in trust for the erection of a Roman Catholic hospital in the city of Savannah, and for no other use or purpose whatsoever."

Simmons, J., delivering the opinion of the court, said:

"The question is, was she excluded from this property by the terms of this item of the will? It was argued by counsel for the defendants in error that she was not excluded, because the will gave her a life estate in the property, remainder over to her children if she had any, and, if she should die leaving no children, then to the church. It was argued that this was not an exclusion of the daughter from the enjoyment of the property, but simply a restriction of the title. We cannot bring our minds to this conclusion. Under the law of Georgia, if Ellen Kine, the testatrix, had died intestate, her daughter Mary would have been entitled to an absolute or fee-simple estate in this property. 'An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with the unconditional power of disposition during his life, and descending to his heirs or legal representatives at his death intestate.' Code, § 2246. This will, therefore, deprives her of a fee-simple estate in this property, and gives her only a life estate therein.

She is deprived of or excluded from one of the main ingredients in the ownership of property—the absolute title thereof. She is excluded from another right, and that is the power of disposition. Under this will she can only enjoy the income of the property for and during her life. She has no right to the ownership of it, except for her life, nor to dispose of it, except her life estate in it." In *re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242; In *re Miller Estate*, 158 Cal. 420, 111 Pac. 255.

This act was passed by the Legislature of this state and approved March 27, 1909 (S. L. 1909, chap. 41, § 1, p. 641), and was an act to amend section 6168, Statutes of Oklahoma of 1893, which section was as follows: "Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will." The fifth section of the act, *supra*, provided "that all acts, or parts of acts in conflict with this act be, and the same are hereby repealed," and became effective June 10, 1909.

Rev. Laws 1910, § 6595, provides that "real property in this state is governed by the law of this state, except where the title is in the United States." Section 6596: "Estates in real property in respect to duration of their enjoyment, are either: 1st, estates of inheritance or perpetual estates; 2nd, estates for life; 3rd, estates for years, or, 4th, estates at will." Section 6597: "Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee-simple or an absolute fee."

By the terms of the will the entire estate of the testator is attempted to be conveyed to the trustee for the trust period or until the youngest child shall become of age, "to take possession, management, and control of said real estate, and receive the rents, issues, and profits therefrom, and to apply the net income from the same to the use of the said wife and children, in the proportions aforesaid, during the term until my youngest child then living shall become of age, and as soon as practicable after that event to be conveyed in fee an undivided one-third interest to my said wife, Mattie Hill, her heirs and assigns, and an undivided one-ninth interest to" certain children, naming them. "I hereby authorize and empower said trustee, A. R. Hickam, in the management of my estate, to rent any and all of said real estate on any terms and in any manner as he in his discretion shall deem for the best interests of my estate, and to execute and deliver good and sufficient contracts therefor."

We think that under section 8341 of the Statutes, *supra*, that the plaintiff was the forced heir of her husband, John T. Hill, at the time of his death to the extent of one-third of the real property owned by him in fee simple, and that when the administration upon his estate closed she was entitled to the possession, management, and control thereof,

clothed with the power of disposition of the same, and that the trust created upon his real property by the testator, John T. Hill, by the terms of his will, was, as to his wife, the plaintiff, and to her one-third of such real estate, void, although the same was valid and subsisting as to all the other legatees named in his will. Revised Laws 1910, § 8341; *Bacus v. Burns*, 48 Okl. 285, 149 Pac. 1115; *Fennell v. Fennell*, 81 Kan. 642, 106 Pac. 1038; *Barry v. Barry*, 15 Kan. 590; *Henry Allen et al. v. Joseph Hannum et al.*, 15 Kan. 625; *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815; *Budd v. Fisher*, 17 Tex. 426; *Succession of John A. Turnell*, 32 La. Ann. 1218; *Kine v. Becker*, 82 Ga. 563, 9 S. E. 828, *supra*.

The rule that a will may be only partially invalid, valid provisions being sustainable, and those invalid may be declared so on a construction of the will by the court, is well supported by the authorities. *Bacus v. Burns*, 48 Okl. 285, 149 Pac. 1115; *Fennell v. Fennell*, 81 Kan. 642, 106 Pac. 1038; *Barry v. Barry*, 15 Kan. 590; *Henry Allen et al. v. Joseph Hannum et al.*, 15 Kan. 625; *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815; *Budd v. Fisher*, 17 Tex. 426; *Succession of John A. Turnell*, 32 La. Ann. 1218; *Kine v. Becker*, 82 Ga. 563, 9 S. E. 828, *supra*; 16 C. L. 2650; 12 C. L. 2368; 14 C. L. 2456; *Clear Spring Twp. v. Blough*, 173 Ind. 15, 83 N. E. 511, 89 N. E. 360; *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *Lewine v. Gerardo*, 60 Misc. Rep. 261, 112 N. Y. Supp. 192; In *re Gibson's Will*, 128 App. Div. 769, 113 N. Y. Supp. 266; In *re Buchner*, 60 Misc. Rep. 287, 113 N. Y. Supp. 625.

(3) The position taken by counsel for defendants in error that the transcript presents the question of former adjudication is without merit; first, because the question of former adjudication is a matter of defense, and must be pleaded, and cannot be raised by demurrer to the petition of plaintiff unless it be apparent upon the face thereof. This court in the case of *Ratcliff-Sanders Grocer Co. v. Bluejacket Mercantile Co.*, 164 Pac. 1142, passed upon the question of what constitutes a sufficient plea of *res adjudicata* in an opinion by Mr. Justice Kane. Syllabus 1 thereof is as follows:

"In order to make a matter *res adjudicata*, there must be a concurrence of the four conditions following, namely: (1) Identity in the thing sued for (or subject-matter of the suit); (2) identity of the cause of action; (3) identity of persons or parties to the action; (4) identity of the quality in the persons for or against whom the claim is made."

This rule is well established and adhered to by numerous decisions of this court. *Prince v. Gosnell*, 47 Okl. 570, 149 Pac. 1162; *St. L. & S. F. Ry. Co. v. Hardy*, 45 Okl. 423, 146 Pac. 38; *Corrugated Culvert Co. v. Simpson Township*, *McIntosh Co.*, 51 Okl. 178, 151

Pac. 854; Duncan et al. v. Deming Investment Co., 54 Okl. 680, 154 Pac. 651; Norton v. Kelley, 57 Okl. 222, 156 Pac. 1184; Woodworth Co. Clerk v. Town of Hennessey, 32 Okl. 267, 122 Pac. 224.

[4] We have carefully examined the transcript, and are of the opinion that the trial court erred in sustaining the demurrer of the defendant to the plaintiff's petition; and the case is therefore reversed and remanded, with directions that the demurrer be overruled, and that the case proceed in accordance with the views herein expressed.

OWEN, C. J., and all the Justices concur, except RAINEY and HIGGINS, JJ., not participating.

WHITEHEAD COAL MINING CO. v. SCHNEIDER. (No. 10076.)

(Supreme Court of Oklahoma. July 22, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §204(2) — MINE PROPS—ASSUMPTION OF RISK—STATUTE.

In a personal injury action for damages brought by a coal miner, where the allegations in the plaintiff's petition and the proof offered in support thereof show that the plaintiff's cause of action is one arising from the defendant's failure to comply with the provisions of Rev. Laws 1910, §§ 3083, 3084, in furnishing sufficient props of proper length which were required and requested by the plaintiff, such provisions were to protect the employes of the defendant from a well-known danger pertaining to the services of such employes, being a risk which, from the nature of their employment, they were compelled to assume, and although an employe impliedly waives a compliance with the statute, and agrees to assume the risk by continuing in the service, a court will not recognize or enforce such agreement. To permit owners or managers of mines to avail themselves of such an assumption of risk by its employes would be, in effect, to enable them to nullify the statute, and that is against public policy.

2. DAMAGES §132(6) — PERSONAL INJURY — EXCESSIVE DAMAGES.

The plaintiff was 46 years of age and was serving as a miner engaged in digging coal, and was earning \$5 per day. The lower portion of his spine was injured, his hips and right leg were crushed, and the latter partially paralyzed, and for about 2½ years he had been unable to work at his avocation and continued to suffer physical pain and was unable to walk without the aid of a crutch or cane. His injuries were permanent. There is nothing in the record to indicate that the jury were influenced by passion or prejudice. *Held*, that a verdict for \$8,423.33 was not excessive.

3. TRIAL §260(1) — REFUSAL OF SPECIAL INSTRUCTIONS—GIVEN INSTRUCTIONS.

It is not error to refuse special instructions requested by a party, when the questions covered by the special instructions are included in the general instructions.

4. INSTRUCTIONS.

Instructions given by the court and excepted to by the defendant examined, and *held* that, when considered together with all the instructions, they state the law applicable to the case with substantial accuracy.

5. REVERSAL ON APPEAL—STATUTE.

Under section 6005, Rev. Laws 1910, the Supreme Court is not authorized to set aside any judgment or grant a new trial in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

6. APPEAL AND ERROR §1050(1) — HARMLESS ERROR—ADMISSION OF EVIDENCE.

A party cannot complain of the admission of evidence over his objection to a single question, where he permits like evidence of other witnesses to be admitted without objection.

(Additional Syllabus by Editorial Staff.)

7. APPEAL AND ERROR §1170(6)—TECHNICAL ERROR—REVIEW.

In coal miner's action for injury from employer's failure to furnish props as requested, the query in argument of plaintiff's counsel as to whereabouts of defendant's foreman and as to why defendant had not called him as a witness, to which objection was overruled, but which record did not show to have affected verdict, was not reversible error within Rev. Laws 1910, § 6005.

Error from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Action by Louis Schneider against the Whitehead Coal Mining Company. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

William M. Matthews, of Okmulgee, for plaintiff in error.

E. W. Smith, of Henryetta, and E. M. Carter and Charles A. Dickson, both of Okmulgee, for defendant in error.

JOHNSON, J. This is an appeal from the district court of Okmulgee county and is an action for personal injuries. The action was brought in the court below by the defendant in error, Louis Schneider, against the plaintiff in error, Whitehead Coal Mining Company, to recover the sum of \$11,599 for injuries which he claims to have sustained while engaged in digging coal in the coal

mine of the plaintiff in error. For convenience the parties will hereinafter be referred to as plaintiff and defendant as they respectively appeared in the court below.

The plaintiff charges in his petition that on the 4th of August, 1915, he was in the employment of the defendant in the capacity of a coal miner and was engaged in the regular prosecution of his duties; that his working place was the fifth north entry, which he alleges "was in a dangerous condition, in that it was negligently and carelessly constructed and maintained, and the roof or arch thereof was improperly and negligently supported, and the timbers thereof were of insufficient length, to wit, 2 feet and 2½ feet long, and the defendant company failed and refused to furnish timbers of sufficient length, to wit, props 4 feet in length, although plaintiff made due demand of A. McVey and W. E. Simmons, assistant foreman, a driver of said defendant company." The plaintiff "was in ignorance of such improper construction and maintenance, and without fault or negligence on his part a portion of the roof or arch of said entry gave way and fell upon the plaintiff, greatly injuring, bruising, and damaging him." He says that he sustained serious injuries about his hips and in the lower extremity of his backbone; that a gash was cut in his head, and that his right leg is partially paralyzed; that he suffered other and internal injuries, the exact nature of which are unknown to him. At the time the injury occurred he says he was earning \$5 a day.

The defendant's answer was as follows:

First. A general denial.

Second. By way of affirmative defense it is charged that the plaintiff, at the time he received the injuries complained of, was engaged in the work of driving an entry, and that the place where the accident occurred was the working place of the plaintiff, and was not being used as a passageway for the transportation of coal or men; it was plaintiff's duty to examine and test the roof of his room and ascertain whether or not it was safe; that the condition of the roof of the room was apparent to a casual observer, and plaintiff entered with full knowledge of all the facts, and therefore assumed all the risks arising from his acts.

Third. The defendant further pleads that the falling of slate rock from the roof of a mine is one of the usual risks incident to the mining of coal, and the plaintiff, in entering the employment of the defendant, assumed all the risks incident thereto.

Fourth. It is charged that the plaintiff had excavated the coal from under the rock which fell upon him, and had himself created all the conditions which produced the injury complained of. If the roof of plaintiff's working place was carelessly and negligently propped, it was due to his own negligence,

which directly and proximately contributed to and produced his injury.

To which answer the plaintiff filed a reply consisting of a general denial. The case was tried to a jury, and a verdict rendered in favor of the plaintiff for \$8,423.33. From a judgment rendered by the trial court upon such verdict the defendant lodged his appeal in this court on July 10, 1918, by petition in error, in which it makes numerous assignments of error, 21 in number, which are considered in its brief in this court under five subheads, the first of which is as follows:

[1] (1) The court erred in refusing to submit to the jury the defendant's plea of assumption of risk, and in refusing its requested instruction on that point.

The act of negligence of the defendant complained of by the plaintiff was the defendant's failure to provide plaintiff with props of sufficient length to prop up the roof of his working room. The defendant's answer was a general denial, plea of contributory negligence, and assumption of risk. The plaintiff's testimony showed that he was 46 years old at the time he received the injuries complained of; that he had been a coal miner ever since he was 11 years old, except a short time during the Spanish-American War when he was a soldier in the army of the United States; that he received the injury complained of on the 4th day of August, 1915, while working in the mine of the defendant known as the Whitehead mine No. 2, Henryetta, Okla., and had been engaged with the defendant company for about 6 months, and at the time of the injury was working in his room, the same being the fifth north entry off of the west main entry in said mine. The plaintiff testified in his own behalf, without objection, as follows:

"Q. I will ask you to state, Mr. Schneider, whether or not you received any injury on the 4th day of August, 1915. A. Yes, sir; I had a fall of rock on me the 4th of August, 1915.

"Q. Was that in your working room, the fifth north entry off of the west main entry in Whitehead No. 2 mine? A. Yes, sir.

"Q. Now, Mr. Schneider, prior to the time you were injured state whether or not you had demanded props. A. On the 3d day of August in the afternoon I ordered some four-foot props.

"Q. Who did you order those of? A. Off of McVay, the driver, and on the 4th, on the morning of the 4th, I ordered them again.

"Q. Who did you order them of the second time? A. Off of McVay, and also Mr. Simmons, the assistant boss.

"Q. Is that W. E. Simmons? A. Yes, sir.

"Q. The assistant foreman of that mine? A. He was at that time.

"Q. Now what time, Mr. Schneider, did you ask for those props of Mr. Simmons? A. Along about, I judge, about 9 o'clock.

"Q. Of what date? A. The 4th of August.

"Q. The day you were injured? A. Yes, sir.

"Q. About what time were you injured? A. I judge about 11 o'clock or a very little after.

"Q. Now, Mr. Schneider, at the time you demanded those props of Simmons, what, if anything, was said between you and him? A. I told him I needed four-foot props; there were some others there, but they were too short in length; they could not be used. He said, 'Yes; I see you need props.' He said, 'Go ahead and I will see that you will get some.'"

"Q. He told you to go ahead with this entry and he would see that you would get props? A. Yes, sir."

"Q. Now, how high was this top which fell, how high was that from the ground? A. Very near four feet; three-foot props were too short."

"Q. Would anything shorter than four-foot props have done? A. Would not have done any good; no, sir."

"Q. In what position were you when you were injured? A. Down on my knees wedging up some bottom coal, getting a place ready to get my drill to drill a hole."

"Q. Why were you drilling this hole? A. I was making holes so I could blast coal off next day."

The testimony further disclosed that about 2½ years elapsed from the date of the injury to the date of the trial, during which time the plaintiff had attempted to resume work as a miner, but that he was unable to do so on account of his injuries; that he during all of the time suffered more or less physical pain as a result thereof; that immediately following his injuries he was taken to the hospital in Henryetta, where he remained for about 3 weeks, after which he returned to his boarding place, where he was in bed for about 2 weeks, when he got out on crutches, and that he had never been able to get around without the use of a crutch or stick since receiving his injuries, and that he suffered pain in his back and hips ever since until the date of trial; that at the time he received the injury complained of he was earning about \$5 per day; that he had never been injured before, and was a stout, able-bodied man; that his right leg had been partially paralyzed ever since receiving the injury; that he was not able to make a living at digging coal any more, and he had no other trade or profession. He testified that he ordered the props off of the driver on the evening of the 3d and on the morning of the 4th. "The first trip he got in I said: 'I want those props I ordered off of you.' He said, 'I will get them as soon as they get them down from the top.'" Then he was asked:

"Q. Did he bring any props into your entry before this accident occurred? A. No, sir."

"Q. Were any four-foot props in your entry at the time of the accident? A. No, sir."

He testified on cross-examination as follows:

"Q. Now, had this rock shown any indication of falling? A. No, sir."

"Q. Had you noticed any imperfection in the roof there? A. Usually a miner always sounds his place, and if he needs props, he goes ahead and gets props and sets them."

"Q. Did you sound your roof? A. Yes, sir."

"Q. When? A. That morning."

"Q. Did you find any indication of loose rocks? A. It sounded hollow like."

"Q. It gave indication that it needed props? A. Yes, sir."

"Q. Then what did you do? A. I demanded my props."

"Q. And that is the reason you demanded props, because you thought the rock was dangerous? A. I wanted to keep it from getting dangerous; that is what a miner sets props for, to keep it from getting dangerous."

The plaintiff testified that it was the custom in the mine at the time for miners to order their props and timbers off the drivers, and the witnesses Walter Nichins, Henry Sturling, Jim Bell, Henry Simpson, A. J. Raquet, all of whom were miners working in defendant's mine, testified to the same custom.

The defendant contends in his brief that the court erred in refusing to submit to the jury the defendant's defense of assumed risk, and in failing to give defendant's requested instruction upon that issue, basing the right to such instruction on article 23, § 6, of the Constitution of this state, which is as follows:

"The defense of contributory negligence or of assumption of risk shall in all cases whatsoever be a question of fact and shall at all times be left to the jury"

—citing also the decisions of this court in *M., K. & T. Ry. Co. v. Hudson*, 175 Pac. 743, decided September 3, 1918, not yet officially reported; *St. Louis & S. F. Ry. Co. v. Bousch*, 174 Pac. 1036; *C., R. I. & P. Ry. Co. v. Beatty*, 27 Okl. 844, 116 Pac. 171; *W. F. N. W. Ry. Co. v. Woodman*, 168 Pac. 209; *St. L. & S. F. Ry. Co. v. Hart*, 45 Okl. 659, 146 Pac. 436; *C., R. I. & P. Ry. Co. v. Hill*, 36 Okl. 540, 129 Pac. 14, 43 L. R. A. (N. S.) 622.

The authorities cited by the defendants supra do not apply and have no application as to the doctrine of assumed risk. The plaintiff's cause of action and his right to recover are controlled by the Revised Laws of 1910, which are as follows:

"Sec. 3983. Every operator shall employ a competent and practical inside overseer for each mine employing ten or more persons inside, to be called mine foreman, who shall have charge of the inside operations of the mine, and shall see that the provisions of this chapter are strictly enforced. Said mine foreman, or in case of his necessary absence, an assistant chosen by him, shall devote the whole of his time to his duties in the mine when in operation, and shall keep a careful watch over the ventilating apparatus and the air ways, traveling ways, timbering, pumps and drainage, and shall often instruct, and, as far as possible see, that as the miners advance their excavations, all dangerous slate and rock overhead are taken down or carefully secured against falling therein, or on the traveling and hauling ways; and that sufficient props, caps and timbers of suitable

size are sent into the mine when required, which props shall be cut square at both ends, and as near as practicable to a proper length for the places where they are to be used, and which props, caps and timbers shall be delivered to the working force by company men.

"Sec. 3984. The mine foreman shall see that all miners in said mine are supplied at all times with such timbers, props and cap pieces as are necessary to keep their working places in a safe condition. Such timbers to be sawed square, as near as possible in proper length to fit the working place. All such timbers, props and cap pieces shall be delivered at the face of the miners' working place in said mine by company men. Timbers in this section shall mean all wood to be used by said miners, and if from any cause the timbers cannot be supplied where required, the said mine foreman shall instruct the persons to vacate all said working places until supplied with the timber needed, and shall see that all water be drained or hauled out of all working places before the miner enters, and as far as practicable, kept dry while the miner is at work. The term 'company men' as used in this chapter shall mean those employed regularly as day hands and paid by shift wages."

The allegations of the plaintiff in his petition in substance and effect are that he received the injuries complained of on account of the defendant's failure to comply with the provisions of the statutes quoted, in its failure to furnish him with props of proper length when so requested. The sections of the statute quoted were enacted by the Legislature of this state for the protection of miners while engaged in their labors as such, and have been construed by this court in the cases of *Great Western Coal & Coke Co. v. Coffman*, 43 Okl. 404, 143 Pac. 30; *Great Western Coal & Coke Co. v. Cunningham*, 43 Okl. 417, 143 Pac. 27; *Great Western Coal & Coke Co. v. McMahan*, 43 Okl. 429, 143 Pac. 27; *Great Western Coal & Coke Co. v. Boyd*, 43 Okl. 438, 143 Pac. 36; *Great Western Coal & Coke Co. v. Belcher*, 43 Okl. 439, 143 Pac. 36; *San Bois Coal Co. v. Resetz*, 43 Okl. 384, 143 Pac. 46; *McAlester-Edwards Coal Co. v. Hoffar*, 106 Pac. 740.

In the *Coffman* Case, supra, Mr. Justice Turner, in delivering the opinion of this court, said:

"It is assigned that the court erred in refusing to instruct that: Ben Coffman assumed all the ordinary risks and hazards, if any, of his employment, and all the ordinary risks and hazards, if any, which by the exercise of ordinary care he could have known, and, in addition thereto, he assumed all the ordinary hazards and risks of his employment, if any, if he knew the dangerous condition and appreciated the risk and continued at work in the presence of such dangers; and this is true, if the dangers were imminent, whether such dangers did or did not arise from the failure of the defendants, or any of them, to use that ordinary care for the reasonable safety of Ben Coffman which a reasonably prudent man would exercise for his

own safety, and if the death of Ben Coffman was caused by any risk or hazard so assumed by him, the plaintiff cannot recover, and your verdict must be for the defendants."

"Not so; this for the reason that, as this is an action to recover damages resulting from the violation of a statute (Rev. Laws 1910, § 3982), the servant as a matter of law cannot waive a compliance by the master therewith and assume the risk of the master's negligence in failing to comply with the statute. Hence the doctrine of assumption of risk was not available as a defense. What we said as to a waiver of compliance with a statute in *San Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153, is equally applicable here."

The authorities cited supra decide this question against the contention of defendant, and render all further discussion thereof unnecessary here.

The plaintiff in error's propositions 2 and 3 as contained in its brief will be considered together, and are as follows:

"(2) The only act of negligence which the plaintiff charges against the defendant is the failure to deliver props. The evidence shows that they were delivered within an hour, or an hour and a half, after demand was made for them. As to whether or not this was a reasonable time was a question of fact for the jury, and it was error for the court to hold that it was not as a matter of law.

"(3) The court erred in refusing to give defendant's requested instruction No. 12, and in permitting witnesses, over the objections of the defendant, to state that Bill Simmons was acting as assistant mine foreman, as agency cannot be proven by the declarations of the agent."

It is true, as disclosed by the record, that the only act of negligence which the plaintiff charges against the defendant is a failure to deliver props. The plaintiff testified that he requested the driver, McVay, both on the evening of the 3d and the morning of the 4th, to bring him the four-foot props. The driver admitted that the plaintiff made such request, but was of the impression that the request on the afternoon of the 3d was for three-foot props. The plaintiff also testified that he made the same request of Bill Simmons, who, he testified, was acting as assistant foreman at the time, which request was made on the morning of the 4th, and that Simmons replied, "I see you need the props, and I will have them sent." The undisputed testimony shows that 18 props about three feet in length were delivered by the driver on the evening of the 3d. The plaintiff testified that they were too short and he could not use them. Witnesses for the defendant gave testimony tending to contradict the plaintiff on that proposition. Counsel for plaintiff in error argues in his brief that the props were delivered in a reasonable time, and complains of the action of the trial court in refusing requested instructions which were as follows:

"Gentlemen of the jury, you are instructed that the only act of negligence charged against the defendant is that it failed to furnish props of sufficient length, upon the request of the plaintiff, Louis Schneider, to prop up the roof of the place at which he was working in the mine. The only question of negligence therefore for you to consider in this case is whether or not the defendant failed to furnish props when proper request was made. If you find that there were sufficient props of proper length at plaintiff's working place to have propped up the rock which fell upon plaintiff, or if you find that the defendant furnished said props with reasonable promptness after plaintiff requested them, then you are instructed that the plaintiff cannot recover, and your verdict should be for the defendant."

"You are instructed that after props have been delivered to the face of the working place of the miner it is his duty to set his props for the purpose of supporting the roof of his working place, and if you find from the evidence that there were a sufficient number of props in his room to have supported the roof of the working place and to have made it safe, and he failed and neglected to set the same, then plaintiff is guilty of contributory negligence, and he cannot recover in this action."

It will be found upon examination of these instructions that they go to the questions, No. 1, as to whether the defendant was guilty of negligence on its part, and, No. 2, as to whether or not the plaintiff was guilty of contributory negligence on his part.

[3, 4] It is disclosed by the record that the court refused to give the above instructions requested by the defendant, but we think that the questions of law called to the attention of the court by the same were fully and completely covered by paragraphs 6, 7, and 8 of the court's instructions to the jury, which were as follows:

"Gentlemen of the jury, while the law imposes upon the coal company the duty of furnishing its miners with props of proper length to support the roof of the working places, that duty does not relieve or absolve the miner himself of exercising due care for his own safety; and if you believe from the evidence that the plaintiff, Louis Schneider, knew of the dangerous condition of the roof of his working place, or by the exercise of reasonable care could have ascertained that it was in a dangerous condition and continued to work in said room, or if you believe that the defendant company had furnished him with sufficient props, prior to the accident, to prop up his room, and that he had failed and neglected to use the same, and if by using the same he could have, in all reasonable probability, prevented the accident, then he was guilty of contributory negligence, and in the event of such findings your verdict should be for the defendant."

"You are instructed that, where a miner furnishes his own working room, it is primarily his duty to render the same safe. It is the coal company's duty to furnish, upon request of the miner, sufficient props at the face of the

miner's working place. After it has done this duty it then becomes the duty of the miner to prop the roof of his room as the work progresses. If you believe that Louis Schneider was in his own working room and was excavating the coal therefrom at the time of the accident, it was his duty, and not that of the defendant coal company, to prop up said room after sufficient props of proper length had been furnished to him by the coal company at the face of his working place, and if the plaintiff was furnished with sufficient props and failed to use them, and has sustained an injury because said roof was not propped up, his injury is due to his own fault, and he cannot recover."

"While the law imposes upon a coal company the duty of furnishing its miners with sufficient props to support the roof of said mine, that duty does not relieve or absolve the miner himself from exercising due care for his own safety, and if you believe from the evidence that the plaintiff, Louis Schneider, knew of the dangerous condition of the roof of his working place, or by the exercise of reasonable care could have ascertained that it was in a dangerous condition, and continued to work in said room, he is guilty of contributory negligence, and your verdict should be for the defendant."

The court having fully and fairly submitted the issues to the jury in the foregoing instructions, he committed no error by refusing instructions requested by the plaintiff. *Grantz v. Jenkins*, 175 Pac. 527; *St. L., I. M. & S. Ry. Co. v. True*, 176 Pac. 758.

[8] The plaintiff in error complains because certain witnesses, including the plaintiff, were permitted to testify over the objection of the defendant that Bill Simmons "was acting as assistant foreman at the time the accident occurred." This contention of the defendant, we think, is without merit, first, because the admission of testimony of the plaintiff, which was undisputed, but fully corroborated by the testimony of other witnesses, that it was the custom in that mine at the time of the injury complained of, and had been for a long time prior thereto, for the miners to make their requests for props of the drivers, and that they were supplied by the defendant with such props in that way, and the fact that the plaintiff on the morning of the 4th made an additional request of Bill Simmons, and that Bill Simmons promised to have them sent, would not have been reversible error if the same had been objected to by the defendant and admitted over such objection; but the record discloses that the plaintiff testified to that fact upon his direct examination without objection, and that the defendant's counsel cross-examined him upon such testimony without objection, and that it was only on the redirect examination of the plaintiff and the examination of the witness Stirling that they were asked as to the capacity in which Bill Simmons worked, and it was then that

objections were made by the defendant, overruled by the court, and excepted to by the defendant. And we think that under these circumstances no error was committed, as the procedure had come clearly within the rule announced by this court in the case of *Gafford v. Davis*, 159 Pac. 490, wherein Mr. Justice Sharp, speaking for the court, said:

"It has frequently been held that a party cannot complain of the admission of evidence over his objection, where other evidence of the same tenor was admitted without objection."

Which rule has been announced by this court in the cases of *Elchoff v. Russell*, 46 Okl. 512, 149 Pac. 146; *Winans v. Hare*, 40 Okl. 741, 148 Pac. 1052; *Reaves v. Reaves*, 15 Okl. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353.

[2] The plaintiff in error's fourth proposition as contained in his brief is as follows:

"The evidence conclusively shows that the plaintiff's injuries were not permanent and the damages awarded him are grossly excessive."

The testimony of the plaintiff, which was not disputed, and was given about 2½ years after the injury, was in substance that he had ever since the injury suffered severe pain, and that prior to the injury he had worked exclusively at digging coal in the mines; that he was earning at the time he received the injury complained of about \$5 per day; that he was at the time 46 years of age, a robust, hard-working miner; that he had never since the injury been able to work at his trade on account of the injury complained of. At the time of the trial his right leg was partially paralyzed, and he was only able to walk by the use of the crutch or cane. And we think, in view of this testimony, the jury was fully warranted in concluding that the plaintiff's injuries were permanent, and that he would continue to be a cripple and suffer physical pain as a result of the injury complained of for the balance of his life, and that it was a question for the jury to determine from the evidence the amount of compensation that plaintiff was entitled to recover on account of such injuries. The jury returned a verdict in favor of the plaintiff for the sum of \$8,423.33. We think the record in this case is such that the jury was authorized, under proper instructions from the court, to find that this was a case of liability on the part of the defendant, which it did. On the question of the amount of a jury's verdict being excessive this court has announced certain rules which have become well established by the decisions of this court. In the case of *Ferris v. Shandy*, 174 Pac. 1061, this court, speaking through Mr. Justice Hardy, announced the rule as follows:

"The rule for determining whether damages awarded are excessive is that they must be so

large as to strike mankind at first blush as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, and corruption. In short, the damages must be flagrantly outrageous and extravagant; for the court cannot draw the line, having no standard by which to ascertain the excess. *C., R. I. & P. R. R. Co. v. Devore*, 43 Okl. 534, 143 Pac. 864 [L. R. A. 1915F, 21]."

Again, in the case of *Railway Co. v. Devore*, 43 Okl. 534, 143 Pac. 864, L. R. A. 1915F, 21, the court, speaking through Mr. Justice Riddle, referring to the foregoing rule, said:

"We think this rule is sound, for the reason the jury and the trial judge have a much better opportunity than do the appellate judges to measure the actual damages suffered by the plaintiff and the amount which would compensate him for the injury. They have an opportunity of seeing the plaintiff and to discern his manner of testifying, his intelligence and capacity, to note his physical condition, and many other living evidences bearing upon the issue, including all the attending circumstances, of the larger part of which the appellate court is deprived. The jury, thus being in possession of all the facts and circumstances, is required to pass upon this issue as an issue of fact, under an appropriate charge of the court as to the law. Their solemn finding, returned into court and approved by the trial court, should not be disturbed by this court, unless it comes within the rule hereinbefore laid down."

Following the rule announced by this court in the cases cited supra, we hold that the contention of the plaintiff in error that the verdict in the instant case is excessive cannot be sustained. *St. L., I. M. & S. Ry. Co. v. True*, 176 Pac. 758.

[5, 7] The fifth proposition of the plaintiff in error in its brief is that of "improper remarks of opposing counsel in making his address to the jury," and states that during the course of the argument counsel for plaintiff made this remark:

"Where is Bill Simmons, and why has the defendant not produced him here as a witness?"

The defendant objected to these remarks and statements, which objection was overruled by the court, to which the defendant excepted. We are not inclined to the view, from an examination of the entire record in this case, that the remarks of counsel complained of in any way affected the verdict of the jury, or that the jury considered such remarks in arriving at the verdict in this case. We think that the error complained of comes within the provisions of Revised Laws of 1910, § 6005, which is as follows:

"*Harmless Error*.—No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal,

on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

See *Democrat Printing Co. v. Johnson*, 175 Pac. 737; *Continental Ins. Co. v. Norman*, 176 Pac. 211; *Kenworthy v. Pendergrass*, 175 Pac. 939; *Silurian Oil Co. v. Morrell*, 176 Pac. 964.

We have examined the entire record in this case, and in our opinion there is no reversible error apparent, and the judgment of the trial court is therefore affirmed.

OWEN, C. J., and KANE, SHARP, HARRISON, PITCHFORD, and HIGGINS, JJ., concur.

RAINEY and McNEILL, JJ., not participating.

LINKUGEL v. LINKUGEL. (No. 9835.)

(Supreme Court of Oklahoma. Dec. 31, 1918.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

DIVORCE — 181 — APPEAL FROM DECREE — JURISDICTION — STATUTE.

Where an appeal is prosecuted for the purpose of having reviewed the judgment and decree granting a divorce, awarding permanent alimony and the custody of a minor child, the notice of intention to appeal must be filed within 10 days from the date of the decree, and the appeal must be perfected within 4 months, as prescribed by section 4971, Rev. Laws 1910, otherwise this court is without jurisdiction to entertain the appeal.

Commissioners' Opinion, Division No. 2.

Error from District Court, Cotton County; Cham Jones, Judge.

Action for divorce by Helena Linkugel against Frank W. Linkugel. Decree for plaintiff granting an absolute divorce, permanent alimony, custody of a minor child, its support, and counsel fees, and defendant brings error. Dismissed.

W. O. Henderson, of Lawton, for plaintiff in error.

Aml H. Japp and Walter Hubbell, both of Walters, for defendant in error.

GALBRAITH, C. The defendant in error, as plaintiff in the trial court, commenced this action against the plaintiff in error, as defendant, for divorce, alimony, and the custo-

dy of a minor child, the ground for divorce being extreme cruelty and nonsupport.

The court, at the close of the evidence, found:

"That the facts alleged in the plaintiff's petition are true; * * * that the defendant has been guilty of extreme cruelty towards this plaintiff; and said defendant has also been guilty of gross neglect of duty towards this plaintiff; * * * that the defendant owned a quarter section of land in Cotton county, valued at \$5,000, against which there was a mortgage for \$2,700, and that he owned two mules, two mares, two mule colts, three calves, two milch cows, one hog, one automobile, and 60 acres of wheat"

—and awarded the plaintiff permanent alimony in the sum of \$1,000, also awarded her custody of the minor child, and directed the defendant to pay to the plaintiff \$5 per month for the support of the child, and \$70 as fee for the plaintiff's attorney, and making said sums a lien upon the real and personal property owned by the defendant. The court also found that the plaintiff was entitled to decree of absolute divorce, and awarded the same. To the decree the defendant excepted, and asked and was granted an extension of time of 90 days to prepare an appeal to the Supreme Court. By an order made in April following, the time for perfecting the appeal was further extended for 60 days. The decree was announced on the 5th day of February, 1917, and the petition in error and the case-made filed in this court on the 1st day of August, 1917.

There are four assignments or error presented in the petition in error, as follows:

"(1) The court erred in rendering judgment in favor of the defendant in error, the plaintiff below, for divorce, alimony, and custody of the minor child, because the evidence was wholly insufficient to entitle plaintiff to the decree.

"(2) The court erred in rendering the judgment in favor of the plaintiff because the evidence wholly failed to and was insufficient to support the charges contained in the petition, and the evidence wholly failed to establish that the plaintiff in error, who was the defendant below, had been guilty either of cruel treatment or gross neglect of duty, as alleged in the said petition, and the evidence was wholly insufficient to support the judgment for divorce or for alimony or the custody of the minor child, and said judgment is contrary to the evidence, and the evidence is insufficient to support said judgment.

"(3) The court erred in overruling the demurrer of the plaintiff in error, who was defendant below, to the evidence of the defendant in error, who was plaintiff below, because the evidence wholly failed to support the allegations of the petition, and said evidence was insufficient to support the judgment in favor of the plaintiff.

"(4) The court erred in overruling the motion for new trial of the plaintiff in error, the de-

fendant below, which ruling of the court was duly excepted to, and exceptions allowed. Case-made, page 237."

The brief of the plaintiff in error, after setting out these assignments, continues as follows:

"The foregoing four specifications of error all relate to the insufficiency of the evidence to support the judgment, and will be presented together."

It thus appears that the plaintiff in error has not only appealed from the decree allowing alimony, but has appealed from the decree of divorce as well.

It appears from the record that no notice of his intention to appeal from the decree granting the divorce was filed with the clerk of the court within 10 days, as required by section 4971, Rev. Laws 1910. It also appears that the proceedings in error were not filed in this court within 4 months from the date of the decree of divorce, as required by section 4971, supra, the divorce having been granted February 5, 1917, and the petition in error and the case-made were not filed in this court until August 1, 1917, thereafter. The written notice of intention to appeal and the 4-month limitation prescribed in said section are jurisdictional. It, therefore, appears that this court is without jurisdiction to entertain said appeal, and the same should be dismissed. *Lewis v. Lewis*, 39 Okl. 407, 135 Pac. 397.

It is therefore ordered that the appeal be dismissed.

PER CURIAM. Adopted in whole.

LANKFORD, State Bank Com'r, v. FIRST NATIONAL BANK OF LAWTON.
(No. 7997.)

(Supreme Court of Oklahoma. July 15, 1919.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES ⇐60, 61—VALIDITY BETWEEN PARTIES—ACKNOWLEDGMENT.

A chattel mortgage is valid between the parties without being acknowledged or witnessed.

2. CHATTEL MORTGAGES ⇐60—ACKNOWLEDGMENT—NECESSITY.

A compliance with the conditions prescribed in section 4036, Revised Laws 1910, wherein it provides, "Such signature may either be attested by acknowledgment before any person authorized to take acknowledgments of deeds, or it may be signed and validated by the signature of two persons not interested therein," is only required in order that said mortgage may be entitled to be filed in the office of the register of deeds of the proper county, and operate as constructive notice to creditors and subsequent purchasers and incumbrancers who have no actual notice of said mortgage.

3. CHATTEL MORTGAGES ⇐60—ATTESTATION—"SIGNED AND VALIDATED."

The words "signed and validated," as used in section 4036, Revised Laws 1910, refer to the attestation of a chattel mortgage, and being essential only as a requisite required in order that a chattel mortgage may be entitled to be filed for record.

4. CHATTEL MORTGAGES ⇐85—ATTESTATION—VALIDITY.

A chattel mortgage is valid as between the parties without being attested in any manner. For the purposes of record, it must be attested either by acknowledgment or witnessed by two disinterested witnesses; but where it does not appear from the face of the instrument that the officer taking the acknowledgment, or the subscribing witnesses, are legally disqualified by reason of their interest in the estate or property mortgaged, the instrument may properly be received for record, and such recording will be constructive notice to subsequent creditors and mortgagees.

5. CHATTEL MORTGAGES ⇐90—ATTESTATION—DISQUALIFICATION OF WITNESS—VALIDITY OF RECORD.

Where a chattel mortgage has been filed for record in the office of register of deeds of the proper county, and the acknowledgment is regular upon the face of the instrument, or the same is attested before two witnesses, and the attestation of the same is regular upon the face of the instrument, but there is a latent defect in the instrument by reason of the subscribing witnesses being disqualified or the person taking the acknowledgment being disqualified, by reason of their being interested in the estate or property mortgaged, but said fact does not appear upon the face of the instrument, the filing of said instrument of record is voidable and not void.

Sharp, J., dissenting.

(Additional Syllabus by Editorial Staff.)

6. WORDS AND PHRASES—"EITHER."

The word "either" means one of two ways. [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Either.]

Appeal from District Court, Comanche County; Cham Jones, Judge.

Replevin by the First National Bank of Lawton, Okl., against J. D. Lankford, Bank Commissioner of the State of Oklahoma. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

S. P. Freeling, Atty. Gen., J. I. Howard, Asst. Atty. Gen., and Chas. C. Black, of Lawton, for plaintiff in error.

Johnson & Stevens, of Lawton, for defendant in error.

McNEILL, J. On the 4th day of January, 1913, one Garrett executed a chattel mortgage on certain personal property located in Comanche county to the Bank of Lawton to

secure an indebtedness to the bank. The mortgage was not acknowledged, but was witnessed by two witnesses, to wit, Frank T. Blair and M. A. Wert. Thereafter, on April 25 and 28, 1913, respectively, Garrett executed two chattel mortgages to the First National Bank of Lawton on a black horse named Dick, which horse was included in the mortgage to the Bank of Lawton. The note due the Bank of Lawton was not paid, and one McCalmant, acting as the agent of the Bank of Lawton, took this horse under the mortgage, whereupon the First National Bank instituted a replevin action to recover possession of said horse by virtue of its mortgage. Thereafter the affairs of the Bank of Lawton passed into the hands and control of the bank commissioner of the state, and the latter was substituted as a party defendant in the proceedings. The case was tried on an agreed statement of facts.

[1, 2] The only question involved, was the effect to be given to the purported mortgage executed to the Bank of Lawton. It was stipulated and agreed that the two witnesses to the mortgage executed to the Bank of Lawton were both stockholders, and one of them also a director in the bank at the time of witnessing the mortgage. It was agreed that, at the time the First National Bank took its mortgage, it did not examine the records in the office of the register of deeds and did not have actual knowledge of the mortgage to the Bank of Lawton. The mortgage of the Bank of Lawton was filed for record on the 6th day of January, 1913, in the office of the register of deeds.

It will be first necessary to determine whether this is a valid mortgage. Does the fact that the same is witnessed by two interested persons make it void? Section 4036, Revised Laws of 1910, is as follows:

"A mortgage of personal property must be signed by the mortgagor. Such signature may either be attested by acknowledgment before any person authorized to take acknowledgments of deeds, or it may be signed and validated by the signature of two persons not interested therein. Mortgages signed in the presence of two witnesses or acknowledged before an officer, as herein provided, shall be duly admitted of record."

[6] It is the interpretation of this statute that is decisive of the issues in the case at bar. The defendant in error contends that the portion of the statute wherein it provides "that the same may be signed and validated by the signature of two persons not interested therein" refers to the execution of the instrument, and the execution is not complete nor the instrument valid until signed and subscribed by two persons as witnesses not interested therein. It will be noticed that the first portion of the section refers to how a chattel mortgage may be executed, and the second portion refers to the attestation. The

second sentence therein is: "Such signature may either be attested by," etc. It then provides that the same may be by acknowledgment or signed and validated by the signature of two persons not interested therein. The word "either" means one of two ways, as defined in the case of *Aldrich v. Bay State Const. Co.*, 186 Mass. 489, 72 N. E. 53, where in the court said:

In the use of the word "either" one or the other of two is meant. "Common definitions of the word are 'one of two'; 'the one or the other.' But the word, when used in a connection which implies a choice of action on the part of the person using it, indicates that the option is in the person who is to do the act involving the choice."

It must be apparent that the Legislature, when they used the language "may either be attested," and then provided two methods for the attestation, was referring to the attestation of the instrument, and provided that the same might be attested in two ways: First, the attestation would be valid if the instrument was acknowledged before a person who is authorized to take acknowledgments of deeds; second, the attestation was valid when the instrument was signed, and validated by the signature of two persons not interested. The words "signed and validated," as used in said sentence, must refer to the sentence which it is a portion of, and refers to the attestation of the instrument, and not to the execution thereof. In construing and interpreting statutes, one of the cardinal rules is to look to the origin of the statutes and the different acts of the Legislature to find the intent of the lawmakers. If we look to the origin of the statute relating to chattel mortgages in Oklahoma, we find the statutes of 1893 have two sections which we think are material in determining the intent of the Legislature in the instant case. Section 3263, Statutes of 1893, provides:

"A mortgage of personal property may be made in substantially the following form."

The form of the mortgage is then set out, but no mention is made of witnesses, nor are blanks left indicating that any are required nor does it make provision for the same being acknowledged. This section of the statute has been carried forth into the different statutes of Oklahoma, and is now section 4025, Revised Laws 1910. At no time has the Legislature ever attempted to change this form or amend the section, but have seen fit to re-adopt it and permit it to stand in its original form. This section of the statute is substantially the same as the statute of South Dakota wherein they, in dealing with chattel mortgages, provided a form for chattel mortgage.

If we look to the statute of 1893 among the sections provided for the filing of chattel mortgages, and the effect to be given them when filed as constructive notice, we find sec-

tion 3275 of the Statutes of 1893, which is as follows:

"A mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed."

This section was copied exactly from the statutes of South Dakota, and being section 4384 of the Comp. Laws of Dakota (1887). In construing said statute, the Supreme Court of South Dakota, in the case of *Walter A. Wood Mowing & Reaping Mach. Co. v. Lee*, 4 S. D. 495, 57 N. W. 238, stated as follows:

"A mortgage of personal property is valid as between the parties thereto, and as to subsequent purchasers and incumbrancers having actual notice of such mortgage, though it may not be attested by any subscribing witness."

"A compliance with the conditions prescribed in section 4384, Comp. Laws, that 'a mortgage of personal property must be signed in the presence of two persons who must sign the same as witnesses thereto,' is only required in order that such mortgage may be entitled to be filed in the office of register of deeds of the proper county, and operate as constructive notice to creditors, subsequent purchasers, and incumbrancers who have no actual notice of such mortgage."

And while section 3275 of the Statutes of 1893 was still in force and effect in Oklahoma Territory, and was carried forth into *Wilson's Ann. Statutes of 1903*, the territorial Supreme Court of Oklahoma, in construing that section, held that a mortgage not attested by two witnesses was valid as between the parties, and that the witnesses to the same were only an essential requisite, that the mortgage might be entitled to be filed for record, and be constructive notice to subsequent purchasers and incumbrancers. *Strahorn Hutton-Evans Comm. Co. v. Florer & Bannerman*, 7 Okl. 499, 54 Pac. 710; *Hess v. Trigg*, 8 Okl. 286, 57 Pac. 159. Before this section was amended, the territorial Supreme Court held that a person interested in a chattel mortgage was not disqualified from being an attesting witness to the mortgage. *Farmers' State Bank v. Spencer*, 12 Okl. 597, 73 Pac. 297. After this construction had been placed upon this section of the statute both by the Supreme Court of South Dakota and by the territorial Supreme Court of Oklahoma, the Legislature of 1907-08 proceeded to amend section 3275 of the Laws of 1893, but made no attempt whatever to amend section 3203 of the Laws of 1893, which gave the form of the mortgage; but the Legislature referred to the fact that it was amending section 3275 of the Laws of 1893, and, as amended, we now have section 4036 in its present form, so it could not be said that the Legislature was attempting to amend the form of mortgage, or to provide that the same was invalid unless acknowledged or subscribed by two disinterested witnesses, but was

amending only that portion of the section of the statute which refers to the attestation of the instrument that was an essential requisite only for the purpose of being entitled to be filed for record.

It was, no doubt, the intention of the Legislature to remedy the evil they thought existed by reason of a person interested in a chattel mortgage to be a subscribing witness to the same, and in doing so provided that the witnesses must be disinterested. It appears that this is the first time this identical question has been presented to this court, although this court has in the cases of *Gibson v. Lanthicum*, 50 Okl. 181, 150 Pac. 908, *Dabney v. Hathaway*, 51 Okl. 658, 152 Pac. 77, and *Merchants' Nat. Bank of Sallisaw v. Frazier*, 159 Pac. 647, held that a mortgage not witnessed was valid as between the parties. In the case of *Blevins v. Graham* (not officially reported) decided May 13, 1919, 182 Pac. 247, this court held that a chattel mortgage not witnessed or acknowledged was valid as between the parties, and if a subsequent purchaser or incumbrancer had actual notice, that he would take subject to the prior mortgage, but from a reading of this opinion it does not appear that this question was argued nor presented to the court, nor did the court in these opinions attempt to interpret this section of the statute.

[3] By giving to this statute its fair interpretation and considering the words "signed and validated" in connection with the sentence of which they are a part, which provides that the attestation may either be by acknowledgment or by the signature of two witnesses, the same must be construed to refer to the attestation of the instrument, and not to the execution of the same. Also looking to the former statutes and to ascertain the intent of the Legislature as to the evils and mischiefs they desire to remedy, it must be said that the evil they were attempting to remedy was not relating to the execution of the mortgage, but only changed the essential requisite that was necessary to entitle chattel mortgages to be filed for record. After reaching said conclusion it follows that the chattel mortgage in the instant case was a valid and subsisting mortgage as between the parties.

[4, 5] The question then arises: The mortgage being attested by two persons who were interested therein, but said fact not appearing upon the face of the mortgage, was the same entitled to be recorded, it being admitted that the witnesses were stockholders and one a director in the bank?

There are two different rules laid down in 1 *Corpus Juris*, pp. 772 and 773:

First. "Where the statute requires an instrument to be acknowledged or proved before it is entitled to registration, the record of an instrument which appears on its face to have been defectively acknowledged or proved will not im-

part constructive notice to subsequent creditors and purchasers in good faith."

Second. "According to the weight of authority, where an instrument bearing a certificate of acknowledgment or proof which is regular on its face is presented to the recording officer, it becomes his duty to record it, and the record thereof will operate as constructive notice, notwithstanding there be a hidden or latent defect in the acknowledgment; but there are authorities in which a contrary view has been asserted."

The case at bar, under the agreed statement of facts, comes within the second classification. The Supreme Court of this state, in the case of *Ardmore Nat. Bank v. Briggs Machinery & Supply Co.*, 20 Okl. 427, 94 Pac. 533, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 138, the court, speaking through Justice Kane, stated as follows:

"The acknowledgment of a deed of trust executed by a corporation grantor to secure payment of certain promissory notes is a ministerial act. Where such an instrument is acknowledged before a notary public, who was at the time a director and treasurer of the grantor corporation, and also indebted for unpaid subscriptions to its stock, which facts were known to the grantor, but there was nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust was entitled to registration, and the registry thereof was notice to subsequent purchasers, incumbrancers, or lienors."

While the above case arose and was governed by the laws of Indian Territory, still the principle involved is the same, and as laid down by *Corpus Juris*, to wit:

"Where the attestation of the instrument is regular on its face, and the same is presented to the recording officer, it becomes his duty to file the same, and the record thereof operates as constructive notice."

Other leading cases in support of this position are: *Fair et al. v. Citizens' State Bank of Sterling*, 70 Kan. 612, 79 Pac. 144, 67 L. R. A. 851; *Blanton v. Bostic*, 126 N. C. 418, 35 S. E. 1035; *Boswell v. First Nat. Bank of Laramie*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; *Bank of Benson v. Hove*, 45 Minn. 40, 47 N. W. 449. The cases supporting this theory and those to the contrary are all grouped in the notes to 1 *Corpus Juris*, 773.

The courts that are in accord with the Supreme Court of Oklahoma have adopted the rule that, where an instrument has been acknowledged or attested, which acknowledgment or attestation is regular upon its face, but the officer who takes the acknowledgment or witness who attests the same are disqualified by reason of their interest therein, but said fact does not appear upon the face of the instrument, the recording or filing of the instrument for record is voidable, and not void, and the same imparts constructive notice to every one until the recording of the same is canceled or set aside; and the same

will support an action by the mortgagor therein to have the same canceled of record by reason of the interest of the witnesses, or the person who has taken the acknowledgment, but until the same is canceled or proceedings brought to cancel the same it is of the same binding force and effect as if said defect did not exist, and is constructive notice to all subsequent purchasers or incumbrancers. The courts holding to the contrary hold that the recording of said instrument, although regular on its face, is void, and is not notice.

The decisions of our court being in accord with the weight of authorities of the different states, we see no reason why the same should be disturbed at this time or our former opinion not followed. It therefore follows:

First. That the chattel mortgage of the Bank of Lawton was valid as between the parties.

Second. From the fact that the same was witnessed by two persons who were interested in the subject-matter, but such disqualification did not appear upon the face of the instrument, the same was entitled to be recorded.

Third. The same, having been recorded, was constructive notice to subsequent purchasers and mortgagees.

Fourth. That the disqualification of the witnesses made the recording of the instrument voidable, and not void, and the same is constructive notice until set aside by proper proceeding for that purpose.

For the reasons above stated, the judgment of the district court is reversed and remanded, with directions to restore the property to the Bank of Lawton, and, in case the same cannot be restored, to render judgment for the value of the property, which was agreed to be \$100.

RAINEY, KANE, HARRISON, PITCHFORD, and HIGGINS, JJ., concur.

SHARP, J. (dissenting). On the 4th day of January, 1913, one Garrett attempted to execute to the Bank of Lawton a chattel mortgage on certain personal property located in Comanche county to secure an indebtedness owing by him to the bank. The mortgage was not acknowledged before any officer authorized to take acknowledgments of deeds, but was witnessed by two witnesses, Frank T. Blair and M. A. Wert. On April 25 and 28, 1913, respectively, Garrett executed to the First National Bank of Lawton two chattel mortgages on a portion of the property included in the Bank of Lawton mortgage. These mortgages were also witnessed by two witnesses. The note due the Bank of Lawton not being paid, one McCalmant, acting as its agent, took possession of the mortgaged property, whereupon the First National Bank

instituted a replevin action to recover the possession of the property covered by its mortgage. Thereafter, the property and the affairs of the Bank of Lawton having passed into the hands and control of the bank commissioner, the latter was substituted as a party defendant in the replevin proceedings. The case was tried on an agreed statement of facts; the only question involved being that of the effect to be given the first mortgage. It was stipulated and agreed that Blair, one of the witnesses to the Bank of Lawton mortgage, was a stockholder in said bank, while the other witness, Wert, was a stockholder and director therein, and that at the time the First National Bank took its mortgage it did not examine the records in the office of the register of deeds, and, we may fairly assume, had no actual knowledge of the prior mortgage. The Bank of Lawton mortgage was filed for record on the 8th day of January, 1913, in the office of the register of deeds of Comanche county, and did not disclose upon its face the interest of the witnesses thereto. Such being the case, it is insisted that the mortgage, being regular on its face, imparted constructive notice thereof to all subsequent purchasers and incumbrancers, including the First National Bank, whose mortgages are admittedly subsequent in point of time.

The statute regulating the manner of the execution of mortgages of personal property originally required that the mortgage must be signed by the mortgagor in the presence of two persons, who should sign the same as witnesses thereto, and that when so executed and attested no further proof or acknowledgment was required to admit such mortgage to be filed in the office of the register of deeds. Section 3547, Stat. 1890; section 3275, Stat. 1893; section 3583, Rev. & Ann. Stat. 1903. On May 22, 1908 (Laws 1907-08, c. 57), section 23 of chapter 51 of the Statutes of 1893 (section 3275), was amended to read as follows:

"A mortgage of personal property must be signed by the mortgagor. Such signature may either be attested by acknowledgment before any person authorized to take acknowledgments of deeds, or it may be signed and validated by the signature of two persons not interested therein. Mortgages signed in the presence of two witnesses or acknowledged before an officer, as herein provided, shall be duly admitted of record." Section 4427, Comp. Laws 1909; section 4036, Rev. Laws 1910.

Ordinarily the offices of an acknowledgment are merely to entitle the instrument to registration to give it effect after its deposit for record or registration, as constructive notice to persons without actual notice and to authorize its admission in evidence without any other proof of its execution being necessary at the time of its introduction. And, in the absence of a statute making the

acknowledgment essential to the validity of the instrument, it is very generally held that the acknowledgment is no part of the contract between the parties, and that an acknowledged instrument is valid and effective as between the parties. 1 Corpus Juris, 747. But it is equally true that it is within the power of the Legislature to prescribe acknowledgment of proof as an essential prerequisite to the validity of a deed or other instrument, and where this is required it has been held that the instrument does not acquire any effective force until it has been acknowledged. Does the statute requiring that a mortgage of personal property be signed and validated by the signature of two persons not interested therein make the execution and attestation an essential prerequisite to the validity of such mortgage, or is the purpose only to affect the right of the mortgage to registration and to authorize its admission in evidence without further proof of its execution? The language, it will be noted, is out of the ordinary. It requires that it be "signed and validated" by the signatures of two disinterested persons. To validate means "to render valid; to give legal force to; to confirm." Webster's Int. Dict. Until the mortgage was both signed and attested in the manner prescribed by the statute it was not, therefore, valid. The statute requires, not that the mortgage be signed in the presence of one witness, but in the presence of two witnesses. Furthermore, it is not sufficient that the mortgage be signed in the presence of two witnesses, but of two witnesses not interested in the mortgage. It is when these combined requirements are met that the statute makes the mortgage valid, when not acknowledged before some person authorized to take acknowledgments of deeds. It was to meet the evil of permitting interested parties to act as witnesses to chattel mortgages in which they were substantially interested that the present statute was enacted. *Bank of Ames v. Lehr*, 37 Okl. 1, 130 Pac. 288. The old statute by its terms, and by the decisions of the court, did not disqualify those interested in the mortgage from acting as witnesses thereto. *Watts v. First National Bank*, 8 Okl. 645, 58 Pac. 782; *Farmers' State Bank v. Spencer*, 12 Okl. 597, 73 Pac. 297; *Kee v. Ewing*, 17 Okl. 410, 87 Pac. 297; *Bank of Ames v. Lehr*, 37 Okl. 1, 130 Pac. 288. With this situation in mind, the Legislature enacted the present statute requiring, in effect, that where the mortgage is not acknowledged before an officer authorized to take acknowledgments, but before two witnesses, in order to make valid the execution thereof, it should be signed in the presence of two disinterested witnesses. These views find abundant support among the reported cases. In *Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334, the deed in question was executed in the

presence of one witness only, whereas the law of Ohio required all deeds for land to be executed in the presence of two witnesses, and it was held to be perfectly clear that no title to land could be acquired or possessed, unless according to the laws of the state in which the land was situate; that, although there were no negative words in the statute pertaining to the execution of deeds declaring deeds for the conveyance of land executed in any other manner to be void, yet this must be necessarily inferred in the absence of all words indicating a different legislative intent. The deed was held to be void. In *Lewis et ux. v. Herrera*, 10 Ariz. 74, 85 Pac. 245, Revised Statutes of the Territory of Arizona of 1901, § 725, provided that every deed of conveyance of real estate must be signed by the grantor, be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration. It was held in an action involving the transfer from a husband to a wife that, as the deed had not been executed in the manner prescribed by law, it was insufficient to effect a conveyance of real estate. The case was appealed to the Supreme Court of the United States, where the judgment of the Arizona court was affirmed (*Lewis v. Herrera*, 208 U. S. 309, 28 Sup. Ct. 412, 52 L. Ed. 506), the second paragraph of the syllabus reading:

"Acknowledgment by the grantor before a proper officer is made as much a prerequisite to the validity of a deed as the signing, by Ariz. Rev. Stat. 1901, § 725, providing that 'every deed or conveyance of real estate must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration.'"

In *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 109 Pac. 312, Ann. Cas. 1912A, 1093, it appeared from the certificate of the officer that it was acknowledged only by the lessee. The statute prescribing the duty of the officer taking the acknowledgment did not appear to differ materially from the usual statutes governing the duties of such officers. An attempt was made to prove acknowledgment of its execution by the lessor by parol evidence or evidence other than of a certificate of a legally authorized officer. The court said in rejecting the offer:

"It is to be remembered that the statutory requirement as to acknowledgment is a requirement affecting the validity of the lease, and is not a mere prerequisite entitling it to public record, as in many states is the only office or purpose of an acknowledgment."

In *Hendon v. White*, 52 Ala. 597, in a scholarly and well-considered opinion by Chief Justice Brickell, it was held that under the provisions of the Revised Code of that state no conveyance was entitled to pass title to real estate, unless attested by one,

and, where the grantor could not write, by two witnesses, or acknowledged before a proper officer. The opinion reviews a number of early decisions, including *Clark v. Graham*, supra. The rule announced has been frequently followed by the Supreme Court of Ohio. Indeed, it appears to be the settled rule of decision of that state. *Richardson v. Bates*, 8 Ohio St. 257; *Smith's Lessee v. Hunt*, 13 Ohio, 260, 42 Am. Dec. 201; *Hout v. Hout*, 20 Ohio St. 110.

Holding, as we do, that the statute provides an essential prerequisite to the validity of a mortgage of personal property, and that the attesting witnesses must not be interested in the mortgage, we conclude that the mortgage given the Bank of Lawton was ineffectual unless it be that the interest of the witnesses be not such as would disqualify them under the statute. Prior to the enactment of the statute pursuant to which the mortgage in question was executed there was no statutory qualification respecting attesting witnesses to a mortgage of personal property. This fact was noted in *Watts v. First National Bank*, supra, and *Farmers' State Bank v. Spencer*, supra. In the former case the attesting witnesses were the president and cashier, respectively, of the bank to which the mortgage was given, and it was observed in the opinion that the court would not conclude therefrom that they were stockholders or that they had any financial interest in the bank, in the absence of proof. In *Farmers' State Bank v. Spencer* one of the attesting witnesses was a stockholder in the mortgagee bank. The court in the opinion, however, contented itself with simply following its former opinion in the *Watts* Case and by calling attention to the statute at the time in force. In *Kee v. Ewing*, supra, it was said, concerning the acknowledgment of the execution of a written instrument affecting real estate, the authorities required that the officer could not acknowledge the execution of the instrument of the kind, made to himself, and, using the court's language:

"We think they are equally clear that an officer of a bank who is a stockholder therein may not take an acknowledgment of such an instrument made to secure a debt made payable to the bank, and, if so taken and acknowledged, the instrument would not be entitled to record, and such record, if made, would not give it the force and effect of a recorded instrument."

In that case the mortgage was not given to the bank, but to one Kee. There was nothing on the face of the mortgage to indicate either that the bank had any interest in the mortgage or that the bank cashier before whom the acknowledgment was taken had an interest in the bank or in the debt secured by the mortgage, though it was found that the bank was in some way interested in the note and mortgage, the nature and extent of which

was not determined. The case of *Ardmore National Bank v. Briggs Mach. & S. Co.*, 20 Okl. 427, 94 Pac. 533, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, involved the execution of a deed of trust made in the Indian Territory and a judgment rendered by the United States Court for the Southern District, and hence the Oklahoma statute was not involved. In *Bank of Ames v. Lehr*, supra, the early opinions of the court based on the old statute were followed, though attention was called to the act of May 22, 1908, which was enacted subsequent to the execution of the mortgage there under consideration. It may be conceded, under the doctrine of corporate entity, that a stockholder has no independent ownership in the corporate property. If, however, the corporate property is enhanced in value, the stockholder secures the benefit of such enhancement by the increased value of his shares; and while in a given case this benefit may be small, in another case it may be large, and it will not do to say that the amount of beneficial interest should be made the criterion of disqualification on the ground of interest. All that is necessary in such cases is to give effect to the plain mandate of the statute, and require that the witnesses be not interested, even as stockholders, in the mortgage to which they are attesting witnesses. This rule is followed by a great majority of the decided cases of the courts, as will be seen from an examination of the following cases: *Ogden Building Ass'n v. Mensch*, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330; *Wilson v. Griess*, 64 Neb. 792, 90 N. W. 806; *First National Bank v. Citizens' State Bank*, 11 Wyo. 32, 70 Pac. 726, 100 Am. St. Rep. 925; *Hayes v. Southern Home Bldg. & Loan Ass'n*, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216; *Bexar Bldg. & Loan Ass'n v. Heady*, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583; *Winsted Savings Bank & Bldg. Ass'n v. Spencer*, 26 Conn. 195; *Betts-Evans Trading Co. v. Bass*, 2 Ga. App. 718, 59 S. E. 8; *Southern Iron & Equipment Co. v. Voyles*, 138 Ga. 258, 75 S. E. 248, 41 L. R. A. (N. S.) 376, Ann. Cas. 1913D, 369; *Horbach v. Tyrrell*, 48 Neb. 514, 87 N. W. 485, 489, 37 L. R. A. 437; *Withers v. Baird*, 7 Watts (Pa.) 227, 32 Am. Dec. 754; *Bowden v. Parrish*, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 874; 1 *Corpus Juris*, 802; 1 *Devlin*, Real Estate, § 477B; *City Bank of Boone v. Radtke*, 87 Iowa, 363, 54 N. W. 435; *Smith v. Clark*, 100 Iowa, 603, 69 N. W. 1011; *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293, 50 N. E. 594; and *Florida Savings Bank v. Rivers*, 36 Fla. 575, 18 South. 850. While there are some cases to the contrary,

the weight of authority clearly supports the rule announced in the foregoing opinions. Where, as in this jurisdiction, under section 4036 of the statute, the acknowledgment is an essential part of the instrument and necessary to its validity, it is clear that the attesting witnesses must be disinterested. Any other view would circumvent the statute and permit its willful violation with impunity. The question in no wise involves the duty of the recording officer in receiving and filing such mortgages. In this way we may give effect to the statute requiring the signature of the grantor to be validated by the signature of two persons not interested therein, while to hold otherwise would permit the mortgagee, the acts of whose officers vitiated the instrument, to reap all the benefits of a valid mortgage, after registration. Such was not the purpose of the Legislature in enacting the statute, and it is not the province of the courts to aid parties to disregard a statute which they themselves have violated, as in the case at bar. The mortgage being void for want of due execution, its subsequent registration gave it no efficacy. From what has been said it will be seen that the following conclusions are properly deducible from the record:

(1) Section 4036, Revised Laws, requiring a mortgage of personal property to be signed by the mortgagor, and providing, as one method of its execution, that it may "be signed and validated by the signature of two persons not interested therein," makes the act of attesting the mortgagor's signature by witnesses not disqualified by interest an essential part of the instrument and necessary to its validity as a statutory mortgage.

(2) A mortgage of personal property given a state banking corporation not acknowledged before an officer authorized to take acknowledgments of deeds, but attested by two stockholders of the bank, one of whom was its president, is, on account of the interest of the attesting witnesses, invalid. Such mortgage, although filed for record in the proper office, is, because of its inherent defect, ineffectual to impart constructive notice to subsequent purchasers or incumbrancers.

(3) A stockholder of a corporation is an interested person within the meaning of section 4036, Revised Laws, and therefore disqualified to act as an attesting witness to a chattel mortgage made to such corporation.

Entertaining these views, I regard the opinion of the court as illogical and unsound, and therefore dissent.

STATE ex rel. WILKERSON v. SUPERIOR COURT OF YAKIMA COUNTY et al.
(No. 15422.)

(Supreme Court of Washington. July 30, 1919.)

1. DIVORCE — 182 — JURISDICTION — APPEALS.

Pending an appeal in a divorce action, the lower court has not jurisdiction to modify or alter the decree as far as relates to custody of children, but such application must be made to Supreme Court, even though a supersedeas bond has been given.

2. DIVORCE — 182 — JURISDICTION.

On application by a party to a divorce action for a writ to prohibit the trial court from entering a decree in a habeas corpus proceeding brought to obtain possession of a child, pending an appeal, the Supreme Court, which alone has jurisdiction of questions concerning the custody of children pending the appeal, may treat the application for writ of prohibition as an original application for custody of the child.

3. HABEAS CORPUS — 99(3) — CUSTODY OF CHILD.

The writ of habeas corpus, as it may refer to the custody of minor children, does not involve the question of personal freedom, and the court is not bound by a purely legal right, but is called on to give consideration to claims founded on human nature, having in view the welfare of the child.

4. DIVORCE — 182 — APPEALS — CUSTODY OF CHILD.

On application in the Supreme Court for writ of habeas corpus to obtain custody of a child and to enforce a decree of the lower court in a divorce action, in which an appeal is pending, the court will leave the child in the position in which it was when the appeal was taken; the record disclosing no condition inapplicable to the welfare of the child.

Department 1.

Application by the State, on the relation of Emma Wilkerson, to prohibit the Superior Court of Yakima County and others from entering an order in a habeas corpus proceeding. Writ granted.

Frank J. Allen, of North Yakima, for plaintiff.

T. J. Casey, of Seattle, for defendants.

MACKINTOSH, J. A decree of divorce was entered on April 12, 1915, by the terms of which there was awarded to the relator the custody of a minor daughter and to the father the custody of two minor boys. On March 19, 1919, the relator filed a petition in the divorce action, asking to have the decree modified so as to award her the custody of all three children, who at the time of the filing of the petition she had in her actual care and control. A restraining order was made prohibiting the father from interfering with this care and custody pending the deter-

mination of the petition, and on June 13, 1919, the petition was heard and the decree was modified so as to award to the relator the custody of the older boy and the girl and to award to the husband the custody of the other boy. The relator, being dissatisfied with this modification, gave notice of appeal, which was perfected by furnishing an appeal bond. Thereafter the father sued out a writ of habeas corpus, directed to the relator, for the purpose of securing the possession of the boy, whose custody had been awarded to him by the original decree and reawarded by the decree as modified. Upon the return of the writ the relator filed a plea in abatement upon the ground that an appeal had been perfected in the divorce action. This plea was denied by the trial judge, the defendant in this action, and thereupon this application was made here to prohibit the defendant from entering an order in the habeas corpus proceeding transferring the possession of the boy to his father.

This court has early decided, and consistently followed that decision, that upon an appeal being taken from an order modifying a divorce decree, the fact of such appeal may be set up by plea in abatement in defense to a subsequent action by either of the parties seeking to have the custody of the children changed during the pendency of such appeal; that the Supreme Court, after the appeal has been taken, possesses the sole power to make orders with reference to the custody of the children; and that all applications for such change must be addressed to this court. *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123; *Gust v. Gust*, 71 Wash. 75, 127 Pac. 566.

In *State ex rel. Davenport v. Poindexter*, 45 Wash. 37, 87 Pac. 1069, a writ of habeas corpus applied for in the Supreme Court was denied where the custody of a minor child had been awarded to the mother and appeal had been taken from that order and a supersedeas bond filed; the court holding that the filing of the supersedeas bond did not give the parties in whom the custody had rested at the time of the commencement of the action the right to resume such custody, since the welfare of the child was the primary consideration.

"In such a proceeding as this, we do not think the giving of a supersedeas bond has any effect whatever upon the possession, custody, and control of the minor children in question. It being presumed that the order of the trial judge was correct, and that he was actuated by a consideration for the minors' welfare, it would be against public policy to have that welfare imperiled during an appeal, in the absence of a statute clearly permitting the staying of such orders. The trial court had jurisdiction to take said children into its possession, if it believed that their physical or moral welfare or other substantial interests necessitated such action. When the appeal was perfected, this court be-

came invested with jurisdiction to make such orders as the welfare and necessities of said minors might demand. If, as contended by relator, the present situation of these minors is so unsuitable as to menace their physical or moral welfare or other substantial interests, the question of an appropriate change could doubtless be considered by this court upon a proper showing. *Irving v. Irving*, 26 Wash. 122, 68 Pac. 123. But such a matter is not before us at this time. Relators are basing their right to the immediate possession of said children upon the supersedeas bond given as aforesaid. The giving of such bond does not entitle them to such possession."

This case, however, was distinguished and its operation restricted in the later case of *State ex rel. Clark v. Mackin*, 90 Wash. 80, 155 Pac. 398, being a case very similar to the one now under consideration. There the custody of a child had been awarded to two persons for alternate periods, and an appeal had been taken to this court from that decree. The child was not delivered to the relator, who, according to the decree, was entitled to its possession on January 1, 1916. The relator then made application to the court for an order directing the compliance with that part of the decree which directed that the child should be placed in the relator's custody. The court refused to do this on the ground that it lacked jurisdiction, since the appeal was pending in the Supreme Court, and an application was then made in this court for a writ of mandate to compel the lower court to enforce its decree. We held:

"In the case at bar, an appeal is pending. The child is in the possession of the sister of defendant, who has been found to be worthy. Whether the respondent had jurisdiction to execute his decree by ordering the child turned over to the parents of the relator is of little consequence; for granting, as the relator admits, that the jurisdiction to make any order for the protection and welfare of the child is in this court, and having jurisdiction in virtue of the petition of the relator, we shall, in the exercise of that jurisdiction, treat the refusal of the respondent as a finding that the welfare of the child will not be jeopardized by allowing it to remain where it is pending the appeal. The custody of the child being given to the parents of relator and to the sister of defendant for equal and alternating periods, neither party can claim that the particular time in which they shall have such custody is of legal consequence. It does not go to the welfare of the child, and that is the only thing this court or the superior court will inquire into."

[1-4] The law is, as we understand it, that pending an appeal in such cases the lower court has not jurisdiction to modify or alter the decree as it may relate to the custody of children, but that such application must be made to the Supreme Court, and that the giving of a supersedeas bond does not suspend

the operation of the decree in actions of this character, as it relates to the custody of the child. The *Clark Case*, above, having been an application for a writ of mandamus to compel the trial court to enforce its decree, and this court having treated the application as an original application in this court, relating to the custody of the child, we may here treat this application for a writ of prohibition in the same manner, and, as in the *Clark Case*, determine from the record that there is no serious question concerning the worthiness of the mother or father; the trial court having seen fit to award children to each of them, and pending the hearing allowed the relator to have all the children in her care and keeping. In the *Clark Case* the relator was attempting to enforce the decree by applying for an order compelling its observance, while in this case the same result is sought to be obtained by means of a writ of habeas corpus while the appeal is pending. In neither case could the trial court take any further steps in regard to the custody or control of the child, no matter what the form of the proceeding in which such steps were sought to be taken. The writ of habeas corpus, as it may refer to the custody of minor children, does not involve the question of personal freedom, and the court in passing upon such writs is dealing with a matter of an equitable nature and is not bound by a purely legal right, but is called upon to give consideration to claims founded on human nature and such claims as are just and equitable, having in view the welfare of the child. The fundamental idea of the writ of habeas corpus is to set at large those who are illegally restrained of their liberty; but when the subject of the writ is a child, the court is not to stop with the mere removal of the illegal restraint, but can go further and transfer the custody from one person to another. These are matters which are left in the discretion of the court seeking to promote the well-being of the child. The trial court not having power to change the decree during the appeal, the application for the writ should have been presented to this court. This court has exclusive jurisdiction, and was the forum in which any proceeding should be instituted which affected the question we are here discussing. Considering this as an application here, what we have said in regard to the fitness of the parties would be determinative of the matter, and the record disclosing no condition inimicable to the welfare of the child, all parties interested should remain in the position in which they were when the appeal was taken.

The writ of prohibition is granted.

HOLCOMB, C. J., and MAIN, TOLMAN, and MITCHELL, JJ., concur.

GREAT NORTHERN RY. CO. v. STEVENS COUNTY. (No. 15288.)

(Supreme Court of Washington. Aug. 13, 1919.)

1. COUNTIES \S 190(2)—TAX LIMIT—NECESSARY GOVERNMENTAL EXPENSES.

A county cannot levy a tax for current expenses to exceed eight mills, as provided by Rem. Code 1915, \S 9213, even though such levy is made, in pursuance of section 9212, to cover necessary expenses to be incurred for the maintenance of the governmental functions of the county for the ensuing year.

2. COUNTIES \S 24—FUNCTIONS—POWERS.

Counties, though legal entities, and in a sense municipal corporations, are but political subdivisions of the state, and, as such, are but agencies of the state, subject to legislative control.

3. COUNTIES \S 190(1) —POWER TO TAX — CONSTITUTIONAL PROVISION.

Neither Const. art. 7, \S 9, article 11, \S 12, nor any other constitutional provision, vests a county with the power to levy taxes; the power of a county to tax existing only by grant from the sovereign state.

4. COUNTIES \S 196(8)—ACTION BY TAXPAYER—APPEAL—DISPOSITION.

On appeal from a judgment for defendants, in an action by a taxpayer to recover taxes illegally levied and to enjoin county authorities from expending the taxes collected, or to be collected, the case will be disposed of as though it is simply one on the part of the taxpayer seeking recovery of the amount unlawfully exacted from it; no temporary injunction having issued in the case, and the record not showing the circumstances under which other taxpayers may have paid the illegal levy, nor what their several rights might be with reference thereto.

Department 2.

Appeal from Superior Court, Stevens County; Sam B. Hill, Judge.

Action by the Great Northern Railway Company against Stevens County. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

F. V. Brown, of Seattle, and Thomas Balmer, of Spokane, for appellant.

Osee W. Noble and L. B. Donley, both of Colville, for respondent.

PARKER, J. The plaintiff railway company seeks recovery of the sum of \$1,628, which it claims was illegally exacted from it by the taxing officers of Stevens county in March, 1918, upon its property in that county, assessed and levied in the year 1917. A trial upon the merits in the superior court for that county, sitting without a jury, resulted in judgment denying to the railway company the relief prayed for, from which it has appealed to this court.

The controlling facts are not in dispute, and may be summarized as follows: in October, 1917, the board of county commissioners, at its regular session held for that purpose, voted an amount for the county current expense fund for the ensuing year to be raised by a tax upon the taxable property within the county, which called for a levy of 9.3 mills on each dollar of the assessed value of such property; and thereupon voted and made such levy of 9.3 mills. The total assessed value of the railway company's property within the county was in amount such that, had the levy been 8 mills instead of 9.3, the railway company would have been required to pay \$1,628 less in taxes for that year than was exacted from it. On March 6, 1918, the taxes having become due, the railway company was compelled to pay and did pay to the county treasurer the full amount levied and assessed against its property, including the excess of \$1,628, resulting from the excess levy of 1.3 mills, then claiming and protesting such excess levy of 1.3 mills to be illegal and made wholly without legal authority. It is to recover from the county an amount equal to this claimed excessive amount of \$1,628, so exacted and paid by the railway company, that it commenced this action in the superior court for Stevens county in May, 1918.

[1] The only express power to be found in our statutes authorizing boards of county commissioners to levy taxes for "county current expenses" is found in section 9213, Rem. Code, which reads as follows:

"For the purpose of raising a revenue for the state, county indebtedness, county current expense, school, road and other purposes, the board shall, at said October session, levy a tax on all taxable property in the county, as shown by the assessment roll, sufficient for such purposes: Provided, that state tax shall not exceed the amount levied by the state board of equalization; the tax for payment of county indebtedness shall not exceed five mills; the tax for payment of county current expense shall not exceed eight mills; the school tax shall not exceed eight mills, except for districts in cities of ten thousand or more inhabitants, where it shall not exceed ten mills, unless the board of directors thereof shall by unanimous consent of all its members determine upon a greater levy, not exceeding two per cent.; the road tax shall not exceed five mills; the bridge tax shall not exceed three mills, and all other taxes shall be in accordance with the laws of the state."

This section not only constitutes the only express statutory grant of power to boards of county commissioners to levy taxes for county current expenses, but it also contains an express limitation upon that grant of power, to wit, that "the tax for payment of county current expense shall not exceed eight mills." It is argued by counsel for the county that the limitation in this section upon the

levy for county current expenses to 8 mills is subject to the exception that in case an 8-mill levy will not produce enough funds to pay the necessary current expenses of the county for the ensuing year, that is, the actual necessary expense of maintaining the several departments of the county government, the board is authorized to make a levy sufficient therefor in excess of 8 mills. Counsel for the county invoke by way of analogy the general rule that the constitutional debt limit is not applicable to the incurring of obligations by the county in the maintaining of its necessary governmental functions, and rely upon the showing made in this case, as claimed by them, that all the items of the estimate of expense, payable out of the current expense fund, made in pursuance of section 9212, Rem. Code, are necessary expenses to be incurred in the maintenance of the governmental functions of the county for the ensuing year. While the arguments of counsel on both sides of this case are directed almost wholly to the question of such necessity for the incurring of the expenses for certain of the several items specified in the estimate of current expenses for the ensuing year, we think the reason of the rule of the exception touching the constitutional debt limit of counties has no application in this controversy. As we view the law, it does not follow that because the board of county commissioners may have in certain cases of necessity the implied power to incur obligations for current expenses of the county government beyond the constitutional debt limit, it may levy a tax in excess of the amount which this statute has prescribed and expressly limited. There are decisions of the courts which seem to hold that ordinarily the granting of power to the governing bodies of counties and municipalities to incur obligations of a particular character implies the power to levy taxes to provide funds for the payment of such obligations. But no decision has come to our notice which holds that an express statutory limitation upon the taxing power of such governing boards may under any circumstances be exceeded.

[2] In the text of volume 1 of *Cooley on Taxation*, at page 465 (3d Ed.) that learned author says:

"The fact that the state creates municipal governments does not by implication clothe them with the power to levy taxes. That power must be conferred in terms, or must result by necessary implication from the language made use of in the law. But it is not requisite that any particular technical or legal terms shall be made use of in giving the power; it is enough that the purpose is apparent, and that on a fair construction of the language employed the Legislature must be deemed to have intended that the power should exist. Where authority to contract debts is given, authority to tax for their satisfaction may be deemed given also, without express words to that effect, if such

appears to be the intent of the Legislature; but an implication to that effect is not a necessary one, and a person who contracts with the municipality must take notice of its power to tax, and of any limitations thereof that may exist."

This statement of the law it would seem is especially applicable to counties and their governing bodies; since counties, though legal entities, and in a sense municipal corporations, are but political subdivisions of the state, and as such are but agencies of the state, subject to legislative control. Even our Constitution, in section 1 of article 11, refers to counties as "legal subdivisions of the state." 7 R. C. L. 923, 936; 15 C. J. 388, 420, 632.

In the text of *Corpus Juris*, at the page last cited, it is said:

"A county has no inherent power to levy taxes, but the power is dependent on legislation."

This view of the law is abundantly supported by the decisions of the courts there cited, among which we note the following: *Albany Bottling Co. v. Watson*, 103 Ga. 503, 30 S. E. 270; *Booth v. Opel*, 244 Ill. 317, 91 N. E. 458; *Russell County v. Hill*, 164 Ky. 360, 175 S. W. 988; *Jackson v. Commissioners*, 171 N. C. 379, 88 S. E. 521; *Obenchain v. Daggett*, 68 Or. 374, 137 Pac. 212.

The last-cited case, while recognizing the rule as stated in the above quotations from *Cooley on Taxation* and *Corpus Juris*, is of interest as showing under what circumstances the power of taxation will be implied from the power to incur debts and obligations on the part of the county; there being no express statutory limitation upon the taxing power involved in that case. Our decisions in *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835, and *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639, are in harmony with the law as stated in the above quotations from *Cooley on Taxation* and *Corpus Juris*. We think it is quite plain that there is nothing in our statute law which lends support to the view that a board of county commissioners has the implied authority to exceed the tax levying power prescribed and limited by the express provisions of section 9213, Rem. Code, above quoted.

[3] When we look to our state Constitution, it appears equally plain that no tax levying power is, by the terms of that document, vested in counties or county authorities; but that such power can exist only by grant from the sovereign state, which, of course, means by legislative enactment. In section 9 of article 7 of the Constitution we read:

"All municipal corporations may be vested with authority to assess and collect taxes."

And in section 12 of article 11 we read:

"The Legislature shall have no power to impose taxes upon counties, cities, towns, or other

municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

We find no language in our state Constitution coming any nearer than these provisions to granting the power of taxation to the governing bodies of counties or municipal corporations, other than cities of the first class having power to frame and adopt their own charters. It seems plain to us that this language does not grant such power, but leaves it to be granted by the Legislature, attended by such conditions and limitations as that body may prescribe. We conclude, therefore, that the tax levy made by the board of county commissioners for Stevens county, to the extent that it is in excess of 8 mills, was made wholly without authority of law, and that the railway company is entitled to relief therefrom.

[4] In its complaint the railway company prays in behalf of itself and all other taxpayers of the county similarly situated, and here makes contention, that the county authorities "be perpetually enjoined and restrained from expending any of the amount of taxes collected or to be collected by reason of said excessive levy." In view of the fact that there was no temporary injunction issued in this case, looking to the preservation of the funds in the manner prayed for, that the year 1918, for which the tax levy here involved was made, during which it became collectable and was to be expended, has long since expired, that we have in this record no means of knowing the circumstances under which the several taxpayers may have paid to the county treasurer the excessive levy, and cannot tell what their several rights would now be with reference thereto, we think it is impractical to go farther in this case than to award the railway company judgment for the amount of illegal tax which it was compelled to pay. We therefore dispose of the case as though it were simply one on the part of the railway company seeking recovery of the amount of taxes unlawfully exacted from it, leaving other taxpayers free to enforce such rights as they may possess.

The judgment is reversed and the cause remanded to the superior court for Stevens county, with direction to enter a judgment in favor of the railway company and against the county for the amount of \$1,628, with legal interest from March 6, 1918, the date on which the railway company was compelled to and did pay the excessive and illegal tax in that sum.

HOLCOMB, C. J., and BRIDGES, MOUNTS, and FULLERTON, JJ., concur.

STATE ex rel. PORT OF SEATTLE v.
WARDALL, County Auditor (LIPPY,
Intervener). (No. 15324.)

(Supreme Court of Washington. July 21, 1919.)

1. CONSTITUTIONAL LAW §32 — SELF-EXECUTING PROVISIONS.

Const. art. 4, § 13, article 11, § 8, article 2, § 25, and article 3, § 25, prohibiting increase in compensation of public officers during their term of office, are prohibitory in their nature, are self-executing, binding alike upon the authority empowered to fix salaries or compensation of public officers, whether the Legislature or a board or commission, or Legislature with concurrence of electorate.

2. OFFICERS §100(2)—COMPENSATION—"PUBLIC OFFICER"—PORT DISTRICT COMMISSIONERS.

Commissioner of port district is a public officer within Const. art. 2, § 25, prohibiting increase or decrease in compensation of "public officer" during his term of office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

3. OFFICERS §100(1) — COMPENSATION — INCREASE DURING TERM.

Under Const. art. 2, § 25, and article 11, § 8, forbidding that "compensation of any public officer be increased" during his term of office, and in view of article 4, § 13, and article 3, § 25, payment to port district commissioners elected to serve without compensation, under Laws 1911, p. 412 (Rem. Code 1915, §§ 8165—1 et seq.), of \$3,000 a year salary, pursuant to election to pay commissioners a salary, under section 5, as amended by Laws 1917, p. 502, § 2, held violative of spirit, if not letter, of Constitution.

4. OFFICERS §100(2) — COMPENSATION — INCREASE DURING TERM.

Port district commissioner, elected and inducted into office under law providing that no compensation should be paid, but subsequent to enactment of law authorizing election to pay salary, and prior to the election whereby salary was voted, came within constitutional prohibitions against increase in compensation during term of office.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Mandamus by the State, on the relation of the Port of Seattle, against Norman M. Wardall, as County Auditor of King County, in which Thomas S. Lippy intervened. Writ granted, and defendant appeals. Reversed and remanded, with instructions to deny application for writ.

Fred C. Brown, Charles Ethelbert Claypool, and Peters & Powell, all of Seattle, for appellant.

Preston, Thorgrimson & Turner, of Seattle, for respondent.

FULLERTON, J. The Legislature of the state of Washington, at its biennial session of 1911, provided for the formation of municipal corporations called port districts. Laws of 1911, p. 412; Rem. Code, § 8165—1 et seq. The act defined with much minuteness the powers and duties of such corporations, and provided that its powers should be exercised through a port commission consisting of three members, who, after the first election, should hold office for a term of three years. Section 5 of the act provided that such commissioners should "serve without compensation."

Pursuant to the provisions of the act, a port district was organized, covering the territory comprising the county of King, called the "port of Seattle." Commissioners were duly elected for the terms prescribed, and they and their successors in office have continually since exercised the powers of the corporation.

In 1917 the Legislature passed an act amendatory of section 5 of the original act; the amendment, in so far as it is pertinent to the question here presented, being as follows:

"All port commissioners shall serve without compensation save and except in port districts having a population of two hundred thousand (200,000) or more inhabitants, and in such port districts each commissioner shall receive a compensation of three thousand dollars (\$3,000.00) per annum, said compensation to be paid monthly out of the funds of the port district, in the same manner as are the salaries of the employees of the port district, the population of a port district to be fixed and determined by the last official census of the United States for the purposes of this section. The foregoing provision relating to compensation of port commissioners is subject to the following proviso: The question of whether port commissioners in port districts having a population of two hundred thousand (200,000) or more inhabitants shall receive compensation as herein provided shall be submitted at the first general election after the organization of any port district having said population of two hundred thousand (200,000) or more inhabitants, or, in the case of any port district already established and having said population then at a special election of the said port district at the time of the next general county election in the county in which said port district is located, held after the taking effect of this act. There shall be printed on the ballot at such election the words 'In favor of compensation for port commissioners in the sum of three thousand dollars each per annum' and the words 'Against compensation for port commissioners in the sum of three thousand dollars each per annum.' If at such election the majority of the voters voting on said proposition shall vote in favor of such compensation, the port commissioners of such port district shall receive compensation in the sum of three thousand dollars per annum as provided herein and in any case where a port district with a population of two hundred thousand (200,000) or more inhabitants, is in existence at the time this act becomes effective and such port district votes for a compensation as hereinbefore pro-

vided, the port commissioners of such district elected and serving shall begin to receive compensation with the calendar month succeeding the month in which the vote is taken." Laws 1917, p. 502, § 2.

Acting pursuant to the amendment, the question whether the port commissioners should receive compensation as authorized therein was submitted to the electors of the district at the general election held on November 5, 1918, at which election the vote was in favor of allowing compensation. At this time the port commissioners were C. E. Remsberg, whose term of office commenced on the second Monday in January, 1916, Robert Bridges, whose term of office commenced on the second Monday in January, 1917, and T. S. Lippy, whose term of office commenced on the second Monday in January, 1918.

At the appropriate time following the election the port commissioners directed the county auditor of King county to draw warrants in favor of the then commissioners, in payment of the salaries allowed by the act for the month of December, 1918, the calendar month succeeding the month in which the vote was taken. The auditor, conceiving the act inoperative as to the commissioners in office, refused to comply with the order, whereupon the port instituted proceedings in mandate in the superior court of King county to compel him so to do. On the hearing the superior court granted a writ of mandate, and this appeal is from its order.

The auditor based his refusal to issue the warrants upon the Constitution of the state. The provisions cited as directly applicable are found in section 25 of article 2 and section 8 of article 11 of that instrument. These read:

"Sec. 25. The Legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office."

"Sec. 8. The Legislature shall fix the compensation by salaries of all county officers, and of constables in cities having a population of five thousand and upwards, except that public administrators, surveyors, and coroners may or may not be salaried officers. The salary of any county, city, town, or municipal officer shall not be increased or diminished after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

Other provisions cited as indicative of the general policy of the framers of the Constitution are section 25 of article 3, which provides that the "compensation for state officers shall not be increased or diminished during the term for which they shall have been elected," and section 13 of article 4, which provides that the salaries of the judges of the Supreme and the superior courts "shall not be increased after their election, nor

during the term for which they shall have been elected."

[1, 2] These provisions of the Constitution, it may be premised, since they are prohibitory in their nature, are self-executing, binding alike upon the authority empowered to fix salaries or compensation of public officers, whether that authority be the Legislature, a board or commission, or, as in this instance, the Legislature with the concurrence of the electorate affected by the increase. It is plain also that these commissioners are public officers within the meaning of the constitutional inhibition. By the act creating port districts, such districts are made municipal corporations. The commissioners are the officers thereof, in whom is vested the authority to exercise the powers of the corporation, and they hold by fixed terms. It is further true, we think, that had the original act given the commissioners a mere nominal compensation, a substantial compensation, such as is here provided, would be an increase within the meaning of the constitutional provisions. The question for consideration is therefore simple in its elements. Since the commissioners are serving without compensation, is the award to them of a substantial compensation within the constitutional inhibition?

In support of the enactment, the commissioners' learned counsel call attention to the rule that courts will not declare an act of the Legislature to be violative of the Constitution unless it is clearly and plainly so, and to the rule that every intendment is in favor of the constitutionality of the act, and if after due consideration a doubt remains as to a conflict with the Constitution, the doubt is resolved in favor of the act. They then argue that it is evident that the present case presents a condition not contemplated by the framers of the Constitution; that the Constitution speaks of an increase and decrease in salary or compensation; that where nothing is granted there can be no decrease, and that to grant something where nothing was granted before is not to grant an increase within the usual meaning of that term; that we cannot speak of nothing as growing or becoming augmented; that there must first be something in order that there may be more of it; and that the thought conveyed by the term "increase" is comparative, which necessarily presupposes a positive, that is to say, it presupposes that something existed which is thereby made more, and does not presuppose the creation of something where nothing existed.

But, plausible as this reasoning may seem, we think it overlooks the purpose and intent of the constitutional inhibitions. These inhibitions, it will be observed, are wide in their application. They cover the case of every public officer holding by a fixed term, whether that officer be elected or appointed and whether his duties conduce much or little

to the public welfare; a provision, said Judge Dunbar in *State ex rel. Davis v. Clausen*, 47 Wash. 372, 91 Pac. 1089, "no doubt intended to prevent pernicious activity on the part of officeholders of the state being brought to bear upon the members of the Legislature—a wise provision which must not be construed out of existence or evaded by legislative enactment." Other courts have said that such provisions also have an additional purpose, namely, to prevent the salary fixing body from rewarding their friends and punishing their enemies, which they were sometimes wont to do, by increasing the salaries of those in favor and decreasing the salaries of those whose actions did not meet with the approval of that body. This court has often had cause to regret that the debates of the constitutional convention have never been made accessible. These debates would certainly throw a flood of light upon the meaning of the doubtful clauses of the Constitution, by making it clear why a given form of words were chosen to express an idea when another form seemingly more appropriate could have been employed. But the purposes of the clauses in question are not doubtful. If they do not have the suggested meaning, they are wholly without purpose. Giving them this meaning, it is at once apparent that it is as much a violation of their spirit and purpose to grant a salary where none was before provided as it is to increase an inadequate salary. In other words, it is as much against the spirit and purpose of the Constitution to permit public officers to solicit a salary during their terms where none has been provided, as it is to solicit an increase of a provided salary, since the one is as much a violation of the public policy involved as is the other. We are impressed with the remarks of Mr. Justice Dickey in *Purcell v. Parks*, 82 Ill. 346. There the learned judge said:

"It seems to me it cannot properly be held that the granting of a compensation to an officer, who, by law, has none, is not, in substance, increasing his compensation. As well might it be said that to permit a tenant to prove that his landlord had no title would be no violation of the rule that 'a tenant cannot dispute his landlord's title,' and this upon the ground that so doing is not disputing his title, but merely showing that 'he had no title to dispute.' A vicious practice had prevailed in Legislatures and county boards, of intermeddling with the compensation of officers after their election, increasing that of friends and reducing that of those not in favor. This was the evil to be cured. To permit a county board to lie by until after the election of a county officer, and afterwards provide a large compensation for the officer if a friend, and a meager compensation if otherwise, is, I think, to permit a plain violation of this Constitution. If this be not so, the county board may, at any time, by an order made just before an election of a county clerk, rescind all orders theretofore made fixing the compensation of that officer, and then, after the

election is over, may fix a large compensation if the successful candidate be in favor, or a small compensation if he be not in favor, and thus the Constitution may, in this regard, become a dead letter."

Our attention has been called to no case from this court where the question has been presented. We have held, however, that the inhibitions of the Constitution relate to public officers receiving salaries payable to them from the public treasury as such, and not to officers compensated by fees paid to them by the person for whom he performed the service; holding that the former were within the inhibitions against change, while the latter were not. Since the inhibition of the Constitution is against any increase or decrease in the "compensation" of a public officer, as well as against any increase or decrease in the "salary" of such an officer, it is difficult to see any sound reason for the distinction made in the cases cited, but, conceding them to be correctly decided, we cannot conceive that either line argues that an officer elected for a fixed term under a statute providing that he shall serve without compensation may afterwards, and during the term for which he is elected, be awarded a substantial salary.

[3] Nor are we cited to any case from another jurisdiction where the precise question has been presented. In Illinois during an early period and in Kentucky more recently, the laws provided that the salaries of certain of the county officers should be fixed by county boards at a meeting preceding the time of the election of such officers, and it was held by the courts of these states that where the duty was neglected or omitted prior to the election, the boards could lawfully fix such salaries after the election. In Illinois (see the case above cited), the decision was rested squarely on the principle that to provide a salary where before there was none was not to increase the salary of an officer during the term for which he was elected. The Kentucky cases seem to be rested on a different principle, although in some of the cases language can be found which indicates that this was one of the reasons which influenced the court's conclusion. But we cannot think these cases in point on the facts here presented. There the law itself provided for a salary, making it the mandatory duty of the boards to fix the amount, which was required to be reasonable. Clearly, therefore, the officers could not be deprived of that which the law contemplated they should have by the mere inaction or refusal to act on the part of the boards. But here the law not only did not provide for a salary or for compensation, but, on the contrary, expressly provided that there should be no compensation. To give them compensation during the terms for which they were elected is plainly a direct

violation of the spirit and purpose, if not the letter, of the Constitution.

[4] From the dates given in the statement, it will be seen that Commissioners Remsburg and Bridges were each elected and inducted into office prior to both the passage of the act providing the salary and its approval by the electors of the port district. As to them the rule announced is strictly applicable. The case of Commissioner Lippy is somewhat different. He was elected and inducted into office subsequent to the passage of the act, but prior to its approval by the electors. It is contended on his behalf that since the Legislature, prior to his election, authorized the port district to pay him a salary at its option, the constitutional inhibitions are satisfied, since the vote of the district was only necessary to make the act operative. But the act was not complete in itself. Alone, it did not create the salary. It required the favorable vote of the electors of the district to make the act effective in this respect. In other words, the act simply empowered the district to pay a salary to its commissioners if it so desired. Since the constitutional prohibitions operate against the district as well as the state, it must follow, we think, that the rule of the Constitution is as applicable to this commissioner as it is to the others.

Our conclusion is that the order of the trial court must be reversed and the cause remanded, with instructions to deny the application for the writ of mandate.

It is so ordered.

HOLCOMB, C. J., and PARKER and MOUNT, JJ., concur.

ANDERSON v. RUCKER BROS. (No. 15285.)

(Supreme Court of Washington. July 21, 1919.)

1. PLEADING \S 385—ISSUES—BILL OF PARTICULARS—EVIDENCE.

Where there is a bill of particulars, proof will be restricted to the matters therein set out.

2. PLEADING \S 236(6)—AMENDMENT—ITEMS OF DAMAGES.

If plaintiff had asked leave to amend complaint specifically alleging items of damages, so as to include another item of damages, it would have been the duty of the court to permit it, unless defendant would have been misled, taken by surprise, or injured thereby.

3. DAMAGES \S 159(5)—PLEADING—EVIDENCE.

In action for damages to land from overflow, where complaint specifically alleged various items of damages, without referring to any deposit of sand or gravel on the land, evi-

dence to prove damage to land from sand or gravel held inadmissible as not within pleadings.

4. WATERS AND WATER COURSES ¶172—CONSTRUCTION OF DAM—CARE—FLOODS—FRESHETS.

One who by means of a dam impounds the water of a stream is required to exercise such reasonable care as a reasonably careful and prudent man, acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rain falls, and other conditions likely to cause freshets, would exercise under like circumstances, but is not required to provide against unprecedented floods or freshets or act of God.

5. WATERS AND WATER COURSES ¶172—OBSTRUCTIONS—FRESHETS—FLOODS.

Such freshets or floods as from climate and geographical condition may reasonably be expected, whether of frequent or infrequent occurrence, must be considered in estimating hazards attending obstructions of water course.

6. WATERS AND WATER COURSES ¶179(5)—OVERFLOW FROM DAM—INSTRUCTIONS.

In action for damages caused by overflow from dam, alleged to have been negligently maintained by defendant, instructions as to care required of defendant in maintaining and constructing dam held not misleading.

7. APPEAL AND ERROR ¶1084(4)—HARMLESS ERROR—INSTRUCTIONS—MINOR INACCURACIES.

Judgment will not be reversed on all technical and minor inaccuracies in instructions; the instruction being sufficient if it gives the law in such way that the jury will understand and will not be misled.

8. APPEAL AND ERROR ¶1002—VERDICT.

Where there is a serious conflict in the evidence, verdict will not be disturbed on appeal.

Department 2.

Appeal from Superior Court, Snohomish County; W. H. Pemberton, Judge.

Action by Charles A. Anderson against Rucker Bros. Judgment for defendant, and plaintiff appeals. Affirmed.

Hathaway, Beebe & Hathaway and J. Y. Kennedy, all of Everett, for appellant. Coleman & Fogarty and W. P. Bell, all of Everett, for respondent.

BRIDGES, J. Suit for damages caused by overflow.

The respondent was engaged in the logging and lumbering business. To assist it in its operations, a number of years prior to March, 1916, it built a dam near its works for the purpose of creating a backwater pond. In order to do this it dug a ditch from Lake Hanson creek to Worthy creek, in Snohomish county, and dug another ditch from Worthy creek to its dam. The purpose of these ditch-

es was to divert a part or all of the water of these two creeks to its dam for the purpose of creating the pond. The pond thus created covered from 5 to 15 acres of land and was from 3 to 6 feet in depth. The appellant owned a farm about three-quarters of a mile below the respondent's pond. The complaint alleged that during the month of March, 1916, through the carelessness and negligence of the respondent in constructing the dam, and in failing to properly maintain and keep the same in repair, and because it had become old and insufficient, the dam and the gates thereof gave way and released large quantities of water stored thereby, which waters were flooded over the appellant's land, causing damage thereto for which he sought recovery. The case was tried by a jury, which returned a verdict in favor of respondent. Judgment was entered on this verdict, and the appeal is from that judgment.

1. At the trial the appellant offered evidence tending to prove that the flood waters caused by the breaking of the dam had deposited on the appellant's land sand and gravel. The trial court sustained objections to this testimony on the ground that it was not within the pleadings. The complaint very particularly mentioned the features of damage. It alleged that—

"The top soil of plaintiff's premises was eroded and washed out, to the plaintiff's damage in the sum of \$960; a certain creek running through the plaintiff's premises was filled up with stumps and other debris for a distance of about 160 rods, to the plaintiff's damage in the sum of \$350; two bridges were washed out, to the plaintiff's damage in the sum of \$25; 10 rods of puncheon were washed out, to the plaintiff's damage in the sum of \$25, together with about 100 feet of fence, to the plaintiff's damage in the sum of \$20."

[1] It will thus be seen that, although the complaint very specifically alleges the various items of damage, it wholly fails to refer to any deposit of sand or gravel on the land. A bill of particulars could not have more definitely given the various items for which recovery was sought, and where there is a bill of particulars proof will be restricted to the matters therein set out. *Powers v. Washington Portland Cement Co.*, 79 Wash. 1, 139 Pac. 615. In the case of *Eckhart v. Peterson*, 94 Wash. 379, 162 Pac. 557, this court held that where the complaint sets out the specific items of damage the plaintiff will not be permitted, over objection, to prove other items. *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091.

[2, 3] If the appellant had asked to have his complaint amended so as to include this item of damage, it would have been the duty of the court to have granted the permission, unless it appeared that the respondent would have been misled, taken by surprise, or in-

jured thereby. But appellant did not ask the amendment. Clearly, the offered proof was not within the pleadings, and the court did not err in its ruling.

2. The appellant next complains of certain instructions given by the court to the jury on the duty of the respondent in the construction and maintenance of the dam. The instructions complained of, the wording of which we will presently notice, the appellant claims did not impose upon the respondent a proper or sufficiently high degree of care.

[4] A few of the earlier cases seem to have held that one creating a pond of water by means of a dam does so at his own peril, and can defend against a claim for damages because of flooding only on the ground that the damage was caused by an act of God. *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736. But the more recent and, unquestionably, the greater weight of authority holds to a less strict and, we believe, a much more just rule of liability, and one which, while properly protecting the rights of others, encourages business development. That rule is that one who, by means of a dam, impounds the water of a stream, is required to exercise such reasonable care and caution in the construction, maintenance, and operation of the dam as a reasonably careful and prudent man, who was acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rain falls, and other conditions likely to cause freshets, would exercise under like circumstances. This rule would cover the stream not only in its ordinary and usual condition as to water, but also when in such unusual and extraordinary flood and freshet as such careful and prudent man would reasonably expect; but the dam owner would not be negligent in failing to provide against unprecedented floods or freshets or act of God. *Maplewood Farm Co. v. Seattle*, 88 Wash. 634, 153 Pac. 1061; *Dahlgren v. Chicago, Milwaukee & St. Paul R. Co.*, 85 Wash. 395, 148 Pac. 567; *Kuhnis v. Lewis River Boom & Logging Co.*, 51 Wash. 196, 98 Pac. 655; 40 Cyc. 683; 13 Am. & Eng. Ency. Law, 688; 3 Farnham, Waters, p. 2798; *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448, 5 South. 864, 11 Am. St. Rep. 58; *Todd v. Cocheil*, 17 Cal. 98.

Let us see if the court's instructions, taken as a whole, will measure up to these requirements.

In its instruction No. 5, the court instructed the jury that—

"If the defendant used ordinary care in constructing and maintaining said dam, that it is not liable, and your verdict must be for the defendant. I further instruct you that ordinary care means such care as ordinarily prudent men would exercise under like conditions, when the risk is their own."

The trial court's instruction No. 6 was to the effect that—

The defendant would be required to use "ordinary care, that is, that degree of care which an ordinarily prudent person would use under the same or similar circumstances, and, under this rule, the dam must be sufficient to withstand not only the usual and ordinary freshets, but must also be sufficient to withstand such extraordinary freshets as an ordinarily prudent person would reasonably expect to occur. If you find from the evidence that there was an unusually large fall of snow in January and February, 1916, and that snow melted away very rapidly in March and caused unusually high freshets, such that an ordinarily prudent person, in the construction and maintenance of the dam in question, would not reasonably have expected to occur, and caused the damage to plaintiff, if you find there was any damage, then in that event the plaintiff cannot recover, and your verdict must be for the defendant."

It has been held time and again that one maintaining a dam of this character is bound to use only reasonable care and prudence. The case of *Maplewood Farm Co. v. Seattle*, supra, was very similar to the case at bar. The court said:

"In the instruction defining negligence, the degree of care which the city was held to in building the superstructure was that of reasonable and ordinary care. The appellant requested an instruction which imposed upon the city a higher degree of care than that of ordinary care in the construction of the superstructure. The instructions given correctly state the law."

At page 688, vol. 13, Am. & Eng. Ency. Law (2d Ed.), it is said:

"That rule in relation to the present subject [floods] requires that each proprietor in exercising his own rights in his own territory shall act with reasonable skill and care to avoid injury to others, and as an approximate rule for measuring that degree it is laid down to be such skill, care, and diligence as men of common and ordinary prudence in relation to similar subjects would exercise in the conduct of their own affairs." *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 541.

See, also, to the same effect, the cases hereinabove cited.

[5] We have no doubt that all of instruction No. 5 and all but the last paragraph of instruction No. 6 properly state the law. In the latter portion of instruction No. 6 the trial court was somewhat unfortunate in the selection of his words. He instructed the jury that if the melting snow "caused an unusually high freshet, such that an ordinarily prudent person, in the construction and maintenance of the dam in question, would not reasonably have expected to occur," then the plaintiff could not recover. As such reasonably prudent person must of necessity expect unusually high freshets, it

is plain that the court meant and referred to unprecedentedly high or extraordinary freshets. In the earlier part of this instruction the court, in the same connection, spoke of "extraordinary" high freshets, and it is plain that in the latter portion of the instruction he used the expression "unusually high freshets" in the sense of "extraordinary high freshets." It may be said generally that there are three stages of freshets: The ordinary freshet, the extraordinary freshet, and the unprecedented freshet. *Avery v. Vermont Electric Co.*, 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818, and especially the note at page 876 et seq. of 59 L. R. A. Such of any of these freshets or floods as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration in estimating hazards attending the obstructions of a water course. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 South. 874; *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176; *Van Duzer v. Elmira, C. & N. R. Co.*, 75 Hun, 487, 27 N. Y. Supp. 474; *Chicago, B. & Q. R. Co. v. Schaffer*, 26 Ill. App. 280.

Taking these instructions as a whole, it is perfectly plain that the court instructed that respondent's dam must be sufficient to withstand all such freshets or floods as an ordinarily prudent person, having knowledge of the conditions, would have expected to occur.

[8, 7] We think the court's instructions may be open to some criticism because they did not express more fully the idea that the reasonably prudent person therein mentioned should be a person who knew the surrounding country, the nature and habits of the stream, the likelihood of snow and rain fall, etc. But the court in instruction 5 told the jury that ordinary care meant such care as an ordinarily prudent man would exercise "under like conditions," and in instruction No. 6 the court spoke of ordinary care as meaning such care as an ordinarily prudent person would use under "the same or similar circumstances." The court unquestionably meant, and the jury must have understood, by the expression "like conditions" and "same or similar circumstances," the same thing as though the court had expressly required of such prudent person knowledge of the nature and habits of the stream, the snow and rain fall, and other surrounding circumstances and conditions. If the appellant had requested the court to amplify these instructions in this regard, it would doubtless have so done. But, taken as they were given by the court, we cannot conceive that the jury was misled. It would be absurd and against all rules of common sense for this court to reverse on all technical and minor inaccuracies found in the trial court's instructions to the jury. In the rush of trial,

that court has not opportunity to mold every word of its instructions to nicety of meaning, or express itself in language of exact fitness. The instruction will be sufficient if it give the law in such way as that the jury will understand and will not be misled.

3. The appellant further complains of that portion of instruction 5 which required the respondent to use such care as an ordinarily prudent man would exercise in like conditions "when the risk is his own." Reference is made to a quotation from *Gulf, Colorado & S. F. R. Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722, found in the case of *Kuhnis v. Lewis River Boom & Logging Co.*, supra. The appellant misconstrues the meaning of the expression "when the risk is his own." The court did not mean that the respondent should exercise such care as if the land which might be damaged were his own, but, on the contrary, meant likelihood of being held in damages because of injuring the land of some one else. This distinguishes the instruction of the court below from the Texas case above mentioned.

The appellant cites the case of *Dahlgren v. Chicago, Milwaukee & St. Paul Ry. Co.*, supra, and quotes from the syllabus of that case to the effect that the obstruction of a water course causing overflow to the lands of another is wrongful, regardless of negligence, and that the instruction should eliminate the question of negligence under such circumstances. In that case the railroad company completely filled the bed of a small stream which had always drained flood waters from the plaintiff's land, and placed therein a tile opening, which it was contended was of insufficient size to carry off the waters in times of freshet. The railroad company in this court complained that the instruction eliminated the question of negligence. On that point the court said:

"But if it be meant by this that it was necessary for the respondents to show, in addition to the fact that the construction of the embankment caused them an injury, that the work of construction was performed in a negligent manner, we cannot agree with the contention. It is doubtless true, as the appellant argues, that it had a lawful right to construct an embankment for the use of its railway, but it does not follow that it had a lawful right to construct it in such a manner as to cause injury to the property of the respondents."

There is nothing in that case contrary to what we have here said.

[8] The appellant makes some contention that the verdict of the jury was against the weight of the evidence. We have carefully read the testimony, and while there was a very serious conflict, we cannot say that it preponderated in favor of the appellant. It was a case to go to the jury, and the jury having found against the appellant, we will

not disturb the verdict. We see no reason for reversing the case.

Judgment affirmed.

HOLCOMB, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

STATE ex rel. PIONEER MINING & DITCH CO. v. SUPERIOR COURT FOR KING COUNTY et al. (No. 15395.)

(Supreme Court of Washington. Aug. 9, 1919.)

1. GARNISHMENT § 1—NATURE.

Under Rem. Code 1915, §§ 680, 681, providing when garnishment proceedings may be instituted, a garnishment proceeding is not an original, but an ancillary, proceeding.

2. GARNISHMENT § 196—TERMINATION.

Under Rem. Code 1915, §§ 693, 695, providing that garnishees shall not be required to pay when defendant secures a favorable judgment, etc., the garnishment proceedings terminate upon entry of judgment for the original defendant.

3. APPEAL AND ERROR § 487—SUPERSEDEAS BOND—GARNISHMENT.

Where the court enters a nonsuit without fixing a supersedeas bond as prescribed by Rem. Code 1915, § 1722, plaintiff is powerless to retain control over garnisheed money, so that it will be available in case appeal is successful.

4. APPEAL AND ERROR § 479(1)—SUPERSEDEAS BOND—GARNISHMENT.

A supersedeas should always be allowed where the delay occasioned by appeal may be met by money award, and should be granted upon plaintiff's appeal from a nonsuit in an action where it had garnisheed money due defendant.

Department 1.

Proceedings by the State of Washington, on the relation of the Pioneer Mining & Ditch Company for writ of mandate against the Superior Court for King County, A. W. Frater, Judge. Writ issued.

Williamson, Williamson & Freeman, of Tacoma, for appellant.

Edward H. Chavelle, of Seattle, for relator.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for garnishee.

Edward Judd and O. L. Willett, both of Seattle, for respondent.

TOLMAN, J. Relator brought suit in the superior court for King county to recover from one J. M. Davidson a sum of money paid in satisfaction of certain indebtedness for which it was alleged Davidson was liable over by reason of certain guaranties made by him and others. At the time suit was

commenced, a writ of garnishment was duly issued, directed to J. E. Chilberg, who answered, admitting an indebtedness to Davidson of upwards of \$15,000. Subsequent to the filing of the garnishee's answer and pursuant to supplemental proceedings had in another cause then pending in the same court, but heard in a different department, Chilberg was required to pay the money, which his answer admitted to be due, to the sheriff of King county, who supposedly is holding the fund awaiting the termination of the garnishment proceedings.

Relator's case against Davidson came on for trial with matters in this condition, and after a jury had been impaneled and sworn and plaintiff's evidence offered, the defendant Davidson interposed a motion for a nonsuit, which the trial court orally granted. Relator immediately and in open court applied to the trial judge for an order fixing the amount of a supersedeas and stay bond for the purpose of retaining in status quo the money sequestered by the garnishment proceedings, pending an appeal to this court from the judgment of nonsuit. The trial judge having declined to fix any supersedeas bond, application is now made to this court for a writ of mandate requiring him to do so.

[1] A garnishment proceeding can be commenced only when an original attachment has been issued, when plaintiff sues for a debt and makes the required affidavit and gives bond, or when plaintiff has a judgment wholly or partially unsatisfied. Rem. Code, §§ 680, 681. So that a garnishment proceeding is in no sense an original or independent action, but is ancillary to the original cause from and through which its existence comes. *Kelly v. Ryan*, 8 Wash. 536, 36 Pac. 478.

[2] And with the dismissal or termination of the original action in favor of the defendant therein, the garnishment proceeding must immediately die. The statute recognizes this fact by the proviso in section 693, Rem. Code, to the effect that, if judgment be rendered in favor of the original defendant, the garnishee shall not be required to pay, nor shall any judgment be rendered against him; and by the provisions of section 695, to the effect that if judgment be rendered in favor of the original defendant in the original cause, any personal property or effects which the garnishee defendant may have previously delivered to the sheriff shall be returned to him.

[3, 4] If then the trial court enters a judgment in the original cause in favor of the original defendant, without at the same time fixing the amount of a supersedeas bond sufficient to save the respondent harmless from damages by reason of the appeal, as prescribed by Rem. Code, § 1722, then the plaintiff is powerless by any means to retain the fund which may have been sequestered by garnishment in a situation where it will be

available to him in the event that his appeal is successful; but under the plain letter of the statute, in such a case as this, the sheriff may and must return the fund to the garnishee; and in any such case, the judgment in favor of the original defendant not being superseded, the garnishee defendant might, it would seem, at once pay over the fund to his creditor, and thereafter plead such judgment as his justification, notwithstanding its subsequent reversal.

That the plaintiff in the original action may appeal from a judgment in favor of the defendant is, of course, not denied; and, if so, that he may stay or supersede that judgment, so as to reap the fruits of a successful appeal, would seem to follow, under our statute as construed by this court, if the loss or damage suffered by the delay may be met by a money award. The subject of what judgments may or may not be superseded is fully discussed in *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916, and the cases bearing upon the subject are collated and classified so fully and logically that it seems unnecessary to go over the subject again. The conclusion there arrived at is:

"From the very nature of the statute [Rem. Code, § 1722] it is implied that the loss or damage suffered by the delay may be met by a money award. Unless the loss can be so met, a stay is not ordinarily granted."

It follows, therefore, that when the loss or damage suffered by the delay occasioned by the appeal may be met by a money award, a supersedeas should always be granted; and, as in this case such loss or damage can be so met, the trial court erred in refusing to fix the amount of a supersedeas bond.

The writ will issue, as prayed for, requiring the judge of the superior court to so act.

HOLCOMB, C. J., and MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

KONICK v. CHAMPNEYS. (No. 15337.)

(Supreme Court of Washington. July 31, 1919.)

1. PLEADING §204(3) — DEMURRER — PURPOSE.

Where a pleader attempted to state two causes of action, but failed in his facts as to one of them, stating only one good cause of action, it is the duty of the court to overrule a demurrer and retain the case for trial upon the cause of action well stated, under Rem. Code 1915, § 259, subd. 5, and section 286.

2. ASSAULT AND BATTERY §24(1) — PLEADING.

A complaint alleging that plaintiff, a grocer, while making a delivery to a tenant in defendant's apartment house, was wantonly and un-

lawfully assaulted and beaten by defendant, to his damage in a stated sum, states a good cause of action, the plaintiff having an implied license to enter for the purposes of making the delivery, and also because of the allegation that the assault was wanton and unlawful.

3. NEGLIGENCE §32(1)—OWNERS OF BUILDINGS—INVITEES AND LICENSEES.

The duty of care which the owner of a building owes to invitees differs from the duty of care he owes to a mere licensee, the duty to an invitee being to keep the ways reasonably safe for him and open to entry at all reasonable hours, and the duty to a licensee being only the negative one of not wantonly injuring him.

4. LANDLORD AND TENANT §51 — PUBLIC BUILDINGS—DUTY TO THIRD PERSONS. *

If a building, fitted for business or office uses and rented in sections to tenants, is open, and there is nothing to indicate that strangers are not wanted, any person may enter without becoming a trespasser, but such person is only a licensee, unless he enters on some business in which a tenant has an interest.

5. LANDLORD AND TENANT §51—RIGHTS OF THIRD PERSON—INVITEES.

When the owner of a building fits it up for business or office uses and leases rooms therein to tenants, retaining control over the entranceways, he impliedly invites all persons to enter the building whose entry is naturally incident to the business carried on by the tenant, provided the invitee enters at a reasonable hour and conducts himself in orderly manner, but the invitation does not extend to a peddler or solicitor or a person seeking a purchaser for something he has to sell; such persons being mere licensees, whose right of entry is subject to be revoked by the owner at any time.

6. INJUNCTION §34 — LANDLORD AND TENANT §167(1) — NEGLIGENCE — APARTMENT HOUSES—INVITEES.

One whom the owner of a building impliedly invites to enter and do business with his tenants has privileges in the premises, and can recover for personal injuries caused by the owner's negligence, and can enjoin the latter from interfering with his right of entry.

7. LANDLORD AND TENANT §51—APARTMENT HOUSES—COMMON PASSAGEWAY.

The owner of an apartment building when he leases the rooms therein confers rights in the tenants in the common entranceways, subject to reasonable regulations, including the right to carry through such entranceways the commodities necessary for their sustenance.

8. LANDLORD AND TENANT §51 — APARTMENT HOUSES—INVITEE.

One who rents rooms in an apartment house can, in the absence of a special covenant to the contrary, confer his right to use the common passageways to another, and he does so when he orders goods from a grocer with the understanding that they are to be delivered, and the grocer may enjoin the owner of the building from interfering with his right to make such deliveries.

9. ACTION ~~ON~~ 48(2)—JOINDER OF CAUSES OF ACTION—"SAME TRANSACTION."

Where an apartment house owner assaulted a grocer making a delivery to a tenant, and prevented his making the delivery, the grocer could not in one complaint ask damages for the assault and battery and also that the owner be enjoined from interfering with his use of the common ways in the building, as such two causes of action cannot be said to arise out of the "same transaction" within the meaning of Rem. Code 1915, § 296.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Same Transaction.]

Department 2.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by B. A. Konick against Weldon V. Champneys. Judgment for defendant, and plaintiff appeals. Affirmed.)

Million & Houser, of Seattle, for appellant.
George B. Cole and John Wesley Dolby, both of Seattle, for respondent.

FULLERTON, J. To the complaint of the plaintiff in this action the defendant interposed a demurrer, on the grounds: (1) That several causes of action have been improperly united; and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, whereupon the plaintiff elected to stand thereon and not plead further. The court then entered a judgment dismissing the action with costs, from which judgment the plaintiff appeals.

The complaint, omitting the formal parts, is as follows:

"I. That at all the times hereinafter mentioned the plaintiff has been and is now engaged in the occupation and business of carrying on and conducting a retail grocery store at 277 Bellevue avenue North, in Seattle, King county, Wash.

"II. That at all the times hereinafter mentioned the defendant is the owner, manager, and has charge of that certain apartment house known as the 'Carlyle Apartments,' situated at 320 Summit avenue North, in the city of Seattle, King county, Wash.

"III. That heretofore on the — day of October, 1917, the plaintiff received by phone an order from one of the tenants or occupants of the apartments in said Carlyle apartment house for groceries, and the plaintiff, answering said call and order, went personally to said apartment house for the purpose of making delivery of said groceries, whereupon the defendant met the plaintiff at the rear entrance of said apartment house, the same being the customary place for the delivering of such articles as groceries, and thereupon the defendant did, in a rude, insolent, angry, and contemptuous manner, forbid plaintiff entering said apartment house or making said deliveries, and did wantonly, recklessly, and unlawfully then and there assault, beat, and bruise the plaintiff, by shaking him,

pulling his ears, and talking to him in a loud, insolent, and boisterous manner, and did with force prevent the plaintiff entering said premises and apartment house.

"IV. That by reason of the said conduct of the said defendant plaintiff suffered great pain and anguish of body and mind, all to his great damage in the sum of \$500.

"V. That the plaintiff has several customers in said apartment house, and at whose invitation the plaintiff is anxious and willing to sell his goods, wares, and merchandise, but that the defendant wrongfully refuses to allow the plaintiff to enter upon said premises, or to deliver groceries to his tenants in the said apartments, and threatens to do the plaintiff great bodily harm should he attempt to make delivery thereof, thereby damaging plaintiff's business, but such damages are uncertain and difficult to ascertain, and are therefore irreparable.

"Wherefore, plaintiff prays for a judgment and decree of this court as follows:

"First. Awarding plaintiff damages in the sum of \$500.

"Second. For a permanent injunction enjoining the defendant from in any manner interfering and molesting plaintiff or preventing him from making deliveries of groceries in the usual, customary, and ordinary manner to tenants in said apartment house, and that plaintiff have any other and further and different relief to which he may be entitled."

[1] The record does not disclose the grounds upon which the trial court sustained the demurrer. A due determination of the issue joined, however, requires a consideration of both of the grounds stated therein. There was plainly an attempt to state two causes of action. If, therefore, the pleader succeeded in stating two causes of action, and these causes are improperly united, the demurrer was rightly sustained, since the Code expressly makes the improper uniting of two or more causes of action a ground for demurrer. Rem. Code, § 259, subd. 5. If, on the other hand, the pleader stated one good cause of action, but failed in his facts as to the other, it was the duty of the court to overrule the demurrer and retain the case for trial upon the cause of action well stated. The allegations made in the attempt to state the other cause of action would be irrelevant and redundant matter, which it is the office of a motion, not a demurrer, to reach. Rem. Code, § 286.

[2] The first question to be considered then is, Are there two causes of action stated in the complaint? That there is a cause of action stated for personal injuries arising from an assault and battery can hardly be doubted. The allegations are that the appellant, a grocer, received an order for groceries from a tenant in the respondent's apartment house; that he went personally to the apartment house to make delivery of the groceries, and was met by the respondent at the rear entrance to the house, the same being the customary place for the de-

livery of such articles as groceries, and was there wantonly and unlawfully assaulted and beaten by the respondent, to his damage in a stated sum of money. There is nothing to show that he had been theretofore forbidden to enter the premises for the delivery of groceries, or that he was acting otherwise than in an orderly and peaceful manner. Plainly, therefore, he had an implied license to enter for the purposes intended, or, at least, was not a trespasser in so doing, and the respondent had no cause to assault and beat him for making the attempt. More than this, it is alleged that the assault was wanton and unlawful. If this be true, and for the purposes of the demurrer it must be so considered, the assault gave rise to a cause of action even though the attempt to enter the building to deliver the groceries was wrongful, since these words negative the presumption that the assault and battery may have been necessary to prevent a wrongful act.

Is there stated a cause of action for injunctive relief?

It is a well-settled rule that when the owner of a building fits it up for business or office uses, and leases rooms therein to tenants, retaining control over the entranceways to such rooms, he impliedly invites all persons to enter the building, whose entry is naturally incident to the business carried on by the tenant.

"The rule of implied invitation may be stated as follows: Invitation as distinguished from mere license is implied by law only when the visitor comes for some purpose connected with the business in which the owner or occupant is there engaged, or which he permits there to be carried on, and there must be some real or supposed mutuality of interest in the subject to which the visitor's business relates." *Gasch v. Rounds*, 93 Wash. 317, 160 Pac. 962.

[3, 4] It is a well-settled rule also that the duty of care which the owner of such a building owes to invitees differs from the duty of care he owes to a mere licensee. If the building be open, and there is nothing to indicate that strangers are not wanted, any person may enter without becoming a trespasser, but the owner owes him no duty of care, other, perhaps, than the negative one of not wantonly injuring him. To the invitee, however, he owes the same duty of care that he owes to the tenant; he must keep the ways reasonably safe for him, and must permit entry at all reasonable hours. *Gasch v. Rounds*, supra; *Stanwood v. Clancey*, 106 Me. 72, 75 Atl. 293, 28 L. R. A. (N. S.) 1213.

[5] The rule presupposes, of course, that the invitee enters at a reasonable hour, conducts himself in an orderly manner, and, as said in the case cited from this court, enters on some business in which the tenant has an interest. In the case where the tenant is a lawyer, doctor, architect, or other professional man, the rule would include a person who

enters to consult him on professional business, and, in the case of a manufacturer of or dealer in commodities, would include a person entering for the purpose of dealing with relation to such commodities. It would not, however, include a peddler or solicitor, or a person seeking a purchaser for something he had to sell. Such persons, even if they are expressly permitted to enter onto the premises, are mere licensees, and their right of entry is subject to be revoked by the owner at any time and for any cause that may seem to the owner sufficient.

[6] It follows from these principles, we think, that an invitee has privileges in the premises which he can enforce in his own right. Certainly, under all of the cases, he can recover for personal injuries suffered by him caused by the negligence of the owner, and it would seem equally plain that if his right of entry is wrongfully interfered with by the owner, he can have, at least as the practice is administered in this state, injunctive relief against the denial of the right.

[7, 8] The legal status of the owner of an apartment house is not essentially different from that of the owner of office or business buildings generally. Such a house has been defined as a building arranged in several suites of connecting rooms, each suite designed for independent housekeeping, but with certain mechanical conveniences, such as heat, light, or elevator services, in common to all families occupying the building. *Kitching v. Brown*, 180 N. Y. 414, 73 N. E. 241, 70 L. R. A. 742. The owner of such a building, when he leases the rooms therein for the purposes intended, confers rights in the tenants, not only in the rooms actually leased, but rights in the common entranceways to such rooms, notwithstanding he may have retained control of them for the common use of all of his tenants. Since the leasing is for housekeeping purposes, among these rights is the right to carry through such entranceways the commodities necessary for their sustenance. Having this right, the tenant can, in the absence of a special covenant to the contrary, confer it upon another, and that other, when the right is so conferred, becomes an invitee of the owner. The rule applies to a grocer from whom groceries are ordered, when ordered with the understanding or agreement that they shall be delivered. He has business with an occupant of the building, in which business the occupant has an interest. It is not, of course, intended to be said that the owner of an apartment house may not make reasonable regulations governing the use of the entranceways to the building. He may, as he seems to have done in this instance, provide a place for the delivery of commodities to his tenants, and requires such commodities to be delivered at that place, and, as before indicated, can require entrance to be made

at reasonable hours and in an orderly manner; and it may be also that for just cause he can forbid a particular person or particular persons from entering. But the regulations must be reasonable, they must not be so stringent as to amount to a practical denial of the right.

[9] In the light of these considerations we think the complaint, although somewhat meager in its allegations, states facts sufficient to sustain a judgment awarding injunctive relief. The complaint therefore states two causes of action, and the question arises, Are they improperly united? The appellant argues that they are not, and calls to his assistance that section of the Code which permits two or more causes of action to be united in one complaint when they arise out of the same transaction. Rem. Code, § 296. But we cannot think the statute aids the appellant. Discussing this provision of the statute, Mr. Pomeroy, in his work on Remedies and Remedial Rights (section 474), says:

"It is clear that every event affecting two persons is not necessarily a 'transaction' within the meaning of the statute; indeed, the word as used in common speech has no such significance. 'Transaction' implies mutuality, something done by both in concert, in which each takes some part. Much less can it be said that, because two events occur to the same persons at the same time, they are necessarily so connected as to become one transaction. The case cited above, in which a cause of action for an assault and battery and one for a slander were united, illustrates this statement. Two events happened simultaneously, the beating and the defamation, but neither was a 'transaction' in any proper sense of the word. The wrong which formed a part of one cause of action was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and different wrongs. The only common point between the causes of action was one of time; but this unity of time was certainly not a 'transaction.' Much of the difficulty in construing this language has resulted, I think, from a failure to apprehend the true nature of a 'cause of action,' from a forgetfulness that it includes two factors—the primary right and the wrong which invades it. A 'cause of action' cannot be said to 'arise out of' an event, when the event produces or contains but one of these factors, the delict or wrongful act."

The case referred to in the quotation is *Anderson v. Hill*, 53 Barb. (N. Y.) 238. The complaint united a cause of action for an assault and battery with one for slander, alleging that the defamatory words were uttered while the beating was in actual progress. To a demurrer for a misjoinder it was answered that both causes of action arose out of the same transaction. Passing upon the question the court said:

"It is claimed, however, by the plaintiff's counsel that the assault and battery and the slander arose out the same transaction, inasmuch as both causes originated or occurred at the same period of time, and therefore both belong to the first class. This is what is held in *Brewer v. Temple*, supra [15 How. Prac. (N. Y.) 286]. But it by no means follows that because the two causes of action originated, or happened, at the same time, each cause arose out of the same transaction. It is certainly neither physically nor morally impossible that there should be two transactions occurring simultaneously, each differing from the other, in essential attitudes and qualities. As here, the transaction out of which the cause of action for the assault springs is the beating, the physical force used; while the transaction out of which the cause of action for slander springs is not the beating, or the force used, but defamatory words uttered. The maker of a promissory note might, at the very instant of its delivery and inception, falsely call the payee a thief; and yet who would say that the two causes of action arose out of the same transaction? It has been held that a contract of warranty and a fraud practiced in the sale of a horse, at the same trade, did not arise out of the same transaction, so as to be connected each with the same subject of action, and that a complaint containing both causes of action was demurrable. *Sweet v. Ingerson*, 12 How. Pr. (N. Y.) 331. This was a general term decision, and of course as authority has greater weight than that of *Brewer v. Temple*. Assault and battery and slander are as separate and distinct causes of action as any two actions which can be named. True they are both torts, but they do not belong to the same category or class, either at common law or by the Code. Indeed the Code, in express terms, enumerates and classifies them separately. The subjects of the two actions are not connected with each other. Each subject of action is as distinct and different from the other as the character of an individual is from his bodily structure. The question is not whether both causes of action sprung into existence at the same moment of time. Time has very little to do in solving the real question. The question is, Did each cause of action accrue or arise out of the same transaction, the same thing done? It is apparent that each cause of action arose, and indeed must necessarily have arisen, out of the doing of quite different things, by the defendant. Different in their nature, and all their qualities and characteristics, and inflicting injuries altogether different and dissimilar. The same evidence would not sustain either cause of action, and they may require different answers."

Within the principles here announced the complaint plainly improperly unites two causes of action, and since the Code, as we have shown, makes the improper uniting of two or more causes of action a distinct ground of demurrer, the demurrer was properly sustained.

The judgment is affirmed.

MOUNT and PARKER, JJ., concur.

PETERSEN et al. v. PACIFIC AMERICAN FISHERIES. (No. 15308.)

(Supreme Court of Washington. Aug. 5, 1919.)

1. PRINCIPAL AND AGENT ⇨105(4)—AGENT'S AUTHORITY TO RECEIVE PAYMENT.

A purchaser is warranted in paying purchase price to seller's agent if the agent is in fact authorized to receive payment, or the seller has clothed him with indicia of authority to receive payment, as by intrusting him with possession of the goods.

2. PRINCIPAL AND AGENT ⇨160½ — PAYMENT TO AGENT—EFFECT.

Payment to an authorized agent discharges the indebtedness, although the agent misappropriates the payment.

3. PRINCIPAL AND AGENT ⇨99—APPARENT AUTHORITY.

A principal is bound, not only by an agent's acts within his actual authority, but also by acts within the agent's apparent authority.

4. PRINCIPAL AND AGENT ⇨105(4)—AUTHORITY TO RECEIVE PAYMENT—LESSEE.

Where a lease required the lessee to sell certain stock of the lessor, the lessor's action in assisting lessee to make the sale did not revoke the lessee's powers under the lease, or require a purchaser to pay the purchase price direct to the lessor.

5. APPEAL AND ERROR ⇨269—QUESTIONS CONSIDERED—INTEREST.

Where appellant did not except to a judgment on the ground that it did not provide for interest, and that question was apparently not raised below, it will not be considered upon appeal.

Department 2.

Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Action by James Petersen, James McDonald, and others against the Pacific American Fisheries, a corporation. Judgment for defendant, and plaintiffs appeal. Affirmed.

Bixby & Nightingale, of Bellingham, for appellants.

Kerr & McCord, of Seattle, for respondent.

BRIDGES, J. The appellants sued to recover \$1,065 as the purchase price of certain box shooks and \$75 as the purchase price of a certain shingle machine. The case was tried by the court without a jury. It gave judgment to the plaintiffs for \$75, being the sale price of the machine, but refused judgment on account of the box shooks.

The facts are substantially as follows:

Each of the parties hereto was the owner of a manufacturing plant at Bellingham. In May, 1916, the appellants and one Wood entered into a lease contract, whereby the appellants leased their factory to Wood. This

lease, among other things, contained the following clauses:

"Understood that one of the conditions for the execution of this lease is that the lessees, immediately upon taking possession of the aforesaid plant, advise with lessor as to how the said stock and material on hand should be completed and finished to the best advantage, in order to obtain available markets therefor, and that lessees will finish and complete within a reasonable time whatever work and material may be necessary in order to complete the aforesaid delivery of stock on hand so that the same can be marketed to the best advantage, and the lessees will be paid therefor the actual cost of finishing the said material and labor, plus 10 per cent. on the same. Lessees further agree to immediately market said stock upon its being finished and completed to the best advantage, and charge therefor a reasonable commission; and it is understood that said stock and material remain in the warehouse of said plant, where the same is now situate, until lessor determines to sell the same, without the paying of any rental or compensation for the use of said warehouse during said time."

Wood thereafter transacted business under the name of W. W. Wood Manufacturing Company. He at once entered into possession of the leased property, including all box shooks, lumber, etc., on the premises, and he remained in possession throughout the period of this controversy. Shortly prior to August, 1916, F. O. Biery, one of respondent's foremen, visited the Wood plant with the view of purchasing its hand shingle machine. While on the premises he saw a miscellaneous lot of box shooks, which he thought his employer might want to purchase. He entered into negotiations with Wood concerning the purchase of the machine and such of the box shooks as would suit the purposes of respondent. Wood, however, did not have any inventory of the box shooks, and referred Biery to Thomas R. Waters for this information. Mr. Waters was an attorney at law at Bellingham and part owner of the leased property. Biery had several conferences with Waters looking towards the purchase of certain of the box shooks; they did not, however, at that time agree upon a sale. Later Wood again took up the question of the sale with Biery and terms were substantially agreed upon. Biery, however, did not have any authority to consummate the sale, and requested Waters to meet H. B. Drisko, respondent's assistant manager, at the office of respondent, for the purpose of closing the deal. Upon this request Mr. Waters met Mr. Drisko at respondent's office, where the deal was closed. The shingle machine was sold for \$75, and such of the box shooks as the respondent might select out of a miscellaneous lot were sold for \$3 per thousand sets.

Waters testified that at this conference he

requested the respondent to send to him or to one James McDonald the check for the purchase price. Drisko and Biery, who were both present at this conference, denied that anything was said about the check or to whom payment should be made. The following day Waters went East, and did not return to Bellingham until about the 1st of November, 1916. Wood took charge of the sorting and tallying and delivering of the shooks to respondent; Biery assisting in keeping the tally. From the time of the sale on till early in November, neither Wood nor any of the appellants had anything to do with the shooks. They had no further conferences with respondent and did not send respondent any statement of the shooks sold or make any demand for payment. Some time in October, and before Waters returned from the East, the Wood Manufacturing Company sent to the respondent a bill for the purchase price of the machine and the box shooks. This bill ran against respondent and in favor of the Wood Company. It was on the billhead of the Wood Manufacturing Company. A few days after receiving the statement the respondent made its check for the amount of the bill to the Wood Manufacturing Company, and the latter, after having received the check, cashed it, and has never paid the appellant any of the proceeds thereof. Upon Waters' return from the East he learned that his company had not received its pay, and made inquiry of the respondent and was told that payment had been made to the Wood Manufacturing Company. One O. W. Crandall, who was in the employ of the Wood Manufacturing Company and acted in the capacity of bookkeeper and manager, testified that Waters told him to send a bill to respondent and collect the money. Waters denied this.

The court's findings give the facts substantially as above, but, in addition, find that by the terms of the lease contract Wood was authorized and empowered to sell the box shooks and to collect the purchase price thereof, but that he did not have any authority to sell the machine or to collect therefor; that when the deal was closed at the office of the respondent Waters requested the respondent to send a check in payment either to him or McDonald, but nothing was said as to whom the check should be drawn; that Biery, who represented the respondent, did not know that Waters had or claimed to have any ownership in the box shooks, but thought he was representing the owner of the shooks or the Wood Manufacturing Company, as agent or attorney. The court further found that the power given by the lease to Wood to sell the box shooks had never been revoked.

The trial court based its conclusions and judgment almost entirely on the lease contract. The appellant urges a new trial, chiefly on two grounds: First, that the lease

contract does not authorize Wood to sell the box shooks or to collect the price thereof, and, second, that if the lease does authorize Wood to sell the shooks and collect therefor, that power was revoked before the consummation of the sale in controversy here. The statement of a few fundamental principles will assist in arriving at a correct decision.

[1] Where the principal has clothed the agent with the indicia of authority to receive payment, as by intrusting him with the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent at the time of sale. But when the agent has not the possession of the goods and no other indicia of authority, and has only authority to sell, the purchaser pays the agent at his peril, and it devolves upon him to show that the agent was authorized to receive the payment. 1 Am. & Eng. Enc. p. 1014.

[2] Payment to an authorized agent will operate as a discharge of the indebtedness, though the agent misappropriate the payment. 22 Am. & Eng. Enc. p. 518.

[3] A principal is not only bound by the acts of his agent, general or special, within the authority which he has given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. *Galbraith v. Weber*, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341.

The apparent authority so far as third persons are concerned is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. 31 Cyc. 1333.

One clause of the lease contract provided that Wood should advise with the appellants as to how to obtain available markets for the box shooks, and that—

"Lessees will finish and complete within a reasonable time whatever work and material may be necessary in order to complete the aforesaid delivery of stock on hand so that the same can be marketed to the best advantage. * * * Lessees further agree to immediately market said stock upon its being finished and completed to the best advantage, and charge therefor a reasonable commission, and it is understood that said stock and material shall remain in the warehouse of said plant, where the same is now situated, until the lessor determines to sell the same, without the payment of any rental or compensation for the use of the warehouse during said time."

The appellants contend that this provision of the lease only authorized Wood to find a market, and does not authorize him to sell the shooks. We cannot so hold. The contract shows clearly that the intention was that Wood should not only have the author-

ity but it would be his duty actually to sell these box shooks. The instrument even goes so far as to provide that the lessees shall be entitled to a reasonable commission for this service. It is true that the last clause above quoted provides that the box shooks shall be permitted to remain in the warehouse "until the lessor determines to sell the same," but this was not intended to reserve the right of sale exclusively in the appellants, but was put in the contract merely to guard against any charge which the lessees might make the appellants for warehouse rent.

[4] The appellants further contend, however, that the implied power to collect the purchase price is always dependent upon the exercise by the agent of his power to sell, and that where the principal makes the sale the presumption of law is that he alone had authority to make the collection, and that since Waters actually made the sale the agent had no authority to make the collection. As principles of law these contentions may be accepted as correct, but they are inapplicable here, because the testimony does not show that Waters, as the owner of the property, made the sale. The most that he did was to assist in making the sale, and even in this the respondent supposed, and had reason to suppose, that Waters was acting as the agent or attorney for the owner and not as owner. The appellant contends that the trial court's finding was to the effect that Waters made the sale, but we do not so construe it. The finding was merely to the effect that Waters finally closed or confirmed the sale. We have very carefully read and considered the testimony, and it is perfectly plain to us that the terms of the sale were made between Wood and Biery, the foreman of the respondent, and that Waters did nothing more than to assist in the making of the sale. It cannot be said that what Waters did had the effect of revoking the powers given in the lease to Wood.

As between two innocent persons, one of whom must suffer, the loss should always fall on the principal who has clothed the agent with apparent authority, and thus enabled him to obtain the advantage of the person with whom he deals, rather than on the purchaser. *Galbraith v. Weber*, supra. Considering all the testimony, we cannot avoid the conclusion that not only did the lease itself give Wood the power to sell and collect, but that the conduct and acts of the appellant, through Waters, was such as to hold out to the respondent that Wood was authorized to sell as well as to collect. Under all the circumstances as shown by the record, it seems to us that any person placed in the position of the respondent, and having the information which it had, would, without hesitancy and with perfect justification, have made the payment to Wood as the re-

spondent did in this case. It will not serve any good purpose for us to particularly refer to the testimony upon which our conclusion is based.

[5] The appellant contends that the judgment of the trial court for \$75 should have carried interest from the date it should have been paid to the date of judgment. If it should be conceded that the court would have had authority to have given interest, yet we find that the appellant is in no position now to raise that question. The court's conclusion of law No. 1 was to the effect that the appellant was entitled to judgment for \$75 and for its costs and disbursements. The conclusion did not provide for any interest. The appellant did not take any exception to the conclusion, nor do we find anything in the record which would tend to indicate that the appellant at any time called the court's attention to this question of interest. Appellant seems to have raised the question for the first time in this court.

Judgment affirmed.

HOLCOMB, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

FIRST NAT. BANK OF EVERETT v.
NORTHWEST MOTOR CO.
(No. 15320.)

(Supreme Court of Washington. Aug. 7, 1919.)

CHATTEL MORTGAGES \Leftrightarrow 225(1)—PURCHASE OF
MORTGAGED PROPERTY—RIGHTS OF BUYER.

Purchaser of automobile subject to a chattel mortgage acquires no greater rights than those possessed by mortgagor, and is in no position to deny validity of mortgage.

Department 1.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by the First National Bank of Everett against the Northwest Motor Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant.

J. A. Coleman and S. H. Kelleran, both of Seattle, for respondent.

MAIN, J. The purpose of this action, as originally instituted, was to foreclose a chattel mortgage upon an automobile. The defendant Powell, who was the mortgagor, defaulted, and the cause went to trial against the other defendant, the Northwest Motor Company, a corporation, which claimed to be a purchaser from Powell. At the opening of the trial it was stipulated that in the event the evidence showed that plaintiff was entitled to foreclosure, but that foreclosure

could not be had because the Northwest Motor Company had sold and transferred the car to another party, then and in that event a money judgment should be rendered. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and a money judgment against the Northwest Motor Company from which it appeals.

The facts may be summarized as follows: The Northwest Motor Company, the appellant, was the general agent for Western Washington, for the sale of Packard automobiles, with its place of business located in Seattle. Fred M. Powell was a subdealer under the Northwest Motor Company, doing business in the city of Everett. In March, 1917, Powell sold to a customer what is referred to as a second series twin six Packard automobile. He took in exchange from the customer a Packard automobile of an earlier series, as a part of the purchase price. It was necessary for Powell to get the new car from the Northwest Motor Company. That company refused to extend him further credit, and it was then necessary for him to finance the deal himself. For this purpose, he borrowed money from the First National Bank of Everett, the respondent, and gave a chattel mortgage upon the old car, which he had received from the customer as a part payment upon the new one. After mortgaging this car and getting the money, the new car was paid for and delivered by the Northwest Motor Company to Powell or his customer.

The chattel mortgage was duly and regularly filed and recorded as required by law, in the office of the county auditor of Snohomish county. The car covered by the mortgage remained in Powell's garage at Everett in Snohomish county until some time early in May, 1917, when it was taken to Seattle and left with the Northwest Motor Company for sale upon Powell's account. The car remained with the Northwest Motor Company until the November following, when it was sold by that company to a third person. The chattel mortgage was not recorded in King county within 30 days after the car had been left with the Northwest Motor Company.

The Northwest Motor Company claims that it purchased the car when it was left with it in May, and that title then passed. The respondent claims that title did not pass in May, but that in November, just prior to the sale of the car by the appellant, it was transferred to the Northwest Motor Company by Powell, subject to an existing mortgage of \$1,775 held by the First National Bank of Everett. The pivotal question in the case is whether the contentions of the appellant or those of respondent are sustained by the evidence.

It may be admitted for the purposes of this

decision that if the sale occurred in May the Northwest Motor Company acquired a good title, because the mortgage was not filed or recorded in King county within the 30 days specified in the statute. On the other hand, if no title then passed, but a sale occurred in November and was made subject to the mortgage held by the respondent, then the judgment of the trial court should be sustained.

Upon conflicting evidence the trial court found the facts to be in accordance with the contentions of the respondent. A careful reading of the evidence leads us to the conclusion that the findings of the trial court are clearly right. If the property was transferred subject to the mortgage, as the trial court found and as we also find, then the appellant took no greater rights than the mortgagor had, and it is not in a position to deny the validity of respondent's mortgage. 11 C. J. p. 651; *Nation v. Planters' & Mechanics' Bank*, 29 Okl. 819, 119 Pac. 977; *Howard v. Chase*, 104 Mass. 249.

The judgment will be affirmed.

HOLCOMB, C. J., and TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

PARKER v. INDUSTRIAL INSURANCE DEPARTMENT. (No. 15118.)

(Supreme Court of Washington. Aug. 13, 1919.)

MASTER AND SERVANT §418(7)—WORKMEN'S COMPENSATION—JUDGMENT ON REMITTITUR.

A judgment entered upon the going down of a remittitur from the Supreme Court, that defendant Industrial Insurance Department make such an order for compensation to plaintiff employé "as will reasonably cover the difference in the wage-earning power of said plaintiff," held to require that award to employé should be in the proportion which the new earning power should bear to the old, as provided in Rem. Code 1915, § 6604-5d, and not that award should be for the full difference between the old and new earning power.

Department 2.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Proceedings by Harry C. Parker under the Workmen's Compensation Act (Laws 1911, p. 345 [Rem. Code 1915, § 6604-1 et seq.]) for compensation for injuries, opposed by the Industrial Insurance Department. From judgment entered upon going down of remittitur on decision reported in 102 Wash. 54, 172 Pac. 830, the Industrial Insurance Department appeals. Affirmed.

W. V. Tanner and D. E. Twitchell, both of Olympia, for appellant.

Turner, Nuzum & Nuzum, of Spokane, for respondent.

PARKER, J. This is an appeal by the Industrial Insurance Department from the judgment of the superior court for Spokane county, entered in this case upon the going down of the remittitur from our decision rendered herein, modifying the judgment of that court; our decision being reported in 102 Wash. 54, 172 Pac. 830. The contention here made in behalf of the department is that the judgment of the superior court is not such as was directed by this court to be entered in the case.

The concluding language of our decision, upon which the clerk of this court entered formal judgment, is as follows:

"It seems to us that the law makes provision for a case like this. 'As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old.' Rem. Code, § 6804—5d.

"Instead of cutting off respondent's allowance altogether, the department should have made an order covering this difference between the present earning capacity of the respondent and his former earning capacity. Considering, then, the spirit of the law, that an injured workman in extrahazardous employment shall have 'a sure and certain recovery,' and the letter of the law as we conceive it to be, the case will be remanded to the superior court to be from thence transmitted to the department, with directions to make such an order as will reasonably cover the difference in the wage-earning power of the respondent. It is so ordered."

We have italicized the portion of the statute quoted and made a part of our decision, to be particularly noticed. The formal judgment of this court entered by the clerk and embodied in the remittitur, directed the superior court "to modify its judgment so that respondent will recover the difference in his wage-earning power." Upon the going down of the remittitur, the superior court entered its judgment, which, in so far as we need here notice its language, reads as follows:

"It is further ordered, adjudged, and decreed that defendant (insurance department) make such an order for compensation to the plaintiff herein, Harry C. Parker, as will reasonably cover the difference in the wage-earning power of said plaintiff."

This appeal seems to have been prompted by a fear on the part of the department that the judgment rendered by the superior court must be construed as compelling the awarding to respondent of the full amount of the difference between his former and present earning power; that is, for instance, if his former earning power was \$4 per day and his present earning power is \$3 per day, that he

must be awarded the full difference of \$1 per day. Looking alone to the language of the judgment of the superior court, there may be some reason for contending that such is its meaning, and that it is not in exact accord with the directions of this court, though it is in almost the exact language of the remittitur and the concluding few words of our decision. But we think that neither our decision, the remittitur, nor the judgment of the superior court, read in the light of the italicized portion of the statute quoted in and made part of our decision, means anything more than that the award to respondent shall be "in the proportion which the new earning power shall bear to the old," and not that the award shall necessarily be for the full difference between the old and new earning power. While the language of the judgment of the superior court, of the remittitur, and of the concluding few words of our decision might have been more precise in this particular, we think it plain that all mean no more than this. So construed, the judgment of the superior court is as directed by this court to be entered.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

EVANS et al. v. RUBLEE et ux. (No. 15280.)
(Supreme Court of Washington. Aug. 8, 1919.)

1. APPEAL AND ERROR ¶555—QUESTIONS CONSIDERED — STRIKING STATEMENT OF FACTS.

Where the statement of facts has been stricken, the only question open for consideration is whether the findings support the judgment.

2. BROKERS ¶88(14)—ACTION FOR COMMISSION — SUFFICIENCY OF FINDINGS — "SALE PRICE."

Findings that plaintiff broker was entitled to a certain percentage of the sale price, that a buyer was found, but that defendant owner wrongfully refused to complete the sale *held* to sustain a judgment for plaintiff, since the term "sale price" as used in the findings did not imply a consummated sale.

3. APPEAL AND ERROR ¶931(8)—FINDINGS—CONSTRUCTION.

Where a term used in findings is capable of two constructions, it will be given that meaning which supports the judgment.

Department 1.

Appeal from Superior Court, King County; King Dykeman, Judge.

Action by A. A. Evans and R. Myers, co-partners doing business as the Evans Investment Company, against George H. Rub-

lee and Florence Rublee, his wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

James W. Reynolds, of Seattle, for appellants.

Nelson R. Anderson, of Seattle, for respondents.

MAIN, J. The purpose of this action was to recover a broker's commission, claimed to have been earned in negotiating the sale of certain household goods, furniture, and furnishings owned by the defendants. The cause was tried to the court, without a jury, and resulted in findings of fact, conclusions of law, and judgment sustaining the plaintiffs' right to recover. From this judgment the defendants appeal.

[1] The statement of facts having heretofore been stricken, the only question which can now be considered is whether the findings support the judgment. To present the question wherein it is claimed the findings are defective it is only necessary to briefly state the facts found.

The respondents are copartners in the brokerage business, and at the instance and request of the appellants undertook to sell the household goods, furniture, and furnishings of a certain apartment house known as the Avalon Apartments, in the city of Seattle, the appellants being the owners of the chattels mentioned. The respondents found and produced a purchaser for the chattels, and entered into a contract for their sale, which contract was approved and ratified by the appellants. The purchaser was, at all times since the making of the agreement, ready, able, and willing to consummate the sale and pay the purchase price as specified in the contract. After the contract was made, the appellants failed and refused to consummate the sale, giving as a reason therefor that they would not sell because they believed they could secure a better price. The appellants had agreed to pay the respondents a commission of "3 per cent. of the sale price" of the property listed for sale. The appellants refused to pay the commission and the present action was brought for its recovery.

[2, 3] The appellants contend that the findings do not support the judgment because no sale was consummated. They construe "sale price," as used in the findings, to mean a consummated sale even though the failure to complete the sale may have been due to the fault of appellants. The general rule, as stated in 4 Ruling Case Law, p. 310, § 50, is that—

"The authorities are practically unanimous in holding that, unless the broker and his employer have expressly stipulated to the contrary, the broker is entitled to his compensation

upon the completion of the negotiations he undertook, irrespective of whether or not the contract negotiated is ever actually consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker."

The facts, as found in this case, do not show that it had been expressly stipulated that the broker was not entitled to his compensation unless the contract of sale was actually consummated. It is expressly found that the failure to consummate the contract was due to the appellants. Under the rule stated, sale price, as used in the findings, cannot be construed to mean a consummated sale. It is expressly found that the respondents found and produced a purchaser who was ready, able, and willing to pay the purchase price and fulfill the agreement, and that the appellants ratified the contract. Under such facts the respondents were entitled to their compensation. But if it be conceded that sale price be susceptible of two constructions, that meaning will be given which supports the judgment rather than one which would defeat it. *Burleigh v. Consumers Publishing Co.*, 95 Wash. 40, 163 Pac. 5.

The judgment will be affirmed.

HOLCOMB, C. J., and TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

TALBOT v. INDUSTRIAL INSURANCE COMMISSION. (No. 15118.)

(Supreme Court of Washington. Aug. 12, 1919.)

MASTER AND SERVANT §349—WORKMEN'S COMPENSATION ACT—ALLOWANCE INCREASED BY AMENDMENT—RETROACTIVE EFFECT.

Where an employé in an extrahazardous occupation was injured before the going into effect of Laws 1917, p. 78, amending the Workmen's Compensation Act (Rem. Code 1915, § 6604—5, par. "b"), by providing that in case of total permanent disability, if the workman is rendered physically helpless so as to require a constant attendant, the monthly payment (of from \$20 to \$35 a month) shall be increased \$20 per month so long as the requirement shall continue, an allowance to the workman commencing as of the date of the amendment's taking effect, and to continue so long as he should require an attendant, did not give the amendment a retroactive effect contrary to the legislative intent.

Department 2.

Appeal from Superior Court, Clallam County; John M. Ralston, Judge.

Claim by F. O. Talbot, an injured employé, for increased allowance under the Workmen's Compensation Act because of his permanent

disability, etc., against the Industrial Insurance Commission. From a judgment reversing a decision of the Commission, rejecting and disallowing the claim, the Commission appeals. Affirmed.

W. V. Tanner, D. E. Twitchell, and G. H. Bucey, all of Olympia, for appellant.

Donworth, Todd & Higgins, of Seattle, for respondent.

PARKER, J. This is an appeal by the Industrial Insurance Commission from a judgment of the superior court for Clallam county reversing a decision of the commission which rejected and disallowed the claim of F. O. Talbot, made for an increased allowance because of his permanent disability and of his being so physically helpless as to require the constant services of an attendant.

The controlling facts are not in dispute, and may be summarized as follows: On May 12, 1917, Talbot was injured while employed in an extrahazardous occupation. His case was classified by the commission as one of "permanent total disability." The commission awarded him an allowance of \$20 per month. Talbot's injuries were such that he is, and has been at all times since he was injured, not only totally disabled, in the sense that his earning power is entirely destroyed, but he has been at all times since he was injured "so physically helpless as to require the services of a constant attendant"; and this he claims entitles him to an increased allowance of \$20 per month so long as such requirement shall continue, resting his claim upon the conceded facts as to his condition and the provisions of chapter 28, Laws of 1917, amending the Workmen's Compensation Act.

On May 12, 1917, at the time Talbot was injured, the Workmen's Compensation Act as then in force (paragraph "b," § 6604—5, Rem. Code) fixed the compensation for injured workmen in cases of "permanent total disability" at a minimum of \$20 per month and a maximum of \$35 per month. The award of \$20 per month and the refusal to award an increased monthly allowance, as claimed by Talbot, was rested by the commission upon the theory that the law as existing at the time he was injured is the only law controlling the amount of monthly allowance he is entitled to. The Legislature of 1917 amended that paragraph by adding thereto the following:

"In case of total permanent disability, if the character of the injury is such as to render the workman so physically helpless as to require the services of a constant attendant, the monthly payment to such workman shall be increased twenty dollars (\$20.00) per month so long as such requirement shall continue. * * *

Laws of 1917, p. 78.

The increased award so provided in the amendment is subject to certain exceptions, which it is not necessary to here notice. This amendment went into force June 6, 1917, after Talbot had received his injuries.

Counsel for the commission, while conceding that Talbot's condition is, and has been since he was injured, such as to bring his case under the amendment of 1917, if he had been injured after the going into force of the amendment, contends that his case does not come under the amendment because of his injury occurring before the amendment went into force. The argument is, in substance, that to award him such increased allowance would be to give the amendment a retroactive effect, and that there is nothing in the amendatory act suggesting any such legislative intent. We may concede for argument's sake that to award Talbot such increased allowance for any time he was in a helpless condition prior to the going into effect of the amendment would be to give it a retroactive effect, contrary to the intent of the Legislature. The trial court, reversing the commission's refusal to award the claimed increased allowance, decided that Talbot was entitled thereto, but only from the date of the going into effect of the amendment, and directed the commission to make such allowance, commencing as of that date, and continue the same "so long as the plaintiff by reason of his said injuries shall require the services of a constant attendant." We are of the opinion that this is not the giving to the amendment a retroactive effect, contrary to the intention of the Legislature. The power of the Legislature to provide for such an increased monthly allowance in such cases is not questioned by counsel for the commission, the only question here presented being as to the legislative intent in enacting the amendment.

We conclude that the judgment of the trial court must be affirmed.

It is so ordered.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

KELLY et al. v. HINKHOUSE. (No. 15255.)
(Supreme Court of Washington. Aug. 6, 1919.)

PLEADING ~~§~~330—"ITEMS OF ACCOUNT"—
SERVICE OF COPY—DAMAGES FOR BREACH
OF CONTRACT.

Rem. & Bal. Code, § 284, requiring service of a copy of items of an account upon adverse party upon demand therefor in order to introduce evidence thereof, did not require land purchaser, pleading damages for vendor's failure to plow land and remove brush therefrom in compliance with contract, to serve vendor with an itemized statement of damages upon vendor's demand therefor, to entitle him to introduce evidence as to such damages; the words "items of account" not including items of damages for breach of land contract.

Department 1.

Appeal from Superior Court, Grant County; Sam B. Hill, Judge.

Action by D. D. Kelly and others as executors of the estate of William Kelly, deceased, against Frank F. Hinkhouse, in which defendant interposed cross-complaint. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions to grant new trial.

W. E. Southard, of Spokane, and N. W. Washington, of Ephrata, for appellant.

MAIN, J. This action was brought to recover a money judgment for the balance claimed to be due on a written contract. The defendant, in his answer, after denying certain paragraphs of the complaint, pleads affirmatively by cross-complaint for damages claimed to have been sustained because the plaintiffs did not perform the contract sued upon in certain particulars in the manner required. The plaintiffs, by reply, denied the material matters pleaded in the cross-complaint. Upon the issues thus framed the cause went to trial before the court without a jury, and resulted in a judgment in favor of the plaintiffs and a denial of the right of the defendant to recover on the cross-complaint. From this judgment the defendant and cross-complainant appeals.

The facts out of which the litigation grew are these: The respondents had purchased from the state on a contract a one-half section of land in Douglas county. Upon this contract certain payments had been made. On the 17th day of February, 1909, the respondents, by written contract, transferred and sold to the appellant all their rights under the contract with the state. The appellant, by the terms of the contract, was to have immediate possession. By the contract of sale to the appellant the terms of payment were fixed. It was also provided that the respondents would plow 160 acres of the land on or before June 1, 1909, for which they were

to receive \$1.50 per acre. By another term of the contract the respondents agreed to remove the brush from the land not later than May 10, 1909. After the respondents had removed the brush and plowed the land, the appellant refused to make the payment provided for in the contract when such work should be done, claiming that the brush had not been properly removed, and that the plowing was not done properly or within the time specified in the contract. As above indicated, the respondents brought the action to recover the balance due, claiming full performance. The appellant, in his cross-complaint, pleaded that the respondents had failed and refused to take the brush off the land as required by the contract, and that they failed to plow the 160 acres within the time agreed upon. For these breaches of the contract damage was claimed, on account of the failure to remove the brush, in the sum of \$450, and for failure to plow within the time agreed upon and in the manner provided by the contract, in the sum of \$500.

Some time before the cause was tried the respondents served upon the appellant or his attorney a demand for a bill of particulars for the items of damage claimed in the cross-complaint. This demand was not complied with. When the appellant offered evidence in support of the damages alleged in his cross-complaint it was objected to because the demand for a bill of particulars had not been complied with. The evidence was admitted by the court, reserving a ruling. In deciding the case the trial court was of the opinion that the evidence was improperly admitted because no bill of particulars had been furnished. Whether this ruling was correct depends upon the construction to be placed on section 284, Rem. & Bal. Code, which provides:

"It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged, but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. * * *"

It will be noticed that under this statute it is not necessary for a party to set forth in his pleading a copy of the instrument in writing, "or the items of account therein alleged." It is further provided that if a demand in writing be delivered to the adverse party, for a copy of the writing or items of account as the case may be, and the same be not complied with within ten days after the demand, that then the party failing to comply with

such demand shall be precluded from giving evidence thereof.

The controlling question here is whether the respondents were entitled, under this statute, to an itemized statement of damages claimed by the appellant in his cross-complaint. The statute refers to "items of an account." The appellant, by his cross-complaint, does not seek to recover items of account. His action is for damages for breach of a contract. As we read the statute, damages for which recovery is sought by the cross-complaint are not included within its terms. Damages claimed for failure to brush and plow land, as required by the contract, are not items of account. It must be remembered that this is not a case where a motion was made, asking that the court require the adverse party to furnish a bill of particulars.

The court was in error in refusing to consider the evidence offered in support of the cross-complaint. The respondents have made no appearance in this court, evidently realizing, upon further consideration, that the trial court was in error in holding that the damages pleaded in this case were such as came within the term "items of account" in the statute.

The judgment will be reversed, and the cause remanded, with directions to the superior court to grant a new trial.

HOLCOMB, C. J., and TOLMAN, MACK-INTOSH, and MITCHELL, JJ., concur.

KENT v. WALLA WALLA VALLEY RY. CO. (No. 15180.)

(Supreme Court of Washington. Aug. 15, 1919.)

1. RAILROADS \S 350(7)—CROSSINGS—WARNINGS—QUESTIONS FOR JURY.

Where there was positive testimony that a whistle was sounded for the crossing at which plaintiff's automobile was struck by an interurban car and the negative testimony, to the effect that the witnesses heard no approaching signal, but did hear a "little toot" when the motorman first saw the automobile, the question of negligence was for the jury.

2. NEGLIGENCE \S 136(8) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR THE JURY.

Contributory negligence is a question for the jury, though the facts are not in dispute, if different minds may honestly draw different conclusions from them.

3. RAILROADS \S 350(22) — ACCIDENTS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether the driver of an automobile, struck at an interurban railway crossing, was guilty of contributory negligence in proceeding from behind a small service station to cross the track without stopping held for the jury.

Department 1.

Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Frank J. Kent against the Walla Walla Valley Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John A. Laing, of Portland, Or., and Sharpstein, Smith & Sharpstein, and John H. Pedigo, all of Walla Walla, for appellant.

E. L. Casey, of Walla Walla, for respondent.

MAIN, J. The purpose of this action was to recover damages for personal injuries and damages to an automobile, claimed to be due to negligence chargeable to the defendant. In the answer it was affirmatively pleaded that the damages claimed were caused by the contributory negligence of the plaintiff. The cause, in due time, came on for trial before the court and a jury. At the conclusion of all the evidence the defendant moved for a directed verdict. This motion was denied, and the cause was submitted to the jury, and a verdict rendered in favor of the plaintiff in the sum of \$804.33. After the verdict was rendered the defendant moved for a judgment notwithstanding the verdict, which motion was overruled, and judgment was entered on the verdict. It is from this judgment that the appeal is prosecuted.

The facts which are either not in dispute or which the jury had a right to find from the evidence may be summarized as follows: The appellant operates an electric interurban railway running from the city of Walla Walla, this state, to Milton in the state of Oregon. The respondent lived on a ranch a few miles out of the city of Walla Walla. The damages for which recovery is sought are the result of a collision which occurred at the intersection of what is referred to as Finch avenue road, which extends north and south, and Wallula avenue road, running east and west. For some distance to the north of this intersection and also to the south, the track of the interurban is along the east side of Finch avenue road. Approximately 6 feet from the west rail of the track on the north side of the intersection, and bordering thereon, is what is referred to as a small depot or shelter station. This is a building approximately 12 feet long, 10 feet high, and 8 feet wide, the long way of which extends north and south. The respondent lived 600 or 700 feet south of the intersection. On the morning of the day the accident occurred he left his home in his automobile, proceeding up the Finch avenue road, which parallels the interurban track, and turned to cross the track at the intersection, when the front end of the automobile was struck by an interurban car approaching from the north.

The respondent testified that as he approached the intersection he looked in both directions and listened for the approach of a car. As he entered the intersection he swung to the left, so as to get a view back of the service station, to the north, to see if a car was approaching. Seeing none, he pulled upon the macadam in the center of Wallula avenue roadway, looking again to the south and to the north. He then saw a car approaching from the north, and within about 50 feet of the center of Wallula avenue roadway. The speed of the automobile was approximately 10 miles per hour at the time, and he made every effort to stop it before reaching the railway tracks.

The motorman upon the car testified that as he passed the service station he observed the respondent for the first time, and his distance from the approaching car was approximately 30 or 40 feet. The service station was an obstruction which prevented the respondent from seeing the approaching interurban car, and also prevented the motorman from seeing the approaching automobile.

In the complaint a number of grounds of negligence were alleged, one of which was failure to blow the whistle as the automobile approached the crossing and station. For the purpose of this decision it will be assumed that none of the other grounds of negligence were sustained.

[1] No motion for a new trial was made and the appellant relies for reversal upon two points: First, that the positive evidence of witnesses, who testified that the whistle was sounded for the crossing, overcomes the negative testimony of other witnesses, to the effect that they heard no approaching signal given. In support of this position the appellant cites the case of *Holland v. Northern Pacific Ry. Co.*, 55 Wash. 266, 104 Pac. 252, but that case is not controlling. There, on the day of the accident, the condition of the elements was such that it was said that the parties testifying that they did not hear the whistle could not have heard it if one had been sounded. Here there is evidence that just prior to the collision, and apparently when the motorman first saw the automobile, a "little toot" of the whistle was given. In addition to this the parties testifying were so situated that they could have heard the signal for the crossing, which was one long and two short whistles, had it been given. The witnesses or some of them, who testified that the signal was not given for the crossing, heard a short whistle just prior to the collision. If they heard this, as they claim, there is no reason why they could not have heard the crossing signal, had it been given. Even though the positive testimony that the signals were given may seem the more credible, we cannot say that the evidence that the signal was not given is overcome. The

question of negligence was properly submitted to the jury.

[2, 3] The second point is that the respondent was guilty of contributory negligence as a matter of law because he failed to stop before attempting to cross the railway tracks. He testified that he both looked and listened, and that he neither saw nor heard the approaching car. Had he stopped, his view would still have been blanketed by the service station. He testified that he was driving a practically new automobile, and that the engine made very little noise. Upon this question the appellant cites the cases of *McKinney v. Port Townsend & P. S. Ry. Co.*, 91 Wash. 387, 158 Pac. 107; *Herrett v. Puget Sound T., L. & P. Co.*, 103 Wash. 101, 173 Pac. 1024; *McEvilla v. Puget Sound Tr., L. & P. Co.*, 95 Wash. 657, 164 Pac. 193; *Aldredge v. Oregon-Washington R. & Nav. Co.*, 79 Wash. 349, 140 Pac. 550; *Bowden v. Walla Walla Valley R. Co.*, 79 Wash. 184, 140 Pac. 549.

In each of those cases the driver of the vehicle, as he approached the crossing, and when the obstructions no longer blanketed his view, could have seen the approaching train or car in ample time to have stopped, had he looked. In this case the motorman did not see the approaching automobile until he was within approximately 40 feet of where the collision occurred. The respondent testified that he saw the car approximately 50 feet distant from the place of the collision. From this evidence it is apparent that as the respondent approached the crossing, and when he reached the place where his view would not be obstructed by the service station, he was so close to the track as to be unable to stop in time to avoid the collision.

Before it could be held that the respondent was guilty of contributory negligence as a matter of law, it would be necessary to find that a reasonably prudent man in the situation in which he was would not have proceeded to cross the track. Even where the facts are not in dispute, if different minds may honestly draw different conclusions from them, the case is one for the jury. *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287, 57 Pac. 820; *Averbuch v. Great Northern Ry. Co.*, 55 Wash. 633, 104 Pac. 1103.

In this case we cannot hold as a matter of law that a reasonably prudent man, in the situation in which the respondent was, would have stopped before attempting to pass over the crossing. In *Pendroy v. Great Northern Ry. Co.*, 17 N. D. 433, 117 N. W. 531, under facts quite similar to those of the present case, it was held that the question of contributory negligence was for the jury.

The judgment will be affirmed.

HOLCOMB, C. J., and TOLMAN, MITCHELL, and MACKINTOSH, JJ., concur.

BROWN v. BAKER et al. (No. 15264.)

(Supreme Court of Washington. Aug. 7, 1919.)

1. PUBLIC LANDS §35(5)—HOMESTEAD ENTRY—RIGHTS OF CONTESTANT.

The only vested right acquired by one who successfully contests homestead entry is the preference right for 30 days, under Act Cong. May 14, 1880, § 2 (U. S. Comp. St. § 4537), to enter upon the lands, no vested interest in the land itself having been acquired, and the government having the right between date of contest and contestant's entry upon land to change the rules relating to acquisition of the land.

2. PUBLIC LANDS §35(5)—FILING OF APPLICATION—RIGHTS OF APPLICANT.

Filing of application to purchase land creates no vested right in the land, and does not affect the right of the government to change the land rules or to entirely withdraw the land from sale.

3. PUBLIC LANDS §38—CONSTRUCTION OF STATUTE—"MINIMUM PRICE."

Timber and Stone Act, § 1 (U. S. Comp. St. § 4671), authorizing sale of surveyed public lands valuable chiefly for timber, "at the minimum price of \$2.50 per acre," did not preclude land office from fixing a greater price; the words "minimum price" meaning the lowest price, and not a fixed price.

Department 2.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by Robert Bruce Brown against Eugene G. Baker and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

R. B. Brown and Peters & Powell, all of Seattle, for appellant.

Thomas A. Stiger and John D. Dally, both of Everett, for respondents.

MOUNT, J. This action was brought to obtain a decree adjudging the title to certain real estate patented by the United States to defendants, to be held by them in trust for the benefit of plaintiff. The trial court sustained a general demurrer to the complaint, and dismissed the action. Plaintiff elected to stand upon the allegations of the complaint, and the action was dismissed. Plaintiff has appealed.

The complaint alleges the following facts: That on the 8th day of November, 1905, the real estate in controversy was public surveyed lands subject to entry at the Seattle land office; that on November 17, 1905, one Otto J. Larson entered upon said lands under the United States homestead laws at said time, filed an affidavit of prior settlement, which under the rules of the department gave him a preference right dating back to July 14, 1905; that on October 24, 1906, Larson made final proof, and commuted his

homestead entry to a cash entry; that on July 31, 1907, the appellant contested the homestead entry of Larson, and upon a hearing of this contest the register and receiver rendered their decision in said contest case in favor of the appellant; that Larson appealed from that decision to the General Land Office, thence to the Secretary of the Interior, resulting in each instance in an affirmance of the decision of the local land office; that Larson's entry was finally canceled, and appellant was given 30 days from the date of notice thereof in which to exercise his preference right to file his entry upon the land; that on February 25, 1910, within 30 days from the date of the cancellation of the Larson homestead entry, appellant made application to enter said lands under the Timber and Stone Act of June 3, 1878, c. 151, 20 Stat. 89, it having been shown and the department having found that the lands in question were chiefly valuable for timber; that this application was made upon the blanks and in the manner prescribed by the General Land Office, which had been in use since the act of 1878 had become effective up to November 30, 1908, at which last-named date a new form of application prescribed by the Secretary of the Interior and new regulations had gone into effect, which regulations, among other things, required the applicant to file an affidavit of the value of the lands sought to be entered, and also the value of the timber thereon, and further provided for the appraisal of said lands and the timber thereon by an appraiser sent out for that purpose, and also provided that after that date no sale should be made under said act except as provided in such regulations; that, the register and receiver of the local land office being divided in opinion as to the right of the appellant to file his application in the manner prescribed prior to November 30, 1908, the application was sent to the General Land Office, and thence to the Secretary of the Interior, and resulted in a decision that the appellant was controlled by the new regulations, and must pay the appraised value placed upon said lands and timber; that thereafter the lands were appraised at the sum of \$4,225, and subsequently reappraised at \$4,022.50, which appellant refused to pay, but offered to pay \$2.50 per acre, as all persons had paid before, appellant claiming this was the only price at which timber land could be sold under said act; that while appellant was contesting these various questions before the department the respondent Eugene G. Baker and wife moved upon the land in question, with full knowledge of all the facts and of appellant's rights therein; and that on November 17, 1917, patent was made and issued to said Eugene G. Baker under the United States homestead act, and he is still holding the lands under said patent.

The prayer of the complaint is that respondents may be adjudged to hold the patent to these lands as trustees for appellant, and that respondents be required to convey said lands to appellant upon the payment of the sum of \$400.

Appellant concedes upon this appeal that he may not litigate matters of fact which have been passed upon by the General Land Office, but argues that errors of law committed by the Land Office may now be litigated in this action. We may concede these positions for the purpose of this case. Appellant then argues that he initiated his right on July 31, 1907, when he instituted the contest in the United States land office at Seattle against the entry of O. J. Larson; that his contest successfully ripened into a vested right, beginning at that date; and that the Land Department could not thereafter make any change in the rules relating either to the price to be paid or to the construction which had previously been placed upon the Timber and Stone Act. Act Cong. May 14, 1880, § 2, c. 89; 21 Stats. at Large, 141 (U. S. Comp. St. § 4537), "An act for the relief of settlers on public lands." 8 Fed. Stat. Ann. (2d Ed.) p. 598, provides:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands. * * *

[1] We think it is apparent that the only vested right which the appellant had upon the cancellation of the entry of Larson upon the lands was the preference right for 30 days to enter upon the lands. He acquired no vested interest in the land itself. We are also satisfied that the General Land Office might, between the date of the contest and the date of the entry filed by the appellant, legally change the rules relating to the manner of acquisition of government lands. It appears from the complaint that prior to the contest above referred to the Land Department had been selling these lands at the minimum price of \$2.50 per acre, and that between the time of the contest and the time of the entry by appellant the Land Department of the government changed this rule so that lands entered upon under the Stone and Timber Act should be appraised and should be sold at the appraised value rather than at the former price of \$2.50 per acre. In *United States v. Braddock* (C. C.) 50 Fed. 669, the court said, at page 672:

"It is perfectly clear that the mere filing of the application to purchase under this act confers upon the applicant no right as against the United States, and that, until the applicant has acquired a vested right in the land, it is within the power of the government to withdraw it

from sale or make any other disposition of it. The filing of an application to purchase may initiate a right to purchase as against a subsequent applicant for the same privilege, but to say that the initiation of such a right imposes an obligation on the government to convey the title is to confound the manifest distinction pointed out by the Supreme Court in the *Yosemite Valley Case*, 15 Wall. 77 [21 L. Ed. 82], between the acquisition of a legal right to the land as against the owner, the United States, and the acquisition of a legal right as against other parties to be preferred in its purchase. 'It seems to us little less than absurd,' said the court in the case cited, 'to say that a settler or any other person, by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.' " The *Yosemite Valley Case* [*Hutchings v. Low*], 82 U. S. (15 Wall.) 77, 21 L. Ed. 82.

[2] What is there said, we think, settles the question that a mere filing creates no vested right in the land. The right of the government to change the rule or to entirely withdraw the land from sale was not affected by appellant's right to file at some later date.

Appellant also argues that the General Land Office had no authority to fix a greater price than \$2.50 per acre upon this tract of land. Section 1 of the Timber and Stone Act (U. S. Comp. St. § 4671 [9 Fed. Stat. Ann. (2d Ed.) p. 606]) provides as follows:

"That surveyed public lands of the United States within the public land states, * * * valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre. * * *

[3] Appellant contends that this section fixed the price of \$2.50 per acre, and that the General Land Office was without authority to change that price, and that when he tendered that price to the Land Department that department was bound to accept it, and the refusal was error of law which may now be corrected by the court. We think it is plain that this section fixes only the minimum price at which the land may be sold. The clear inference is that the General Land Office may fix a greater price. This was done, and at the time the appellant filed upon the land he was required to file under the rules and regulations then promulgated by the General Land Office. The words "minimum price," used in this section, mean the lowest price, and not a fixed price of \$2.50 per acre. To hold otherwise would be to say that the words "minimum price" were superfluous and meant nothing. We are of the opinion, therefore, that the General Land Office or the Sec-

retary of the Interior committed no error in law when a provision was made for the appraisal of such lands, and that the lands should be sold at the appraised value, and not at the minimum price.

From these considerations we are led to the conclusion that the trial court properly sustained the demurrer, and the judgment is therefore affirmed.

HOLCOMB, C. J., and BRIDGES and PARKER, JJ., concur.

FULLERTON, J., concurs in the result.

SWANSON v. STUBB et al. (No. 15272.)

(Supreme Court of Washington. Aug. 8, 1919.)

1. APPEAL AND ERROR ¶654—ABSTRACT OF RECORD—STATEMENT OF FACTS—FAILURE TO COMPLY WITH STATUTES—RELIEF.

Appellant, to secure relief under Rem. Code 1915, § 1730—8, from failure to serve abstract of record and statement of facts in compliance with sections 389, 393, must make an application to Supreme Court for leave to supply record, accompanying his application with the showing of excuse, and must obtain an order from Supreme Court, granting him leave to so do, which order may be made with or without terms.

2. LANDLORD AND TENANT ¶291(14)—UNLAWFUL DETAINER—DOUBLE DAMAGES.

Landlord is entitled to double damages in unlawful detainer action, under Rem. Code 1915, § 827, although verdict of the jury for landlord is not founded on nonpayment of rent.

Department 2.

Appeal from Superior Court, King County; Clay Allen, Judge.

Action by Hedwig Swanson against O. A. Stubb and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Flick & Paul, of Seattle, for appellants.

Leopold M. Stern, of Seattle, for respondent.

FULLERTON, J. This is an appeal from a judgment in an action for unlawful detainer, founded on the verdict of a jury finding in favor of the plaintiff and assessing her damages in the sum of \$300. The judgment was for twice the amount found to be due by the jury.

The respondent moved to strike the statement of facts for the reasons: (1) That the proposed statement was not served upon the respondent; (2) that no written notice of the

filing of the proposed statement was served on the respondent; and (3) that the statement of facts was settled and certified by the trial judge in the absence of the respondent, without previous notice of the filing thereof, and without previous notice of the application to settle and certify the statement, and after the appellants' brief and abstract of record on appeal had been served.

The facts upon which the motion is based are, in substance, these: Judgment in the cause was entered on November 20, 1918. The notice of appeal was served and the bond on appeal was filed December 7, 1918. On January 17, 1919, the appellants applied for and obtained an extension of time in which to file and serve a statement of facts, the time being extended to January 28, 1919. The statement of facts was filed on January 27, 1919. No service of the statement was made upon the respondent, nor was she served with notice of the filing thereof. On March 25, 1919, and without notice to the respondent, the statement was certified by the trial judge. On the next day a copy of the statement was left at the office of the respondent's attorney, and two days later the original statement was filed in this court.

On March 28, 1919, the respondent moved in this court to strike the statement of facts and dismiss the appeal. On the application of the appellants to supplement the record the motion was denied, with leave to the respondent to renew it at the hearing on the merits. After the denial of the motion the appellants served upon the respondent a notice to the effect that they would apply to the trial court on a day named for a "recertification and resettlement" of the statement of facts, at which time the respondent would be at liberty to present any amendments thereto that she might desire. The court at the hearing refused to make a further certificate, deeming itself without power unless directed so to do by this court. At the hearing upon the merits the respondent renewed her motion to strike the statement.

As the statute relating to the filing and service of proposed statements of facts (Rem. Code, §§ 389, 393) stood prior to the amendatory statute of 1915 (Id. § 1730—8), unquestionably the motion is well taken. That statute required that the proposed statement must be filed with the clerk and served on the adverse party within 30 days after the time begins to run in which an appeal may be taken, with the proviso that the time of filing and service might be extended before or after its expiration by the trial court on stipulation of the parties, or for good cause shown, but not for more than 60 days additional in all. Here, as will appear from the dates before given, the statement was filed within the additional period allowed by the statute, but was not served on the respondent.

ent, who in this instance is the adverse party, until long after the expiration of such period. This, as we have repeatedly held, is fatal to its consideration.

The remaining question is whether the omission has been cured in virtue of the amendatory statute by the subsequent proceedings. That statute reads as follows:

"Sec. 1730—8. In case of a failure of the appellant to serve an abstract of record and statement of facts, or the one served is insufficient, the Supreme Court shall, if such failure is found to be excusable, allow the appellant a reasonable time, upon such terms as the court may impose, in which to supply such abstract of record and statement of facts."

[1] It is plain, we think, that before relief can be had under this statute from a failure to comply with the original statutes, the delinquent appellant must make an application to this court for leave to supply the record, accompanying his application with a showing of excuse, and obtain an order from this court granting him leave so to do, which order may be made with or without terms. The appellant cannot, after time and without leave of this court, supply the record, and then claim relief under the statute. Such a procedure would deny the respondent the benefit of the statute; he would be denied the right to question the sufficiency of the excuse offered, or the benefit of terms, could he show that he was entitled to terms. There was here no compliance or pretense of compliance with these conditions. There was neither an application to this court for leave to supply the defects in the record, nor was there an order of this court granting leave so to do. It follows that the statement of facts must be stricken.

[2] The errors assigned with one exception are based upon matters shown in the statement of facts. Since we conclude that the statement is not before us, these, of course, cannot be considered. The exception noted is the contention that the court erred in entering judgment for twice the amount of the damages returned by the jury. It is argued that the statute (Rem. Code, § 827) permits such doubling only in cases where the verdict of the jury is founded on nonpayment of rent. But the question does not require discussion. It was met and determined by this court contrary to this contention in the case of *Hinckley v. Casey*, 45 Wash. 430, 88 Pac. 753.

The judgment is affirmed.

HOLCOMB, C. J., and PARKER and MOUNT, JJ., concur.

SWAFFORD v. CARNATION LUMBER & SHINGLE CO. et al. (No. 15365.)

(Supreme Court of Washington. Aug. 20, 1919.)

APPEAL AND ERROR ⇐1005(3)—REVIEW—QUESTIONS OF FACT.

In an action for services under a contract of hiring, where the evidence on the points was in direct conflict, the questions whether plaintiff was hired at all, and whether he was bound by the receipt which he admitted he had signed, were of fact, and verdict approved by the trial judge will not be disturbed.

Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by L. B. Swafford against the Carnation Lumber & Shingle Company and others. From judgment for plaintiff, defendants appeal. Affirmed.

See, also, 181 Pac. 682.

Edgar C. Snyder, of Seattle, for appellants.
Flick & Paul, of Seattle, for respondent.

MOUNT, J. This action was brought to recover \$1,923 alleged to be due for services rendered to the defendants under a contract of hiring. The defendants for answer to the complaint denied the alleged contract, and claimed that the services were performed under a joint venture; that the plaintiff had been paid in full and had signed a receipt acknowledging satisfaction. The plaintiff for reply denied having executed such receipt, alleging that, if he signed such receipt, the signature was procured by fraud. On these issues the case was tried to the court and a jury, and resulted in a verdict for the plaintiff for the full amount claimed. After verdict defendants moved the court for a new trial. This motion was denied, and judgment was entered upon the verdict. The defendants have appealed.

They make but one assignment of error, to the effect that the trial court erred in denying the motion for a new trial. They argue that the respondent was not hired, and that he was bound by the receipt which he admitted he had signed. The evidence upon these questions is in direct conflict. They were both submitted to the jury upon instructions which were not excepted to and which are not claimed to be erroneous. Both questions were clearly questions for the jury under the evidence and were resolved in favor of the respondent. The trial court did not abuse its discretion in refusing a new trial.

Judgment affirmed.

HOLCOMB, C. J., and FULLERTON, PARKER, and BRIDGES, JJ., concur.

In re MASTERSON'S ESTATE.
McMANIS v. LLOYD.
(No. 15197.)

(Supreme Court of Washington. Aug. 20, 1919.)

1. ADOPTION ⇐21—INHERITANCE.

Under Rem. & Bal. Code, §§ 1341, 1699, an adopted sister is entitled to inherit along with the natural brothers and sisters of one dying without issue, husband, wife, father, or mother.

2. EXECUTORS AND ADMINISTRATORS ⇐221(2)
—CLAIMS AGAINST ESTATE — BURDEN OF
PROOF—EXTRA SERVICES.

One who seeks to establish a claim against an estate for extra services rendered deceased, where regular payments for services have been received under an original contract, has the burden of showing by the clearest and most convincing evidence that there was an agreement for such extra services, either express or implied.

3. EXECUTORS AND ADMINISTRATORS ⇐221(5)
—CLAIMS AGAINST ESTATE—EVIDENCE—EX-
TRA SERVICES.

In an action against an estate to recover compensation for nursing deceased by one who had, under an original contract, been receiving regular payments for furnishing room and board, evidence held to show that there was an understanding that plaintiff was to receive extra compensation for the nursing.

Department 1.

Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

In the matter of the estate of John Masterson, deceased. From an order of distribution, Emma J. McManis appeals. Affirmed.

Evans & Watson, of Walla Walla, for appellant.

John C. Hurspool, of Walla Walla, for respondent.

MAIN, J. This appeal presents for review the order of the superior court distributing the estate of John Masterson, deceased, and allowing a claim against the estate. The deceased left surviving him, as heirs at law, Emma J. McManis, a sister, Andrew A. Smith, a nephew, being the son of a deceased sister, and Gertrude Lloyd, a sister by adoption. For approximately 14 months prior to his death John Masterson roomed and boarded in the home of his sister, Emma J. McManis, and during this time A. K. Rice was his duly appointed, qualified, and acting guardian. At the time he began to room and board with his sister the deceased was a bachelor approximately 40 years of age. For his board and room the sister was to receive \$20 per month. This was paid at the end of each month by the guardian and was receipted for by the daughter of Mrs. McManis. After a few

months the amount paid was increased to \$30 per month, and subsequently to \$40. The evidence shows that all the money received was expended for the use and benefit of the deceased. The claim presented and which was allowed by the court was by Mrs. McManis for nursing her brother during the 14 months mentioned; it being her contention that she was to be paid for the nursing in addition to his room and board. During all of this time he was in a deplorable condition, both physically and mentally.

The order of distribution entered in the cause, from which the appeal is taken, distributed a portion of the estate to Gertrude Lloyd, the sister by adoption, as though she were a natural sister, and allowed the claim for nursing. The questions here for review are: First, whether the sister by adoption had a right to a portion of the estate; and, second, whether the court properly allowed the claim for nursing.

[1] Gertrude Lloyd was the adopted daughter of Sima Masterson, now deceased. John Masterson was the natural son of Sima Masterson. Emma J. McManis was a natural daughter, and Andrew A. Smith was the son of a natural daughter. Under these facts is Gertrude Lloyd, a sister by adoption, entitled to an heir's portion of the estate of John Masterson, deceased? Whether she has the right to so inherit depends upon the construction to be given to the adoption statute. Rem. & Bal. Code, § 1699, provides what shall be the effect of adoption as follows:

"By such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock: Provided, that on the decease of parents who have adopted a child or children under this chapter, and the subsequent decease of such child or children without issue, the property of such adopting parents shall descend to their next of kin, and not to the next of kin of such adopted child or children."

By this statute the natural parents are divested of all legal rights and obligations in respect to the adopted child, and the child is free from all legal obligations of obedience and maintenance of its natural parents. It is expressly provided that such adopted child shall be, to all intents and purposes, the child and legal heir of the adopters and entitled to all the rights and privileges and subject to all the obligations of a child of the adopters begotten in lawful wedlock. The language of the statute is broad and comprehensive.

One of the rights or privileges of a natural child is to inherit from a brother or sister, the natural son or daughter of the same parents. If the adopted child does not have the same right, then it is denied a right or privilege which the natural child has. The statute says that such adopted child shall be entitled to all the rights and privileges as though it were begotten in lawful wedlock, and to all intents and purposes shall be the child and legal heir of its adopter. To hold that the adopted child cannot take an heir's portion of the estate of the natural son of the adopting parents would require a strict and narrow construction of the statute. The authorities are not in harmony as to whether such statutes are to be construed strictly or with a tendency to liberality in order that the primary purpose of such statutes, which is to promote the welfare of unfortunate children, may be carried into effect. Many of the cases adhere to a strict construction, but the prevailing tendency of the more modern authorities is in the direction of a liberal construction. *Batcheller-Durkee v. Batcheller*, 39 R. I. 45, 97 Atl. 378, L. R. A. 1916E, 545.

While the question involved in *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530, was not the same as here presented, the court's view of the statute there expressed would indicate that the adoption statute was not to be given a strict construction. The statute of descent (section 1341, subd. 3) provides that—

"If there be no issue, nor husband nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent. * * *

If the adopted daughter is not permitted to inherit, it would require a holding that under this statute she was not to be considered a sister of John Masterson; in other words, that the natural child and the adopted child of the same parents are not to be considered brothers or sisters. This would be giving a meaning to the words brothers and sisters, as used in the statute, other than what those words are commonly understood to have. We think the trial court properly held that Gertrude Lloyd, the sister by adoption, had a right to inherit as though she were the natural child of her adopted parents.

Many cases from other jurisdictions have been called to our attention. Adoption statutes have been enacted in a large number of the states. Practically all of these statutes are materially different from the statute of this state. In some of them there is express language which would indicate that it was the intention of the Legislature that an adopted child should not inherit as though it were a natural child, except from its adopted parents. In others the language

used is much less comprehensive than is that embodied in the statute of this state. It is unnecessary to review the decisions construing these statutes, because each decision is rendered having in mind the language of the statute which was then before the court for construction. There is, however, one statute, that of the state of Ohio, which is substantially the same as our statute and in almost the identical language. The Supreme Court of that state, in *Phillips, Executor, v. McConica, Guardian*, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753, in construing the statute, expressed a view different from that above indicated. But that court held that the statute must be "strictly construed." Since we have declined to adopt the rule of strict construction, the Ohio case cannot be regarded as persuasive authority.

[2] The other branch of this case, that of the claim, presents largely a question of fact. It will be admitted that the rule is that, when one seeks to establish a claim against an estate for extra services rendered the deceased during his lifetime, where regular payment for services was received under the original contract, the burden of showing an agreement for such extra services, either express or implied, is on the one asserting the claim, and that, where payments have been made on the original contract at regular and stated periods, it is the presumption that such payments were received as full compensation for the services rendered. The evidence in support of the claim for extra compensation must be of the clearest and most convincing character. *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916.

[3] In this case the evidence meets the requirements of the rule stated. It shows that no part of the sums paid prior to the death of John Masterson were for the nursing upon which the claim in controversy is based. The money received was for room and board and for other articles for the use and benefit of the deceased. In addition to the other testimony A. K. Rice, who had been the guardian of the person and estate of John Masterson and who appears to be a disinterested and credible witness, expressly testified that no payment had been made Mrs. McManis for nursing, and that there was to be a charge for that service later. The record presents no reason for disturbing the holding of the trial court upon the allowance of the claim. The decision of this question is not to be construed as encouraging the withholding of questionable claims until after the death of the party claimed to be indebted and then presenting them against the estate. It would undoubtedly have been better practice in this case to have presented to the guardian from time to time a claim for nursing so that it could be allowed and paid in due course. As above indicated, since the evidence clearly and con-

vinch.) establishes a just claim for nursing, based upon an understanding with the guardian, its allowance by the trial court is approved.

The judgment will be affirmed.

HOLCOMB, C. J., and MITCHELL, TOLMAN, and MACKINTOSH, JJ., concur.

ARCHIBALD v. NORTHERN PAC. R. CO.
et al. (No. 15256.)

(Supreme Court of Washington. Aug. 6, 1919.)

1. MASTER AND SERVANT \Leftrightarrow 264(10) — EMPLOYER'S LIABILITY—VARIANCE.

Where a complaint pleaded a cause of action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and proof showed that plaintiff was not engaged in interstate commerce, but established a case under Laws 1917, p. 96, § 19, making the provisions of the federal act applicable to certain accidents in intrastate commerce, there was no variance or failure of proof requiring dismissal of the complaint.

2. MASTER AND SERVANT \Leftrightarrow 288(16½) — ASSUMPTION OF RISK—JURY QUESTION.

Evidence that plaintiff machinist helper uncovered his eyes and was struck by flying particles of steel, while shifting his position as instructed by the machinist, who resumed his work of chiseling before plaintiff could protect himself, *held* to make a jury question whether plaintiff assumed the risk.

3. MASTER AND SERVANT \Leftrightarrow 287(4) — NEGLIGENCE OF FELLOW SERVANT—JURY QUESTION.

Evidence that plaintiff machinist helper uncovered his eyes and was struck by flying particles of steel, while shifting his position as instructed by the machinist, who resumed his work of chiseling before plaintiff could protect himself, *held* to make the machinist's negligence a jury question.

4. STATUTES \Leftrightarrow 117(2)—TITLE—SUFFICIENCY—INJURY TO SERVANTS.

Laws 1917, p. 76, entitled "An act relating to the compensation * * * of injured workmen," etc., and providing in section 19 that the liabilities and defenses prescribed by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) should apply to certain workmen injured in intrastate commerce, does not violate Const. art. 2, § 19, requiring bills to embrace only one subject to be expressed in the title.

5. CONSTITUTIONAL LAW \Leftrightarrow 245—EQUAL PROTECTION OF LAWS—EMPLOYER'S LIABILITY.

Laws 1917, p. 96, § 19, making the provisions of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) applicable to railroads engaged in both interstate and intrastate commerce, does not deny equal protection of the laws in violation of Fourteenth Amend-

ment to the federal Constitution, in that it discriminates against employes of purely intrastate carriers.

Department 1.

Appeal from Superior Court, Spokane County; D. H. Carey, Judge.

Action by M. D. Archibald against the Northern Pacific Railroad Company and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Plummer & Lavin, of Spokane, for appellant.

Cannon & Ferris and F. J. McKevitt, all of Spokane, for respondents.

MACKINTOSH, J. For a period of 16 months the appellant had been employed in the repair shop of the respondent as a machinist's helper, and while so employed, one afternoon about 4 o'clock, he was assisting one Johnston, a machinist, in shaping a forging to be fitted upon an engine frame. In order to properly perform this work, Johnston was chiseling the forging, having marked it where it was to be chipped, and having set it in a vise. The tools used were the ordinary cold chisel and hammer. While Johnston was chiseling, the appellant was standing at Johnston's right, holding a torch in his right hand to enable Johnston to see the work he was engaged upon. At the time this particular work had been commenced, Johnston had warned the appellant of the danger to his eyes from flying particles of steel, and had told him to keep his eyes covered with one hand while holding the torch with the other. The appellant had heeded this warning by keeping the gloved left hand over his eyes. When the work had progressed for 15 or 20 minutes, and had arrived at a point where the forging was to be chipped back, it became necessary for Johnston and the appellant to change places. Johnston ordered the appellant to shift his position so as to pass to Johnston's left side, and while getting into this position he changed, or was in the act of changing, the torch to his left hand, and Johnston, in the meantime, having recommenced his work from his new position, in striking the chisel caused a flying piece of steel to become lodged in the appellant's eye; this being the injury for which the action was commenced.

The allegations of negligence state that Johnston, without warning to the appellant and while he was changing his position as he had been directed to, and changing the torch as it became necessary by reason of the changed position, carelessly struck the chisel before the appellant had an opportunity to change the torch and thus free his right hand so that it might be used in protecting his eyes. A nonsuit having been

granted, appellant is here and presents four questions for decision.

[1] 1. The complaint pleads a cause of action under the federal Employers' Liability Act (Act Cong. April 22, 1903, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]), and contains no statement under separate and distinct counts under the state law. By the enactment of the Legislature of 1917, contained in chapter 28, § 19, the appellant and respondent have the same rights and are under the same liabilities and are subject to the same rules of evidence and the same defenses, whether the action be prosecuted under the federal Employers' Liability Act or the state law; that is, the state law has established the same rules of evidence and procedure for actions against carriers engaged in both interstate and intrastate commerce as is provided by the federal Employers' Liability Act in the case of interstate carriers. The complaint in this case made allegations that at the time of the injury the respondent was engaged in interstate commerce, but the proof failed to establish this fact, and the appellant now tacitly admits that he did not bring himself within the provisions of the federal Employers' Liability Act. The respondent's claim is that the appellant, having elected to sue under the federal act, was not entitled to have his case go to the jury when he failed to prove that he came within the operation of that act, although the testimony established a cause of action under the state laws. The complaint was drawn broadly enough to entitle the plaintiff to relief under the federal Employers' Liability Act, and by its terms it was drawn under that act; there being no separate cause of action alleged under the state act. There is no question of the respondent having lost any right it may have had to move the case to the federal court for trial. All the proof introduced was equally material and proper to establish a cause of action under either the federal or the state law, and under both laws the respondent was entitled to and limited to the same defenses. The appellant failed to satisfactorily prove that he was such employé as was protected by the federal act, but did establish by his proof that he was such an employé as was protected by the state act. This situation presents squarely for our determination the question of whether such conditions constitute a variance and failure of proof, warranting the dismissal of the action.

In *Baird v. Northern Pacific Railway*, 78 Wash. 68, 138 Pac. 325, this court had under consideration a question very similar to this. There was a cause of action stated under both the federal act and common law, and the parties had treated it, however, as a common-law action; and while different issues and defenses were possible under the federal act and at common law, yet the court said:

"There is no decision, so far as we are advised, which holds that, where a complaint states facts sufficient to show a liability at common law, proof admissible thereunder should be excluded on the ground of variance merely because the complaint also alleges that the railroad company was engaged in interstate commerce, and that the injured person was, at the time of the injury, engaged in work in aid of such commerce."

And further in the same case:

"Obviously, if, as held in the last-quoted decision [*Jones v. Chesapeake & Ohio Ry. Co.*, 149 Ky. 566 (149 S. W. 951)], the federal act did not repeal, but only superseded, the common law in a proper case, then, in a case such as here presented, where both the complaint and proof showed that the appellant was not, at the time of his injury, engaged in any act connected with interstate commerce, but did state facts sufficient to show a right of recovery under the common law, it would have been positive error not to submit the case to the jury upon that theory."

The reasoning of the *Baird Case*, applied to the facts of the case at bar, must lead to the conclusion that where, under the federal act and state law, the parties stand in exactly the same relation to each other and an action between them is subject to the same rules, under a complaint broad enough to cover both laws, the plaintiff is entitled to have his case proceed, if there is sufficient proof to entitle him to recovery under either the act or the state law, notwithstanding the fact that his complaint may have indicated that it was based on the federal act.

Corbett v. Boston & Maine Railroad, 219 Mass. 351, 107 N. E. 60, although it relates to two concurrent actions brought under the federal act and under the Massachusetts act, contains reasoning that is apropos to our discussion:

"It [the federal act] does not undertake to affect the force of the state statute in its appropriate sphere. The state law is as supreme and exclusive in its application to intrastate commerce as is the federal law to interstate commerce. If the employé of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the federal law; if in the latter service, such liability rests wholly upon the state law. * * * The facts and not the pleadings determine whether the wrong done in any given case confers a right to recover under the federal or state statute. The allegations in the plaintiff's declarations in these two actions do not constitute the test whether the jurisdiction of the court is under the federal or state statute. These simply are the basis for a judicial inquiry into the facts, which alone can determine that question. It is a familiar principle that, where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The as-

section of one claim which turns out to be unsound, so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril.

* * * This rule has been followed frequently in actions where it was doubtful whether the remedy of the plaintiff was under our Employers' Liability Act or at common law. * * * It is equally applicable to the cases at bar. The principle is not changed in any material respect because the question relates to remedies afforded by the statutes of different sovereign powers, each exclusive within its own domain. The relief is sought in the same forum, for the state court has jurisdiction of the cause of action, whichever statute may be controlling. * * * There are strong practical considerations in the administration of justice which lead to the same result. It oftentimes would be a great hardship upon the parties to compel them to try out first the question whether the federal act applies, and, if it in the end shall be decided that it does not, then to test by further litigation their rights under the state statute. The short period of limitations provided in each act often might expire before a final decision could be reached. If adverse to the plaintiff on the ground of error in the form of relief sought, he thus might be barred from a just recovery. Although both the federal and state statutes as to amendments are liberal, * * * and are liberally interpreted in cases of this sort, * * * nevertheless, the allowance of such amendments rests commonly in the sound discretion of the trial judge and is not subject to revision on exceptions. As it is not a matter of right, substantial interests might be lost through no fault of a plaintiff who constantly had been alert in his own behalf.

"The federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. * * * Whether a railroad employé is engaged in interstate or intrastate commerce often involves legal discrimination of great nicety, about which even the justices of the highest court are not in harmony. * * * It would be a saving of expense both to the parties and to the commonwealth if the two actions could be prosecuted together, so that by one trial the facts could be ascertained and the causes ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all phases than to require two distinct and successive inquiries before separate tribunals, where only a single aspect of the incident could be open to investigation at one time."

If the court in that case was justified in concluding that two independent actions could properly be presented as one, then in this case we may hold that in one action the entire question may be tried out and the case submitted to the jury's consideration as being under the act which the proof shows is applicable to the situation.

Bravis v. Chicago, M. & St. P. Ry., 217 Fed. 234, 133 C. C. A. 228, cited by the respondent, holds:

"It is said that the complaint, after its amendment, stated a good cause of action under the state laws and also under the federal Employers' Liability Act, and it is insisted in view of that fact that the court erred in directing the verdict. This case does not present a complaint where, in separate counts, a cause of action is pleaded under the federal act and another under the state law, and no election is made, and we do not determine the effect of a motion for a directed verdict in such a case. It presents a case where the plaintiff at the close of his own case so amended his complaint, which stated in a single count a cause of action under the state law, as to make it state a cause of action under the federal Employers' Liability Act. The plaintiff thereby elected to abandon his cause of action under the state law and to insist upon a recovery under the federal act. The defendant then moved for a directed verdict, and the court could not lawfully escape the decision of the only question thus presented, the question whether or not the evidence sustained the cause of action which alone the plaintiff had then pleaded and on which he had elected to rely. There was no error in its decision of that issue, and the plaintiff was estopped from repudiating his election."

This case differs from the case at bar, in that the plaintiff, at the conclusion of his case, sought to amend his complaint so as to state a cause of action under the federal act, which was not sustained by his proof, and which amounted to an abandonment of the cause of action originally stated under the state law. Had the appellant in this case insisted that at the time of the injury he was engaged in interstate commerce, and relied for his recovery upon the evidence introduced to establish that fact, which evidence was not sufficient, the *Bravis* Case and the case at bar would be analogous.

Respondent has also cited the case of *Louisville & N. R. Co. v. Stange's Adm'r*, 156 Ky. 439, 161 S. W. 239, which contains a statement in support of the rule in the *Baird* Case:

"Where the parties themselves and the rights and liabilities of the parties are precisely the same under both the state law and the federal statute, there would doubtless be no good reason for requiring an election."

[2, 3] 2. It is also urged that the evidence was not sufficient to allow the case to go to the jury, irrespective of the law applicable, for the reason that the plaintiff's testimony established his assumption of risk. It is argued that the work being done was of a simple character, and the dangers incident to it were so open and apparent that the appellant must, as a matter of law, be held to have assumed the risk of injury as a part of this employment.

It may be true that the appellant should be held, as a person of ordinary intelligence

and experience, to have appreciated the danger, but the negligence complained of was the negligence of Johnston, and the appellant is not, as a matter of law, to be held to have assumed the risk of Johnston's negligence. The testimony shows that the appellant was following Johnston's instructions in changing his position, and that before he had an adequate opportunity to change that position and protect himself in the new position, Johnston, without warning, resumed the dangerous work. This presented a question of fact upon which the jury should have been allowed to pass, and this is true although the facts as testified to might have been materially different from those contained in the statement made by the appellant to the claim agent of the respondent soon after the injury. This presented a question of credibility within the province of the jury to decide.

Reed v. Dickinson (Iowa) 169 N. W. 673, was a case in its facts closely akin to this. The Iowa court in reversing a directed verdict said:

"It is apparent that plaintiff was injured while in the line of his employment, and while engaged in the very act which he was directed by defendant's foreman to do. Taking this record as it is before us, the jury might well find that the plaintiff had done the work assigned him in the usual and ordinary way. He had succeeded in loosening his end of the rail, and, while standing with his bar in the bolt hole waiting the action of his coemployé at the other end of the rail, the rail was suddenly turned with plaintiff's bar in the bolt hole, and the position of the bar changed by the act of turning. This threw it out of position, and injury resulted to the plaintiff. Plaintiff was waiting for the employé at the other end to signal him that he had secured a bar hold on the rail sufficiently strong to enable him to turn the rail free from its position and loosen it from the pile. The record shows that his coemployé, without giving the warning which the plaintiff had reason to expect, and which the employé was directed to give, and upon which plaintiff relied, suddenly jerked the rail loose, causing plaintiff's bar to strike him upon the head.

"The jury could well have found that the cause of the injury was the sudden and unexpected movement of the plaintiff's assistant in suddenly jerking the rail loose without warning plaintiff that he was about to do so, and without warning plaintiff that the rail was in a position to be jerked at that end. It was said in *Caverhill v. Boston & M. Ry. Co.*, reported in 77 N. H. 330, 91 Atl. 917, that whatever risks the deceased assumed as to the defendants' method of doing business, he did not assume the risk of injury from the negligence of another servant. For an injury so caused state statute expressly makes the employer liable. It was said by this court in *Byram v. Ill. Cent. Ry.*, 172 Iowa, 631, 154 N. W. 1006, Ann. Cas. 1918A, 1067: 'It is clear that the plaintiff did not assume the risk arising out of the negligence of another employé; for this he could not anticipate or guard against.'"

In *Cules v. Northern Pacific Railway*, 177 Pac. 830, occurs this statement:

"When, therefore, the men agreed upon a line of action and proceeded with the work in pursuance of the agreement, any departure therefrom by any number of the workmen would be a negligent act, whether willfully or heedlessly performed, giving a workman injured thereby a right of action against them to recover for such injury; this on the principle that they failed to exercise that degree of care which ordinary prudence required of them under the given circumstances."

So here, when Johnston directed the appellant to change his position and resumed the dangerous acts before the appellant had placed himself in a position of safety, a question of fact was presented to the jury as to whether this was negligence upon Johnston's part.

[4] 3. Chapter 28, § 19, Session Laws 1917, which provides for a cause of action against carriers engaged in interstate and intrastate commerce in all cases where liability does not exist under the federal act, is a portion of a general act relating to the compensation of injured workmen and amending certain designated sections in the prior act on that subject. It is claimed by respondent that this section 19 is invalid for the reason that it relates to a subject not embraced in nor germane to that expressed in the title of the act, and is therefore in violation of section 19 of article 2 of the state Constitution:

"No bill shall embrace more than one subject, and that shall be expressed in the title."

"As the Constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, the courts should not embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that the double subject was not fully expressed in the title." *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077.

"No elaborate statement of the subject of an act is necessary to meet the spirit of the Constitution. A few well-chosen words, suggestive of the general subject treated, is all that is required." *State ex rel. Seattle El. Co. v. Superior Ct.*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831.

"A title may be as broad as the Legislature sees fit to make it, and thereunder any specific legislation, as to any subject relating to the general matter thus broadly embraced in the title, sustained." *Percival v. Cowychee, etc.*, Dist., 15 Wash. 480, 46 Pac. 1035.

In *Thayer v. Snohomish Logging Co.*, 101 Wash. 458, 172 Pac. 552, there being a restrictive title, this court held:

"The language of an act should be construed in view of its title and lawful purposes, since the subject expressed in the title fixes a limit upon the scope of the act."

"The title of the act need not be an index to the body thereof, nor need it express in detail every phase of the subject which is dealt with by the act. The essential requirement is notice; and the title is sufficient if it gives reasonable notice of the subject legislated upon." *Davis-Kaser Co. v. Col. Fire Ins. Co.*, 91 Wash. 383, 157 Pac. 870.

"This provision of the organic act above referred to was not intended to require details and particulars to be stated in the title of acts." *State ex rel. G. N. R. Co. v. Superior Court*, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793.

"It is enough if it indicates to an inquiring mind the scope and purpose of the law. The title may be general and all matters incidental or germane thereto." *State v. Asotin County*, 79 Wash. 634, 140 Pac. 914.

"The mention of a given subject in the title is notice of all things germane to that subject found in the act." *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938.

This, being an act relating to the compensation of injured workmen, is comprehensive enough to include all manner of compensation for such workmen and all the means by which such compensation may be obtained. The title does not indicate that the only compensation provided for is that which is obtained through industrial insurance, although we popularly speak of the act as an industrial insurance act. The act provides for compensation by industrial insurance in certain cases, and also provides for the obtaining of compensation by injured workmen from their employers by legal action, and in the section to which we are now confining our attention provides, among other things, the defenses available to such employers. Compensation being the purpose and general scope of the act, section 19 is certainly germane thereto.

The title to the original act "relating to the compensation of injured workmen" contained the additional phrase "abolishing the doctrine of negligence as a ground of recovery against employers." This court, in referring to the title, said in *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1918A, 358, Ann. Cas. 1915D, 154:

"The first clause of the title indicates that it is an act relating to the compensation of injured workmen in any industry in the state, and the employment of the language further on in the title, 'abolishing the doctrine of negligence as a ground for recovery of damages against employers,' is indicative of the evil the act seeks to overcome rather than the new remedy created. The title is plainly broad enough to indicate that the act is intended to furnish the only compensation to be allowed workmen subsequent to its becoming law, and as such clearly includes any and all rights of action theretofore existing in which such compensation might have been obtained."

[5] 4. The fourth point raised is that the section in question violates section 1 of the Fourteenth Amendment of the federal Con-

stitution, in that it denies the equal protection of the laws to a given class of employes.

The determination of whether legislative acts "deny to any person within its jurisdiction the equal protection of the laws" is fraught with considerable difficulty. From the nature of the case, it is impossible to formulate a general definition which will meet the individual situation as it arises. The Supreme Court of the United States, in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, encountering this difficulty, says:

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

Commenting upon this quotation, Hannis Taylor, in his work on *Due Process of Law*, p. 49, § 20, remarks:

"In a word, the rule is that when a citizen of the United States, as such, complains that a fundamental right guaranteed by the clauses in question has been taken away, the court will ascertain in that particular case whether the right is an incident of national citizenship, and as such within its protection, or an incident of state citizenship, whose protection belongs to the state alone. If it appears that the right claimed is an incident of national citizenship, then the ultimate question arising is whether or no that right as protected by the amendment has been actually taken away by state action, executive, legislative, or judicial. The natural and inevitable tendency always impelling the court to narrow rather than extend its jurisdiction arises out of the principle of self-preservation. After stating that so long as the due process of law clause was only a part of the Fifth Amendment it 'has rarely been invoked in the judicial forum, or the more enlarged theater of public discussion,' attention was called to the fact, as early as 1878, that 'while it has been a part of the Constitution, as a restraint upon the power of the states, only a few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state Legislatures have deprived their citizens of life, liberty, or property without due process of law.' For the last 36 years the court has been applying its rule of inclusion and exclusion to the ever-rising tide of cases before it, and the result is a body of unique and profoundly important judicial literature which the author is now striving to condense and arrange in a more complete and systematic form than it has ever assumed before. This body of literature is unique because it embodies the result of an effort upon the part of the only court in the world's history ever endowed with such a power to annul national and state laws whenever they attempt to violate the rights of the national citizen as guaranteed by the national Constitution."

The respondent, in support of his argument that section 19 is class legislation,

insists that the right to institute an action for personal injuries is given to persons engaged "in maintenance and operation of railroads doing interstate, foreign and intrastate commerce, and in maintenance and construction of their equipment," and provides that such railroads shall, in actions against them, have available only such defenses as are available to interstate railroads or railroads engaged in interstate business under the federal Employers' Liability Act, and that constitutes a discrimination between the rights possessed by employes of railroads such as logging, interurban, street, etc., for the reason that workmen engaged upon railroads doing purely an intrastate business are subject to the same hazards as those workmen engaged in similar occupations upon railroads within the act. In other words, that an arbitrary classification exists, while there is no substantial distinction between the classes of workmen.

"The equal protection of the laws means the protection of equal laws, but this equality of protection is not violated by classification, provided equal protection is afforded the members of each class. The power of the state to classify the objects of legislation is very broad. It is a matter of legislative discretion, and such classification will be upheld if it bears a reasonable relation to a proper object sought to be accomplished, even if it may appear unwise or unjust. The courts will not interfere with such classification unless the distinctions made are clearly arbitrary." Taylor, Due Process of Law, p. 725, § 458.

The Supreme Court of the United States had before it the Employers' Liability Law of Indiana in *Louisville & Nashville R. R. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84:

"It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employes to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. * * * But, while conceding this, the argument is that classification of railroad employes for the purpose of the doctrine of fellow servant can only consistently with equality and uniformity embrace such employes when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployes not subject to like hazards or employes engaged in other occupations. The argument is thus stated: 'Plaintiff in error does not question the right of the Legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employes incident to railroad hazards, but it does insist that to make this a constitutional exercise of legislative power the liability of the railroads must be made to depend upon the character of the employment and not upon the character of the employer.' Thus stated, the argument tends to confuse the question for decision, since there is no conten-

tion that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employes is justified, yet as in operating railroads some employes are subject to risks peculiar to such operation and others to risks which, however serious they may be, are not in the proper sense risks arising from the fact that the employes are engaged in railroad work, the legislative authority is classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employes collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this, that by the operation of the equal protection clause of the Fourteenth Amendment the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that, however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class."

See, also, *St. Louis Cons. Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872.

Jeffrey v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364, contains the statement:

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. * * * That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the Legislature must be allowed a wide field of choice in determining the subject-

matter of its laws, what shall come within them, and what shall be excluded."

Volume 6 R. C. L. page 373 et seq., contains a full discussion of this subject, citing a multitude of authorities supporting the principles here stated.

In the decision of this court in passing upon the constitutionality of the Workmen's Compensation Act (Laws 1911, p. 345), State ex rel. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, a related question was considered:

" * * * It is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally or applying it to the use of the state at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms and a sum of money exacted from the individuals carrying it on for the purpose of recompensing those who suffer losses because thereof.

"So, in this instance, if the Legislature believed that to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the laws, is well sustained by authority."

Based on these authorities, it must follow that section 19 does not deny the equal protection of the laws to the class of employes as argued by respondent.

We reverse the judgment of the lower court, and remand the case for a new trial.

HOLCOMB, C. J., and TOLMAN, MAIN, and MITCHELL, JJ., concur.

UMPQUA VALLEY FRUIT UNION v.
NORTH PACIFIC FRUIT DIS-
TRIBUTORS. (No. 15347.)

(Supreme Court of Washington. Aug. 15, 1919.)

1. APPEAL AND ERROR ⇐1039(13)—HARMLESS
ERROR—VARIANCE.

Any variance between allegations that certain cars of fruit were intrusted to defendant's exclusive control and testimony that plaintiff retained full power of disposition, presents no ground for reversal, where plaintiff's counsel stated at beginning of case that defendant had no power to dispose of fruit without notice to plaintiff shipper.

2. CORPORATIONS ⇐519(3)—CONTRACTS—EV-
IDENCE—SUFFICIENCY.

Evidence held to establish that a contract for handling cars of fruit was made between plaintiff and defendant, although practically all the dealings were had between plaintiff and one of defendant's subsidiary corporations.

3. EVIDENCE ⇐158(26)—BEST EVIDENCE—IN-
CORPORATION.

The fact of incorporation may be proved by oral testimony.

4. APPEAL AND ERROR ⇐1056(2)—HARMLESS
ERROR—ADMISSION OF EVIDENCE.

Erroneously sustaining an objection to evidence regarding a concern's incorporation because it was oral is harmless, where the offered testimony was immaterial.

Department 2.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by the Umpqua Valley Fruit Union against the North Pacific Fruit Distributors. Judgment for plaintiff, and defendant appeals. Affirmed.

Hamblen & Gilbert, of Spokane, for appellant.

Chas. P. Lund, of Spokane, and Dodds & Dodds, for respondent.

BRIDGES, J. The respondent sued for damages for the negligent handling by appellant of three carloads of Bartlett pears. The verdict of the jury was for the plaintiff, and the appeal is from the judgment entered thereon. The facts are substantially as follows: The appellant is a Washington corporation. Those interested in it and controlling its affairs are as follows: The Wenatchee North Central Fruit Distributors, the Idaho-Oregon Fruit Growers' Association, the Montana Fruit Distributors, and the Western Oregon Fruit Distributors. The subsidiary corporations constituting the appellant were its active agents and exercised extensive powers. In 1917 the appellant, acting through its agent, the Western Oregon Fruit Distributors, solicited and obtained

the promise of the business of the respondent for that year. There was an agreement between the parties to the effect that the appellant should first find purchasers in the East for the respondent's fruit, at certain fixed prices, which sale was to be confirmed by the respondent, and the cars of fruit were to be shipped in the name of appellant to the persons to whom sold, and it was to be the appellant's duty to take charge of the shipment and see to the delivery thereof and the collection of all moneys. The appellant maintained a fruit inspection bureau at Chicago, and one of the important features of the contract was that cars of fruit shipped east of Chicago should be carefully examined at that point. If upon inspection the fruit appeared to be ripe and would not stand further shipment, the appellant was to notify respondent, who would give further instructions with reference to its disposition. If, for any reason, the purchaser of the fruit refused to take the same, appellant was required to acquaint respondent with this fact also so that it could give such instructions as it saw fit. In August, 1917, under this general agreement, three carloads of respondent's Bartlett pears were sold. One car was sold to F. B. Crovo at Washington, D. C., and was shipped thither, billed in the name of appellant. Another car was sold to W. H. Harrison at Washington, D. C., and was shipped and billed as the first car. The third car was sold to Wignall & Moore Company at Chicago, and was shipped and billed in the same manner as the other two cars.

It appears that when the first car reached Chicago the fruit was inspected and found to be ripe and in no condition to stand the delay of shipment on to Washington. It was in such condition that it should have been disposed of at once on the Chicago market. The appellant did not notify respondent of the condition of the fruit when it reached Chicago, but, notwithstanding its ripe condition, permitted it to go forward to Washington. When the car arrived there the fruit was overripe, and the purchaser refused to accept it. Still the appellant did not notify respondent of what had happened at Washington. Instead, it shipped the fruit to Philadelphia, where it was sold at auction, bringing a relatively small price. It appears from the testimony that this fruit could have been sold at Chicago at the time it was there at \$2 per box, and that, had respondent been notified of its condition when it reached Chicago, it would have instructed that the fruit be disposed of there at that price. The second car was also inspected at Chicago, and when it reached Washington the purchaser, W. H. Harrison, refused to take the same unless it was reduced in price 25 cents per box. Respondent was not notified of this fact. Appellant caused the car to be shipped to Philadelphia, where the

fruit was sold at auction. It appears that, had the appellant notified respondent that Harrison would take the fruit at the reduced price, respondent would have directed a sale to him at that price. When the third car reached Chicago, its destination, the purchaser refused to take the fruit because a good many boxes of it were undersized. This purchaser, however, agreed to take the fruit provided it was discounted 25 cents per box. The respondent was not notified of this condition or of the prospective sale, and appellant sent the car on to Buffalo to be sold to one of its clients. When the car reached Buffalo, the client would not accept the fruit, and the car was finally landed in Boston, where it was sold at auction. It appears from the testimony that, had the respondent been notified that Wignall & Moore Company would have purchased the fruit in Chicago at a discount of 25 cents per box, it would have accepted that offer and directed the sale to be made. The appellant has never paid the respondent anything on account of these three cars of fruit. It appears, however, incidentally, that at one time appellant tendered respondent certain sums, which probably represented all or a portion of the moneys which the fruit brought when sold at auction.

While the appellant does not concede that the facts are as above related, yet the evidence was sufficient to convince the jury, and is sufficient to convince us, that the foregoing statement is correct.

[1] Appellant makes two chief claims of error; one being that there is a fatal variance in the proof from the allegations of the complaint, and the other that in no event, under the testimony, was the respondent's contract made with it, and therefore it could not be liable. Appellant claims that the complaint alleges that these cars of fruit were given over to its exclusive control and disposition, whereas plaintiff's testimony was to the effect that, while the actual physical possession of the fruit was turned over to appellant, respondent retained full control and power of disposition, and was to be notified as hereinbefore related. If it should be conceded that there was a variance as claimed, the appellant is in no position to take advantage of it. When counsel for appellant was making his opening statement to the jury, counsel for defendant interposed the following:

"I am going to reserve my statement, and I want to be sure that we understand counsel as to one point that seems to me quite important. Counsel say that in each instance the exclusive control of these cars was retained by the plaintiff, that is, by the Umpqua Valley Fruit Union. In the complaint, for instance, in paragraph 4 of the first cause of action, they say that the plaintiff turned over the exclusive control and delivery of said fruit to said defendant as provided by said agreement. Now, I do not par-

ticularly care which theory they adopt, but I want to be sure that they adopt one now and stay by it."

The plaintiff's counsel then stated:

"They had no power of disposition of the fruit without notice to the shipper."

It would seem, therefore, that at the very outset of the trial the appellant knew what the contentions of the respondent would be in these regards and that the complaint would be considered as amended. Appellant did not claim surprise, nor did it ask for a continuance on account of the alleged variance. We are of the opinion that it is not in any position to complain of any alleged variance.

[2] But it is contended that the testimony shows that the respondent's contract was made with the Western Oregon Fruit Distributors, and not with appellant. It would not serve any useful purpose to go particularly into the testimony, which convinces us, and appears to have convinced the jury, that the contract was made with the appellant. The court by appropriate instructions submitted this exact question to the jury, and in finding for the plaintiff it must have found that the contract was made with the appellant. While practically all of the dealings were had between the respondent and the Western Oregon Fruit Distributors, yet it does not follow that the contract was with the last-named concern. The testimony plainly shows that that organization was acting as agent for the appellant and the latter was bound by its action.

[3, 4] In the course of the defense the appellant undertook to prove, by the oral testimony of one of its witnesses, that the Western Oregon Fruit Distributors was a corporation. The trial court rejected this testimony on the ground, apparently, that the existence of a corporation could not be proved by parol. Appellant claims that this ruling was erroneous. In this we agree. This court has held in so many cases that the fact of incorporation may be proved by oral testimony that it is not necessary to cite the decisions. However, it did not make the slightest difference whether the Western Oregon Fruit Distributors was a copartnership or a corporation or any other manner of organization. The testimony sought to be elicited was entirely immaterial. The court might well have sustained the objection on the ground that it was immaterial. Such being the case, the appellant was not injured by the ruling of the court.

As we read the testimony, the appellant's chief defense on the merits was that it had used its best judgment in the handling and disposition of respondent's fruit, but made very little effort to show that it had notified

respondent of the various troubles that fruit had gotten into at Chicago and Washington. Evidently the jury believed that the respondent was entitled to this notice. All these questions were properly submitted to the jury under correct instructions, and we are bound by its verdict.

We find no error in the record, and the judgment is affirmed.

HOLCOMB, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

CLARK et al. v. WILSON et al. (No. 15332.)
(Supreme Court of Washington. Aug. 6, 1919.)

1. MUNICIPAL CORPORATIONS \S 706(6)—AUTOMOBILE—MOTORCYCLE COLLISION — JURY QUESTION — NEGLIGENCE OF AUTOMOBILE DRIVER.

In action for injuries to motorcycle driver in collision with automobile at street intersection, question of negligence of automobile driver held for jury under the evidence.

2. MUNICIPAL CORPORATIONS \S 703(4)—USE OF STREETS — MOTORCYCLE POLICEMAN — RIGHT OF WAY—SPEED REGULATIONS.

Motorcycle policeman, under traffic ordinances of city of Seattle, had the right of way at street intersection, and was not limited to the speed prescribed for ordinary vehicles.

3. MUNICIPAL CORPORATIONS \S 705(1)—USE OF STREETS—DUTY OF MOTORCYCLE POLICEMAN.

Motorcycle policeman in approaching street intersection was required to exercise due care, though under traffic ordinances of city of Seattle he had right of way, and was not limited to speed prescribed for ordinary vehicles.

4. MUNICIPAL CORPORATIONS \S 706(7)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE OF MOTORCYCLE POLICEMAN—JURY QUESTION.

Motorcycle policeman, answering an emergency call in line of duty, was not contributorily negligent as a matter of law in traveling at the rate of 35 or 40 miles an hour, upon a dry street with little traffic in immediate vicinity, in section of city where there was much vacant property; the question under the evidence being for the jury.

5. MUNICIPAL CORPORATIONS \S 705(5)—USE OF STREETS—NEGLECTANCE OF AUTOMOBILE DRIVER—STREET INTERSECTION.

Automobile driver who stopped or slowed down after entering street intersection, for purpose of allowing motorcycle approaching from intersecting street to pass in front, and thereafter started machine and made effort to drive in front of motorcycle, held negligent.

Department 1.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by H. R. Clark and another against Alex C. Wilson and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

S. D. Wingate, of Seattle, for appellants. Tucker & Hyland and S. H. Steele, all of Seattle, for respondents.

MAIN, J. The purpose of this action was to recover damages for personal injuries. The cause was tried to the court and a jury and resulted in a verdict in favor of the plaintiffs. Motions for judgment notwithstanding the verdict and in the alternative for a new trial were made and overruled. Judgment was entered upon the verdict, from which the defendants appeal.

The undisputed facts and the facts which the jury had a right to find from the evidence may be stated as follows:

The respondent H. R. Clark was a motorcycle policeman in the employ of the city of Seattle. On the evening of May 16, 1917, at about 9 o'clock p. m., while he was responding to an emergency call in the line of his duty, the motorcycle upon which he was riding collided with the Ford roadster automobile, near the northwest corner of the intersection of Fourth avenue and Bell street, driven by the appellant Alex C. Wilson.

The two streets mentioned intersect at right angles. Bell street is 33 feet and Fourth avenue 54 feet from curb to curb. Before reaching this intersection the respondent was driving north on the east side of Fourth avenue. The appellant was driving west on the north side of Bell street. From the time that the appellant entered Bell street, a block to the east, until the time of the collision, there was nothing to prevent one of the parties from seeing the other excepting a garage, 30 feet in width, which stood 230 feet south of the south curb of Bell street and fronted to the west on Fourth avenue. The respondent saw the automobile approaching before his view was obscured by the garage. The appellant, as he approached the intersection, observed the approaching motorcycle. From the time when the parties reached the respective points where their vision would no longer be obscured by the garage, each saw the other continuously. The motorcycle was traveling at the rate of from 35 to 40 miles per hour. The automobile, before reaching the intersection stated, was traveling at approximately from 12 to 15 miles per hour.

As the appellant came to the intersection, the motorcycle was approximately 250 feet south of the south line of Bell street. The evidence on the part of the respondent is that after the appellant entered the intersection he stopped or slowed his automobile as though he were going to stop, then started and again stopped and started. The respondent construed the stopping of the automobile

as an invitation to pass in front and the starting again as an invitation to pass at the rear. When the appellant stopped the second time the respondent swung his motorcycle to pass in front, believing that the automobile would remain standing. It again started, the appellant at that time making an effort to turn to the right down Fourth avenue, and the collision occurred a little to the north of the northwest corner of the intersection of the streets named and about 15 feet from the west curb of Fourth avenue. The space between the automobile and the curb was not sufficient, at the speed at which the motorcycle was traveling, to enable it to make the turn to pass through in safety.

At the time the collision occurred the motorcycle was traveling rapidly and it hit the automobile a heavy blow. The respondent was thrown from the motorcycle and sustained the injuries for which he seeks recovery in this action.

[1] The appellant first contends that the evidence fails to show negligence on his part. This being an action tried to a jury, we are not concerned with the evidence further than to inquire whether there was substantial evidence from which the jury might have found negligence. If the appellant, on entering the intersection, started and stopped, as the respondent testified that he did, there was certainly ample evidence to take the question of negligence to the jury. As the appellant entered the intersection the motorcycle was at least 150 feet away, and was traveling at the rate of 35 or 40 miles per hour. Had the appellant proceeded across without halting, it is clear that he would have crossed the intersection before the arrival of the motorcycle. Had he stopped and remained still the motorcycle would have passed and the collision would have been avoided.

[2-4] The second point is that the respondent was guilty of contributory negligence. There is no merit in this claim. At least, under the evidence, it was a question for the jury. Under the traffic ordinances of the city of Seattle, the motorcycle policeman had the right of way at the crossing, and was not limited to the speed prescribed for ordinary vehicles. Even though he had the right of way and was not subject to the speed regulations, this would not absolve him from exercising due care. The street at this time was dry. The accident occurred in a portion of the city known as the Denny Hill regrade, in which there is much vacant property. At the time of the accident there was no other traffic on the street in the immediate vicinity. Under such circumstances, it cannot be held, as a matter of law, that the respondent, in traveling at the rate of 35 or 40 miles per hour, answering an emergency call in the line of his duty, would be guilty of contributory negligence.

In this connection the appellant cites the case of *Miner v. Rembt*, 178 App. Div. 173, 164 N. Y. Supp. 945, as being closely in point. There are, however, two or three material distinctions between that case and the facts in the present case. There the accident happened at a crowded street junction. The motorcycle upon which the plaintiff was riding was masked by a fence along the street. Here the accident did not happen at a crowded intersection, and the parties saw each other in ample time to have avoided the accident. In addition to this, in that case the defendant's conduct, after entering the intersection, was not such as to mislead the plaintiff as to whether he intended to stop or continue his movement. Here the conduct of the appellant was such as to invite the respondent at one instant to pass to the rear of him and at another to pass in front. The other cases cited are less closely in point than is the one referred to and need not be here noticed in detail.

Finally, it is claimed that the trial court committed error in submitting the case to the jury. The instruction to which the objection is made may be divided into two parts, in the first of which the jury were told that if they found from the evidence that the appellant, before entering the intersection, saw or heard, or acting as a reasonably prudent man could have seen or heard, the respondent approaching and knew, or as a reasonably prudent man had reason to believe, that he was a policeman, that then it was the duty of appellant to have stopped before entering the intersection and permit the motorcycle to pass. As we have already said, the respondent had the right of way. The evidence is that the motorcycle was making a great deal of noise, being driven with the muffler open and the horn being sounded. Some of the witnesses testify that it could have been heard for a distance of three or four blocks. The instruction tells the jury that if the appellant knew, or as a reasonably prudent man had reason to believe, that the driver of the approaching vehicle was a policeman, that then it was his duty to stop and permit the motorcycle to pass. The instruction is no more than making effective the reservations of the traffic ordinances which give to motorcycle policemen or other emergency vehicles the right of way.

[5] In the second part of the instruction the jury were told that if the appellant, after entering the intersection and observing the rapid approach of the plaintiff, stopped or slowed down his automobile near the east side of Fourth avenue, for the purpose of allowing the motorcycle to pass in front of him, and that respondent, in plain view and sight of the appellant, changed his course for that purpose, then in that case it would

be negligence on the part of appellant to start his automobile and drive in front of respondent. If the appellant stopped or slowed down after entering the intersection, for the purpose of allowing the motorcycle to pass in front, and the driver of the motorcycle changed his course for that purpose, then it certainly would be negligence for the driver of the automobile to again start his machine and drive in front of the motorcycle. This is not only a correct rule of law, but is a sound rule of common sense. The instruction, in both its parts, correctly defined the law, and is therefore approved.

The judgment will be affirmed.

HOLCOMB, C. J., and TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

BERNSTEIN et al. v. SCHWARTZ.
(No. 15311.)

(Supreme Court of Washington. Aug. 18, 1919.)

1. EVIDENCE §117 — PRELIMINARY SHOWING OF RELEVANCY.

In an action for breach of a contract to purchase scrap iron, objection was properly sustained to defendant buyer's question to its manager if a particular person was a salesman for plaintiff seller, the material matter being what was done in the particular case by such salesman, while the witness had already testified that he could not say that he, the salesman, had authority to contract for his house.

2. PRINCIPAL AND AGENT §120(6) — EVIDENCE—OTHER TRANSACTIONS.

In an action for damages for breach of a contract to purchase scrap iron, evidence was inadmissible to show a special agency in plaintiff's salesman to make contracts with a particular person or company other than defendant buyer.

3. PRINCIPAL AND AGENT §119(1)—AGENT TO MAKE CONTRACTS—POWER TO RESCIND.

Presumptively an agent employed to make contracts has no power to rescind them, his duty being to acquire interests, and not to give them away, while he has no implied power to waive or give up rights or interests of his principal.

4. PRINCIPAL AND AGENT §101(1)—EXTENT OF AUTHORITY—AGENCY TO COLLECT—MODIFICATION OF CONTRACT.

In an action for breach of a contract to purchase scrap iron, in view of the whole record, held that the trial court properly instructed that plaintiff seller's agent had no authority to make any modified contract for plaintiff when defendant buyer refused to pay for a car of the shipment; plaintiff's agent merely having been sent on to make collection.

5. SALES —182(1) — ACTION FOR BREACH
—QUESTIONS OF FACT.

In an action for breach of a contract to purchase scrap iron, the matters of the quality or identity of the goods and of the account between the parties were questions of fact for the jury.

Department 1.

Appeal from Superior Court, King County;
Everett Smith, Judge.

Action by B. Bernstein and A. Mesher, doing business as the Astoria Junk Company, against Frank Schwartz doing business as the Alaska Junk Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Reynolds & Harroun, of Seattle, for appellant.

Jones & Riddell, of Seattle, for respondents.

MITCHELL, J. The Alaska Junk Company, through its agent, purchased from the Astoria Junk Company 150 tons of mixed scrap iron, at Astoria, Or., upon a personal examination of it by the agent. Later the contract was reduced to writing and signed by both parties in Seattle. After partial delivery and part payment the purchaser refused to further carry out the contract, and this suit was brought to recover damages for its breach. The Alaska Junk Company defended, relying on an alleged modification of the contract to the prejudice of plaintiff's rights. Plaintiff denied the contract had been modified. There was a jury trial, resulting in a judgment in favor of plaintiff, from which judgment the defendant has appealed.

[1, 2] There are seven assignments of error. Assignments numbered 1 and 2 refer to the signing and entry of judgment and denying a motion for a new trial, and are controlled by the disposition made of the other assignments. Assignments numbered 3, 4, and 5 relate to the alleged modified contract claimed by appellant to have been signed for respondent by S. E. Mesher, unsuccessfully offered in evidence, and the question of the agency of Mesher in connection therewith. Mesher was not a witness at the trial. There is no proof that he ever acted with any authority in any dealing between the parties to this suit up to and including the making of the contract. The so-called modified contract has the purported signature of respondent by Mesher. Upon identification of it by appellant it was offered in evidence, and properly refused until the agency of Mesher was shown. Attempt was made to show such agency in a general way, and also by a peculiar circumstance. It is clear the original contract which was made in duplicate was not signed at all by respondent on the duplicate kept by appellant, and later when Mesher as collecting agent for respondent

received a payment on the contract he signed a receipt therefor written on the duplicate held by appellant in such way and place that at the trial appellant attempted with poor grace and manifest hedging to say that the signature of S. E. Mesher was to the contract as such, although the same witness otherwise testified he did not remember if Mesher was present on the day the contract was made and signed, and a number of other witnesses—indeed, all others on both sides who testified on the subject at all—said either that Mesher was in Oregon on that day, or that they did not remember his being present at the time the contract was signed. At the conclusion of all the evidence on this particular point, in fact, at the conclusion of all the evidence in the case, the trial judge, referring to such signature of Mesher under the receipt written on the duplicate contract held by appellant, remarked:

"It is not signed as a contract. He put his signature not to the contract. He put his signature to the receipt at the bottom, as a receipt for \$400"

—to which ruling counsel for appellant not only did not take any exception, but said, "That is a matter of course," but still claimed there was a showing generally of the agency of Mesher to make a modified contract. Thus having failed to show that Mesher as agent had signed the contract, it is contended the court erroneously excluded evidence tending to show agency generally. In this respect, after appellant's manager had testified that salesmen for different junkhouses had authority to draw up and enter into contracts, appellant's attorney (not its present attorneys, however), in the absence of any proof that Mesher had ever acted as a salesman for respondent, commenced a question, "And if S. E. Mesher was a salesman for the Astoria Junk Company?"—At which juncture an objection was made that it was immaterial, the question being what was done in this particular case, and that the witness had already testified he could not say if Mesher had authority to enter into a contract for his house. The objection was properly sustained. Further, in this regard, appellant attempted to show by an officer of the Northwest Junk Company that it had made contracts with this respondent through Mesher. The attempt and character of the agency were narrowed as indicated by an offer to show that Mesher had made contracts with the Northwest Junk Company, and that it was customarily understood in the trade that he was competent to make contracts with the Northwest Junk Company. It was unimportant in the present case to show a special agency to make contracts with another particular person.

[3, 4] The sixth assignment of error refers to an instruction given the jury. It is claimed the court erroneously advised as a matter of law that Mesher had no authority to make any modified contract for the Astoria Junk Company. Upon the whole record we think the instruction was clearly right. The attempt of appellant to show that Mesher had authority to make a contract for respondent had wholly failed, and besides, presumptively, an agent employed to make contracts has no power to rescind them. His duty is to acquire interests, not to give them away; nor has he any implied power to waive or give up rights or interests of his principal. 31 Cyc. 1387. In this case Mesher was only a collection agent of respondent, and called upon appellant for that purpose. In the course of delivery of the goods from Astoria, Or., to Seattle, a presidential proclamation had ordered an embargo upon the export of scrap iron, which greatly reduced its market value. Appellant refused to pay for a car of the iron shipped, and Mesher was sent to make collection. On reaching Seattle appellant insisted on a cancellation or modification of the contract, claiming the goods were unsatisfactory. Mesher wired for advice, and received a reply from respondent not to cancel the contract, but to tell the Alaska Junk Company they would be held to their contract, and that remaining cars would be shipped within the specified time. At the trial this dispatch of respondent's was admitted in evidence, with the consent of appellant's counsel. It was after the receipt of the telegram by Mesher that the so-called modified contract was made. Obviously, the trial court was right, under all the circumstances and evidence, in giving the instructions now complained of.

The seventh assignment of error refers to the refusal of the court to give a requested instruction, permitting the jury to determine if there was a modification of the contract that was binding upon respondent. What we have just said concerning the sixth assignment of error disposes of this adversely to appellant.

[5] As to the quality of the goods, part of which was delivered and others tendered, although there was some testimony on behalf of appellant that they were not up to grade, respondent's proof was that they were the particular goods examined by and sold to appellant. The matter of the quality or identity of the goods and of the account between the parties were questions of fact for the jury, whose verdict is supported by ample proof.

Judgment affirmed.

HOLCOMB, C. J., and MACKINTOSH, MAIN, and TOLMAN, JJ., concur.

IN RE LOCAL IMPROVEMENT DIST. NOS.
29-37 OF TOWN OF GRANDVIEW.
(No. 15307.)

(Supreme Court of Washington. Aug. 12, 1919.)

1. MUNICIPAL CORPORATIONS ⚡511(2) —
CONFIRMATION OF SPECIAL ASSESSMENT—AS-
SESSMENT ROLL—DISMISSAL OF APPEAL.

Upon property owners' appeal under Rem. Code 1915, §§ 7892-22, 7892-23, to the superior court from the levy and confirmation of local assessments by town council, the requirement that the appellant file a transcript consisting of the assessment roll and his objections thereto within ten days from filing of notice of appeal, though jurisdictional, does not warrant dismissal, where the failure was the fault of the appellee city's clerk, and not of appellant.

2. MUNICIPAL CORPORATIONS ⚡511(2) —
SPECIAL ASSESSMENT—DISMISSAL OF AP-
PEAL—FAILURE TO FILE TRANSCRIPT—PAR-
TY AT FAULT.

Affidavits and evidence held to show that appellant's failure to file transcript of the assessment proceedings within the ten days required by statute was not through the fault of appellant, but was caused by the delay of the city clerk.

3. MUNICIPAL CORPORATIONS ⚡511(2) —
SPECIAL ASSESSMENT — FAILURE TO FILE
TRANSCRIPT—FAULT OF APPELLEE—MANDA-
MUS.

Facts in such case held not such that appellant was required to institute mandamus proceedings to compel the making of the transcript provided for by Rem. Code 1915, § 7892-22, to relieve himself from responsibility for delay.

4. MUNICIPAL CORPORATIONS ⚡511(2) —
SPECIAL ASSESSMENT — DISMISSAL OF AP-
PEAL.

Such appeal should not be dismissed where appellant's failure to file the assessment roll within time was caused by appellee, since such statute excludes the right to review such proceedings by a suit in equity.

Department 2.

Appeal from Superior Court, Yakima County; Harcourt M. Taylor, Judge.

From a judgment of the Superior Court for Yakima County dismissing an appeal by certain property owners from the levy and confirmation of local assessments by the council of the Town of Grandview for Local Improvement Districts Nos. 29 to 37, the said property owners appeal. Order of dismissal reversed, and cause remanded to the Superior Court.

Grady & Shumate, of Yakima, for appellants.

Richards & Fontaine, of North Yakima, for respondent.

PARKER, J. This is an appeal from a judgment of the superior court for Yakima

county dismissing an appeal from the levy and confirmation of local assessments by the town council of the town of Grandview. The town, having created local improvement districts for the construction of sewers therein, caused an assessment roll to be prepared, levying the cost of the improvements against the property claimed by the town authorities to be benefited thereby. The assessment roll was, after due notice and hearing thereon, confirmed by the town council by ordinance, over the objections of certain of the owners of property so charged with the cost of the improvements, which ordinance became effective on November 15, 1918. We assume, as counsel do in their briefs that the assessments were all made and confirmed in one proceeding, though there were several local improvement districts. The objecting property owners, considering themselves aggrieved by the levying and confirmation of the assessments, on November 22, 1918, within ten days after the confirmation of the roll, gave due notice of appeal from the decision of the confirmation to the superior court for Yakima county, by filing written notice of appeal with the town clerk and with the clerk of the superior court, and at the same time executing and filing with the clerk of the superior court a good and sufficient appeal bond, all as provided by section 7892—22, Rem. Code, relating to appeals in such cases. The objecting property owners did not within 10 days after the filing of their notice of appeal file with the clerk of the superior court a transcript of the assessment proceedings, as provided by that section, and did not file such transcript until December 20, 1918, which, it will be noticed, was 28 days after the filing of the notice of appeal. On December 18, 1918, 2 days before the filing of the transcript, the town, by its attorneys, served upon the objecting property owners, and filed with the clerk of the superior court, a motion to dismiss their appeal. The motion came on for hearing after the filing of the transcript with the clerk of the superior court by the objecting property owners, and on January 6, 1919, the superior court entered its order dismissing the appeal, resting its order and decision upon the ground, as counsel for the town in the making of their motion did, that the filing of the transcript with the clerk of the superior court within 10 days after the filing of the notice of appeal was a jurisdictional step in the taking of such appeal, and that the objecting property owners have not shown themselves excusable for their failure to file the transcript with the clerk of the superior court within 10 days after the filing of the notice of appeal, as provided by section 7892—22, Rem. Code. From this disposition of the case by the superior court, the objecting property owners have appealed to this court.

[1] Before noticing the showing of facts made in the superior court touching the question of appellants' being excusable for their failure to file the transcript with the clerk of the superior court within 10 days after the filing of their notice of appeal in that court, let us notice the law applicable to excusable failure in such cases. Section 7892—22, Rem. Code, prescribing the manner of taking appeals from the confirmation of local assessments, reads in part as follows:

"Such appeal shall be made by filing written notice of appeal with the clerk of such city or town and with the clerk of the superior court in the county in which such city or town is situated within ten days after the ordinance confirming such assessment roll shall have become effective, and such notice shall describe the property and set forth the objections of such appellant to such assessment; and, within ten days from the filing of such notice of appeal with the clerk of the superior court, the appellant shall file with the clerk of said court, a transcript consisting of the assessment roll and his objections thereto, together with the ordinance confirming such assessment roll, and the record of the council or other legislative body with reference to said assessment, which transcript, upon payment of the necessary fees therefor, shall be furnished by such city or town clerk and by him certified to contain full, true and correct copies of all matters and proceedings required to be included in such transcript."

In *Goetter v. Colville*, 82 Wash. 305, 144 Pac. 30, we held that the filing by appellant of a transcript of the assessment proceedings with the clerk of the superior court is a jurisdictional step in the taking of an appeal from the confirmation of the assessments under this statute, the failure to perform which, on the part of appellant, would render his attempted appeal of no effect. There was not in that case any question of excusable failure on the part of appellant to timely file the transcript with the clerk of the superior court. Now as we proceed, let us have in mind that under this, as under many appeal statutes, there are these two classes of jurisdictional steps to be taken by appellants in perfecting their appeal: (1) Acts which lie wholly within the power of appellant to perform, such as the serving and tendering for filing of his notice of appeal, the executing and tendering for filing of his appeal bond, and the demand and tendering of fees for the transcript to be prepared and certified by the clerical officer having the custody of the record from which the transcript is made; (2) acts which do not lie within the power of appellant to perform himself, or which it is not his duty to perform himself, such as the actual filing of his notice of appeal, appeal bond, and transcript by the clerk of the appellate tribunal, and also the preparation and certifying of the transcript of the proceedings by the clerk of the tribu-

nal from which the appeal is taken, which acts the appellant is to cause to be performed; and a failure on the part of appellant to cause any of them to be performed within the time prescribed by the statute will, as a general rule, render his appeal of no effect. We think the law is that as to those acts, though jurisdictional, which are not within the power or duty of the appellant to perform himself, his appeal will not be rendered ineffectual by their failure of performance if he has done everything by way of demand, tender of fees, etc., which the law imposes upon him, looking to their timely performance. For instance, If the appellant should timely tender to the clerk of the appellate tribunal for filing a proper notice of appeal, together with sufficient filing fees, and the clerk should refuse to receive and file such notice within the time prescribed by statute for filing such notice, without fault on the part of the appellant, such acts on the part of appellant would be regarded in law as of the same effect as if the notice were in fact filed in time. It seems to us equally plain that, if these appellants have made proper and timely demand of the town clerk that he prepare, certify, and deliver to them for filing in the superior court a transcript of the assessment proceedings, at the same time tendering to him proper fees therefor, and he has failed to timely comply with such demand, without fault on their part, and they with due diligence thereafter procured from him and filed a transcript of the proceedings, they will be deemed in law to have perfected their appeal within the time prescribed by the statute. Manifestly the preparation of the transcript is not within the duty of appellant to do himself, and its certification is not within his power to do himself. We are to remember that the section of the statute above quoted from, by express terms provides, that the transcript "shall be furnished by such city or town clerk and by him certified to contain full, true, and correct copies of all matters and proceedings required to be included in such transcript," and also states specifically what shall be embodied in the transcript.

In the text of 3 C. J. 1072, we read:

"As a rule, if delay in taking or perfecting an appeal or in filing or suing out a petition in error or writ of error is caused by the act or omission of the court or some official thereof when the act or occurrence of the court or of such official is necessary, the appeal may be taken or perfected, or the petition or writ of error filed or sued out, after the expiration of the prescribed time."

This view of the law is abundantly supported by the authorities there cited, and is applicable to all tribunals from or to which appeals may be taken, whether courts or other bodies which act judicially, as town councils do in assessment cases of this na-

ture. Among the decisions of the courts so holding, dealing with this question where there is involved jurisdictional steps in the taking of an appeal which are not within the power or duty of the appellant himself to perform, but making it his duty to see that they are performed, we note the following: *Cameron v. Calkins*, 43 Mich. 191, 5 N. W. 292; *Short v. Cohen*, 11 Ga. 39; *Holt v. Edmondson*, 31 Ga. 357; *Dobson v. Dobson*, 7 Neb. 296; *Cheney v. Buckmaster*, 29 Neb. 420, 45 N. W. 640; *Omaha Coal, etc., Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Continental Bldg. & Loan Assoc. v. Mills*, 44 Neb. 136, 62 N. W. 478.

It is manifest that, if the law were otherwise, one desiring to appeal from a judgment or decision rendered against him by an inferior tribunal could be deprived of that right without fault on his part by the neglect of some public officer to perform some official act necessary to the perfecting of the appeal. Plainly an appellant should not be permitted to suffer by such neglect of a public officer; the appellant himself being free from fault.

[2] The facts upon which the trial court rested its order of dismissal of the appeal were shown by affidavits presented to the court at the hearing of the motion to dismiss. E. E. Horner, one of the appellants and owner of property which was sought to be charged with the cost of the improvement, stated in his affidavit, among other things, the following:

"That on Friday, the 22d day of November, 1918, in company with E. C. Ellis, * * * [he] called upon Fred E. Swain, town clerk of the town of Grandview, * * * and first read to him the notice of appeal to the superior court of Yakima county, Wash., the notice read being an exact copy of the notice filed in this court on the 22d day of November, 1918; that, after your affiant had finished reading the said notice, he handed it to the said clerk and requested that he file the same, and the said Fred E. Swain then accepted said notice; * * * that on the same date and at the same time this affiant requested the said town clerk to immediately commence the preparation of a transcript of the records and proceedings had before the town council relative to the local improvement districts involved in this action; that he had a letter from the attorneys for the appellants, Grady & Shumate, which he read to said clerk, and specifically called his attention to the fact that the transcript must be prepared and certified to before ten days so that it could be filed in the superior court as set forth in the letter of the said attorneys; that thereupon the said Fred E. Swain stated that he would immediately go to work to prepare said transcript; that this affiant, in the hearing and presence of the said E. C. Ellis at that time, asked the said clerk what his fees would be for preparing said transcript, and the said Fred E. Swain stated that he could not tell what the fees would be, and that as soon as the transcript was finished, he would let this affiant know the amount of

his fees; that this affiant offered to advance the money for the clerk's fees at this time, being the 22d day of November, 1918; that said Fred E. Swain stated that it would take him over Sunday to complete said transcript, and this affiant, believing that he had had time to prepare the same called upon the clerk on Monday, the 25th day of November, 1918, and asked him if the transcript was finished; that the said clerk answered him that he had not prepared the transcript; that it was too big a job for him, and that he had sent to Chicago to the bond attorneys where they already had a complete transcript prepared, for the purpose of getting copies thereof to furnish the appellants in this case; that the said Fred E. Swain then stated to this affiant that he expected to have a return from Chicago within a week from the date of November 25th; that this affiant wrote the attorneys for the appellants, Grady & Shumate, that the clerk had requested more time in which to get out the transcript, and at the expiration of the said one week this affiant called upon the said Fred E. Swain for the transcript, and the clerk then said that he was having three or four girls work on the transcript, and that it was about finished, and that all that he lacked was the blueprint from Chicago, which he expected any day; that the clerk also said that as soon as the blueprint arrived he would turn over to this affiant the complete transcript certified. * * *

E. C. Ellis, another owner of property within the district sought to be charged with the cost of the improvement, confirmed by his affidavit all the facts stated in the above-quoted portion of the affidavit of Horner as occurring in his presence. The town clerk in his affidavit denied the statements made by Horner and Ellis in some particulars, but admitted that Horner gave him the notice of appeal on December 22d, and then demanded the preparation and certification of a transcript of the proceedings and made proper tender of fees therefor, and also that he did not prepare and have ready for delivery the transcript within the 10 days prescribed by the statute, stating that he was unable to do so. While these affidavits also contain statements as to what occurred looking to the furnishing and certifying of the transcript of the assessment proceedings after the expiration of the statutory time for the filing of the transcript with the clerk of the superior court, as to what then occurred prior to the filing of the transcript on December 20th, we think it is sufficient to say that the affidavits render it plain that Horner and Ellis, representing the appellants, then exercised due diligence and did all within their power to hasten the preparation and filing of the transcript of the assessment proceedings with the clerk of the superior court. We are satisfied that Horner and Ellis, representing appellants, did not fail to do all that they were required to do under the statute looking to the time-

ly filing of the transcript of the assessment proceedings in the superior court, and that such failure was solely because of the fault of the town clerk, and that therefore the appeal should be deemed to have been timely taken and perfected.

[3] Some contention is made in behalf of the town that it was the duty of appellants to seek the hastening of the filing of the transcript of the assessment proceedings with the clerk of the superior court, by mandamus proceedings; and some decisions are cited to sustain this contention. We are satisfied that there was no reason for appellants to regard it as necessary to institute mandamus proceedings against the town clerk prior to the expiration of the statutory period, and that mandamus proceedings instituted thereafter would not have resulted in a more prompt filing of the transcript with the clerk of the superior court than actually occurred. The decisions which hold that an appellant should resort to mandamus proceedings in such cases have to do with situations where there was an undue delay after the expiration of the time prescribed by statute, or where the appellants had reason to believe before the expiration of the statutory time that the duty would not be performed as demanded within the statutory time.

[4] Counsel for the town contend for a strict and literal construction of the statute, and suggest that the right of appeal exists alone by virtue of the statute, in the absence of which there would be no appeal. It is true that there would be no appeal in such cases from the decision of the city council to the superior court but for the statute. We are to remember, however, that this statute, by express terms, prevents the review of such an assessment proceeding in the courts other than by an appeal as provided therein. This means that the right to review such proceedings by a suit in equity, which would exist in the absence of such statute, is taken away. Section 7892—23, Rem. Code; In re Local Imp. Sewer Dist. No. 1, 84 Wash. 565, 147 Pac. 199. These considerations suggest that care should be exercised by the courts in seeing that such right of appeal is not defeated by the failure on the part of an officer of a municipality to perform a plain duty which the appellant is entitled to have him perform looking to the perfecting of his appeal.

The order of dismissal is reversed, and the cause remanded to the superior court for further proceedings not inconsistent with the views herein expressed.

HOLCOMB, C. J., and BRIDGES, and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

STATE ex rel. McKEE v. SAVIDGE, Commissioner of Public Lands, etc. (two cases).

STATE ex rel. SHOUDY v. SAME.
(Nos. 15341-15343.)

(Supreme Court of Washington. Aug. 18, 1919.)

MANDAMUS \S 14(1) — LEASE TO HIGHEST BIDDERS—FEDERAL PROHIBITION.

Where the auditor of a county, subject to the approval of the commissioner of public lands, accepted the highest bids for leases of school indemnity grazing lands granted to the state by an enabling act of Congress, providing that they might be leased in quantities not exceeding one section to any one person or company, the Supreme Court, on applications of the next highest bidders for writs of mandate, cannot compel the land commissioner to issue to such bidders a lease of the lands on the allegation that the successful bidders were under agreement to hold title for the benefit of parties who had previously obtained the beneficial interest in leases of more than one section, the unsuccessful bidders, though making formal protest, not having demanded a hearing on the question which might have been afforded under Rem. Code, §§ 6611, 6612, 6616, 6688.

Department 2.

Applications for writs of mandate by the State of Washington, on the relation of W. H. McKee, W. G. McKee, and Addison Shoudy, against Clark V. Savidge, as Commissioner of Public Lands, etc. Writs denied.

Ralph Kauffman, of Ellensburg, for relators.

Lindsay L. Thompson, of Olympia, and Jno. A. Homer, of Seattle, for respondent.

HOLCOMB, C. J. These three applications made to this court were consolidated for hearing and determination.

Each relator seeks a writ of mandate to compel the state land commissioner to issue to him a lease covering certain state grazing lands in Kittitas county. Demurrers were interposed to the applications, and motions were made in each case, objecting to the jurisdiction of the court to grant the relief sought. Answers or affidavits were also filed at the same time, showing the acts and contemplated acts of the commissioner in the premises.

A summary of the facts in the petitions in each case upon which relators rely for the issuance of the leases to them is as follows:

On March 15, 1919, the auditor of Kittitas county, by direction of respondent, invited bids for lease of certain school indemnity land of the state, known as "grazing land." At the public leasing of the three tracts of land involved herein the auditor announced

that the highest and best offer in each instance was that of a party whose bid exceeded that of relator, and that the lands would be leased to such successful bidders, subject to the approval of the respondent. It is averred that the successful bidder on each tract of land was represented by an attorney who pretended to act for said bidder, but who was, in fact, bidding either for a gas and water company or for a certain copartnership engaged in the sheep growing business, or for both of them; that the successful bidder owns no live stock; that he had an agreement to hold the legal title to the land for the benefit of the parties (or would assign to them his lease when executed), for whom it is alleged the attorney in reality acted, and that this is in contravention of the terms of the act of the United States Congress granting the lands to this state, the real parties in interest having previously obtained the full beneficial interest in leases to grazing land in excess of one section.

Respondent's affidavit sets up facts constituting compliance with the statute governing leases of grazing lands of the state—notice of public auction of leases, accepted bid highest offered, payment of first year's rental thereunder, and that no lease of public lands of the state which is now in force has been issued to such bidder. Respondent contends that section 6681, Rem. Code, requires leasing of land of the character of that in controversy to the highest bidder at public auction; that it appears from the return of the county auditor that the party to whom the lease will issue was the highest bidder.

The Enabling Act of Congress, granting these lands to the state of Washington, in section 11 thereof provided:

" * * * Said lands may, under such regulations as the Legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company."

While not part of the statutory regulations of the Legislature of Washington, the above restriction by Congress must govern the state commissioner of public lands in leasing such granted lands.

But while so restricted, the commissioner is nevertheless entitled to the presumption that he exercises his powers and performs his duties according to law, unless the contrary manifestly appears.

So far as the returns to the commissioner show, the highest bidder at the public exposal of the lands involved in each instance herein is a person entitled to acceptance as such bidder and to receive the lease, and not a person having such granted lands leased as, with those here involved, would render

such bidder a lessee of more than one section of such lands.

Section 6688, Rem. Code, provides that the commissioner of public lands, or the auditor, may reject any and all bids (for such lease) when the interests of the state shall justify it. This empowers those officers to reject the bid of any person or company when the acceptance thereof would result in the leasing of more than one section of such granted lands to any one person or company. The officers are thus granted discretion relating to such matters, which, however, they may not abuse, or accept or reject such bids arbitrarily.

Another statutory provision (section 6612, Rem. Code) authorizes the board of state land commissioners or the commissioner of public lands, to consider and review any of their official acts relating to the public lands, until such time as a lease, contract, or deed shall have been made, executed, and finally issued. And another (section 6616, Rem. Code) provides for an appeal to the superior court of the county in which such lands are situated from any order or decision of the board of state land commissioners relating to same by the party feeling aggrieved thereby.

While these relators made formal protest in writing to the commissioner, it does not appear that any demand for a hearing and offer to prove the allegations of the relators was made to the commissioner or board of state land commissioners and denied. There is no specific statutory provision for such hearing other than those hereinbefore cited, and the power granted by section 6611, Rem. Code, to issue subpoenas and compel the attendance of witnesses, under penalty of contempt, and to conduct the examination of the witnesses. Under those provisions we have no doubt that the commissioner would, in all such cases, where sufficient showing is made that the bidding was collusive, or simulative, or violative of the laws relating to such leases, grant such hearing. And we have no doubt it would be his duty upon sufficient showing and demand so to do.

As it appears by the answering affidavits of respondent in each of these proceedings that he is doing or threatening no more than accepting bids from apparently legally qualified bidders to lease to each of them less than one section of land, and that each such bidder is the highest bidder for the tract bid in by him, and that he has no knowledge or information as to the allegations contained in the respective affidavits of relators sufficient to form a belief, we are impelled to hold that he has not acted or threatened to act arbitrarily or capriciously, but entirely within his powers and discretion upon the returns made to him; and no more searching proceeding and inquiry having

been required of him, he is acting wholly within his powers and duties, with which we cannot interfere.

Writs denied.

MOUNT, FULLERTON, MAIN, and MITCHELL, JJ., concur.

STATE v. PRESTA. (No. 15224.)

(Supreme Court of Washington. Aug. 15, 1919.)

WITNESSES \S 274(2) 349 — CHARACTER WITNESSES—CROSS-EXAMINATION.

In a prosecution for arson, where defendant put witnesses on the stand to testify that his general reputation was good, it was error to permit the state's attorney on cross-examination to ask the witnesses if they had heard about the defendant having a fire which destroyed the house in which he lived, and also whether they had heard that the house in which the defendant and his father lived had been destroyed by fire; the fact that such houses had burned not tending to discredit the witnesses nor to show that defendant's reputation was bad.

Department 2.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Frank Presta was convicted of arson in the second degree, and appeals. Reversed and remanded.

Burcham & Blair, of Spokane, for appellant.

Joseph B. Lindsley, of Spokane, for the State.

BRIDGES, J. The appellant was charged with the crime of arson in the second degree. Upon trial he was convicted, and from judgment thereon appeals to this court.

The appellant put on the witness stand some three or four character witnesses, all of whom testified that his general reputation was good. On cross-examination of at least two of these witnesses, the prosecuting attorney asked if they had heard about the appellant having had a fire which destroyed the house in which he lived, and also whether they had heard that the house in which the appellant and his father lived had been destroyed by fire. Timely objections to these questions were overruled, and the witnesses answered that they had known of and heard of these several fires. These questions and answers constitute the only question involved in this appeal.

While it is the rule that cross-examination on matters of this kind usually takes a wide range, and is very largely in the discretion of the trial court, yet it is manifest that these questions were incompetent, and, coming, as

they did, from the prosecuting attorney, may well have been highly prejudicial to the appellant. On direct examination the witnesses had testified that the general reputation of the appellant was good, and the cross-examination of them should have been limited to an effort to discredit their testimony. It is certainly proper cross-examination to compel the witness to admit that he has heard rumors of individual acts of the appellant which would tend to show that his reputation in the community was not good.

It has been held that a witness on cross-examination may be asked if the defendant had not before been arrested upon another charge (*McCormick v. State*, 86 Neb. 387, 92 N. W. 606); or if the witness had heard that the defendant had served a term in the penitentiary (*State v. Boyd*, 178 Mo. 2, 76 S. W. 979); or if he had heard of the defendant having been in the penitentiary for cattle stealing (*Holloway v. State*, 45 Tex. Cr. R. 303, 77 S. W. 14); or if he had heard it reported that the defendant was a gambler (*State v. Thornhill*, 174 Mo. 364, 74 S. W. 832); or if he had heard that the defendant had been guilty of various breaches of the peace and criminal conduct (*State v. Beckner*, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. [N. S.] 535); or if he had heard that defendant had killed a man on another occasion (*Ingram v. State*, 67 Ala. 67); or if he had heard that defendant, on a previous occasion, had committed an assault (*State v. Brown*, 181 Mo. 192, 79 S. W. 1111); or if the defendant had been arrested for disturbing the peace (*People v. Moran*, 144 Cal. 48, 77 Pac. 777); or if he had heard that defendant had drawn a pistol against a third person (*Newton v. Commonwealth [Ky.]* 102 S. W. 264); or if he had heard of the prisoner getting drunk and carrying concealed weapons (*Carson v. State*, 128 Ala. 58, 29 South. 606).

But the cross-examination here does not come within the rule announced by any of the above-mentioned cases or of any other cases which we have examined. If these witnesses had been asked by the prosecuting attorney whether they had heard that the appellant had been accused of burning his own house, or that in which he and his father lived, it is likely that such question would have come within the general rule and been proper, because if there were any such rumors or accusations against the defendant the acknowledgment thereof by the witnesses would weaken their previous statements that the reputation of the appellant was good; but here the witnesses were merely asked whether they had not heard that these houses in which the appellant lived had been destroyed by fire. This question did not even tend to show that appellant's reputation was bad. Unquestionably, the great majority of fires are entirely without any criminal fault,

and it seems to us that the mere asking of these questions by the prosecuting attorney and the repetition by him of them may well have left with the jury the idea that the prosecuting attorney had some inside information concerning these acts. To the questions asked the witnesses were required to answer that they had heard of these fires. If the witnesses had been asked if they had heard of any one accusing appellant of setting these fires they would probably have answered in the negative.

For the error pointed out, the case must be reversed and remanded for a new trial.

HOLCOMB, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

JONES-SCOTT CO. v. ELLENSBURG MILLING CO. (No. 15359.)

(Supreme Court of Washington. Aug. 5, 1919.)

1. FRAUDS, STATUTE OF §118(3)—WRITTEN CONTRACT—LETTERS.

A written contract of sale satisfying the statute of frauds may be gathered from letters passing between the parties.

2. FRAUDS, STATUTE OF §118(3)—WRITTEN CONTRACT OF SALE—LETTERS.

Letters between the seller and buyer of wheat *held* to constitute a complete contract in writing sufficient to satisfy the statute of frauds.

3. SALES §377—ACTION BY SELLER—COMPLAINT—TENDER OF PERFORMANCE.

In an action by the seller of wheat for damages because the buyer failed to perform its contract of purchase, complaint *held* sufficient to allege a performance or tender of performance by the seller.

Department 2.

Appeal from Superior Court, Kittitas County; John B. Davidson, Judge.

Action by the Jones-Scott Company against the Ellensburg Milling Company. From judgment dismissing the action, plaintiff appeals. Reversed, and cause remanded.

Gose & Crowe, of Walla Walla, and Hovey & Hale, of Ellensburg, for appellant.

Austin Mires, of Ellensburg, and Carroll B. Graves, of Seattle, for respondent.

MOUNT, J. This action was brought to recover damages because defendant failed and refused to carry out a contract for the purchase of 10,000 bushels of wheat. When the original complaint was filed the defendant demanded, and was furnished with, a bill of particulars, setting out the contract relied upon. This bill of particulars con-

sisted of four letters written between the parties, as follows:

"August 13, 1917.

"Ellensburg Milling Company, Ellensburg, Washington—Gentlemen: Attention Mr. Helm. We confirm sale of 10,000 bushels of Blue stem on the 11th at \$2.44 f. o. b. cars Eureka Flat points, understanding that we are to carry you on this wheat at 7% and you to send us your check of \$1,000 as margin and as per our phone conversation with you Saturday morning you were to have sent us the check that day.

"As the mail did not bring it in we suppose you overlooked this. Kindly mail us your check and oblige,

"Yours very truly, Jones-Scott Co.

"[Signed] By H. B. Kershaw."

"August 27, 1917.

"Ellensburg Milling Company, Ellensburg, Washington—Gentlemen: Attention Mr. Helm. When you were here little over a week ago you advised that you would remit us \$1,000 on account in three days or by Wednesday of last week. We have put out something over \$24,000 for your account and we think it is up to you to mail us this check.

"Yours very truly, Jones-Scott Co.

"[Signed] By H. B. Kershaw."

"August 28, 1917.

"Jones-Scott Co., Walla Walla, Wash.—Gentlemen: Regarding the \$1,000, there was a note of \$3,000 due which we cleaned up, and we cannot pay the \$1,000 at this time. We have not made arrangements for handling the new crop yet, as our banker is out of town. We will pay this, however, at the earliest possible moment.

"Yours very truly, Ellensburg Milling Co.

"[Signed] By Helm."

"October 13, 1917.

"Jones-Scott Co., Walla Walla, Wash.—Gentlemen: If you will give me time I will take the wheat bought from you in August. You can ship one car about November 1st and draw sight draft. Will take balance as fast as I can.

"Ellensburg Milling Co. [Signed] By Helm."

After this bill of particulars was filed the trial court sustained a general demurrer to the complaint. The plaintiff thereupon filed an amended complaint, substantially the same as the original. The trial court sustained a general demurrer to this amended complaint; plaintiff elected to stand upon the allegations thereof, and the action was dismissed. Plaintiff has appealed.

[1] It is argued by the respondent that the writings set forth above, relied upon by the appellant, do not constitute an enforceable agreement under the statute of frauds, for the reason that no memorandum was signed by the respondent containing the terms of the alleged contract, nor were the terms contained in the writings signed by the appellant ever accepted or agreed to in writing by the respondent. There can be no doubt of the rule that a written contract may be gathered from letters passing be-

tween the parties. *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031.

As was said in *Ryan v. United States*, 136 U. S. 68, at page 83, 10 Sup. Ct. 913, at page 918 (34 L. Ed. 447):

"The principle is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract."

[2] Referring now to these letters: The first one, dated August 13, 1917, from Jones-Scott Company to Ellensburg Milling Company said:

"We confirm sale of 10,000 bushels of Blue stem on the 11th at \$2.44 f. o. b. cars Eureka Flat points, understanding that we are to carry you on this wheat at 7% and you to send us your check of \$1,000 as margin. * * *

Two weeks later, on August the 27th, the Jones-Scott Company again wrote to the Ellensburg Milling Company, saying:

"When you were here little over a week ago you advised that you would remit us \$1,000 on account in three days or by Wednesday of last week. We have put out something over \$24,000 for your account and we think it is up to you to mail us this check."

Upon the next day the Ellensburg Milling Company answered that letter, saying:

"Regarding the \$1,000, there was a note of \$3,000 due which we cleaned up, and we cannot pay the \$1,000 at this time. We have not made arrangements for handling the new crop yet, as our banker is out of town. We will pay this, however, at the earliest possible moment."

Up to this point there was apparently no acknowledgment of the alleged contract by the Ellensburg Milling Company, though there is a statement evidently referring to the letter of the Jones-Scott Company, written the day before, in which they agree to pay the \$1,000 therein mentioned at the earliest possible moment. Two months thereafter the Ellensburg Milling Company wrote to the Jones-Scott Company, saying:

"If you will give me time I will take the wheat bought from you in August. You can ship one car about November 1st and draw sight draft. Will take balance as fast as I can."

We think there can be no doubt that this letter refers to the contract mentioned by the Jones-Scott Company on August 13th. If this letter had been dated the next day, or within a few days after August 13th, there could be no escape from the conclusion that it referred to that letter and was in answer to it; for it says: "I will take the wheat bought from you in August." The re-

spondent, in reference to this letter, says that it makes no reference to the memorandum of appellant of August 13th, and accepts no terms proposed by the appellant, but makes a counter proposition which appellant seems to have turned down, as it is not again referred to. The only counter proposition which we gather from this letter is contained in the words, "If you will give me time." By the letter of August the 13th from the Jones-Scott Company to the Ellensburg Milling Company time was provided for, and we think this letter of October 13th makes no change in the terms of the contract, and expressly accepts the terms referred to in the letter of August 13th. We are of the opinion, therefore, that these two letters taken together constituted a complete contract between these parties sufficient to take the contract without the statute of frauds. The intervening letters of August 27th and 28th, while not directly acknowledging the contract did not accept it. The one dated the 28th in substance stated that respondent was not ready at that time to pay the thousand dollars or to receive the grain. The letter of October 13th expressly acknowledges the contract, "if you will give me time. * * *". These two letters clearly made a contract between the parties, with all the necessary terms and conditions.

[3] Respondent further argues that the complaint does not show a performance of the contract or tender of performance. Upon this question the amended complaint alleges that appellant bought the 10,000 bushels of blue stem wheat at Eureka Flat points in Walla Walla county for the purpose of supplying respondent therewith upon its demand therefor; that appellant held the grain subject to respondent's demand therefor at that place until respondent, on the 7th day of January, 1918, repudiated and disavowed the contract and refused further to be bound thereby or to receive the wheat. This allegation was clearly sufficient to show that the appellant purchased and held the wheat for the respondent, and that respondent refused to accept it. It is true the contract set out in these letters does not state the time at which the wheat should be delivered, but where no time is stated in the contract delivery may be made within a reasonable time. *Menz Lumber Co. v. McNeeley & Co.*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007.

We are satisfied that the complaint stated a cause of action, and that the trial court was in error in sustaining the demurrer.

The judgment appealed from is therefore reversed, and the cause remanded for further proceedings.

HOLCOMB, C. J., and PARKER, FULLERTON, and BRIDGES, JJ., concur.

STATE ex rel. GOVAN v. CLAUSEN, State Auditor.

STATE ex rel. RYDSTROM v. SAME.

(Nos. 15414, 15415.)

(Supreme Court of Washington. Aug. 6, 1919.)

1. STATES ⇨131—CLAIMS AGAINST STATE—APPROPRIATIONS.

Although by Constitution and an act in pursuance thereof the state has agreed it may be sued, nevertheless it has the power without litigation to provide for compensation on account of services rendered or material furnished for its benefit, by making an appropriation therefor.

2. CONSTITUTIONAL LAW ⇨70(1)—VALIDITY OF STATUTE—REVIEW BY COURT.

Where the Legislature (Laws 1919, p. 299) makes an appropriation of money for relief of a certain person "for services performed and material furnished," the court cannot go behind the statute and hear evidence to determine whether or not any services were performed or materials furnished, as one branch of the government cannot impeach the judgment of another and co-ordinate branch of the government as triers of fact.

3. CONSTITUTIONAL LAW ⇨47—VALIDITY OF STATUTE—REVIEW BY COURTS.

Declarations that statutes are invalid are generally the results of consideration of the enactments as they appear upon their faces, or influenced by facts within common knowledge, and of which courts take judicial notice.

4. CONSTITUTIONAL LAW ⇨70(3) — APPROPRIATIONS — MOTIVE OF LEGISLATURE — FRAUD.

Where a Legislature (Laws 1919, p. 299) made an appropriation to provide payment for services performed and materials furnished the state by a certain person, the court cannot inquire into the motives of the Legislature in making the appropriation, although fraud and corruption are alleged.

Department 1.

Mandamus by the State in two cases, on the relation of Hugh Govan and Arvid Rydstrom, to compel C. W. Clausen, as State Auditor, to issue warrants drawn on the State Treasurer in favor of the relators. Writ ordered to issue in the second case; and in the first, on certain conditions.

T. F. Trumbull, of Port Angeles, for relator Govan.

Sullivan & Christian, of Tacoma, for relator Rydstrom.

Lindsay L. Thompson and John H. Dunbar, both of Olympia, for respondent.

MITCHELL, J. These two cases were presented together to the court, and are thus considered in deciding them. Each of the petitions alleges:

"That at the 1919 session of the Legislature of the state of Washington an act was duly enacted by the Legislature and approved by the Governor March 15, 1919, being chapter 128 of the Laws of 1919, page 299, a copy of which act is as follows:

"An act making appropriations for the relief of Arvid Rydstrom and David Govan for services performed and material furnished.

"Be it enacted by the Legislature of the state of Washington:

"Section 1. That the sum of twenty-seven thousand three hundred nineteen dollars and fifty-eight cents (\$27,319.58) is hereby appropriated from the public highway fund for the relief of Arvid Rydstrom for services performed and materials furnished the state, for which he has not been paid, and the state auditor is hereby authorized and directed to draw his warrants upon the state treasury in favor of said Arvid Rydstrom in the said amount.

"Sec. 2. That the sum of twelve thousand dollars (\$12,000.00) is hereby appropriated from the public highway fund for the relief of David Govan for services performed and materials furnished the state, for which he has not been paid, and the state auditor is hereby authorized and directed to draw his warrants upon the state treasury in favor of said David Govan in the said amount."

That in one case the beneficiary named in the act, and in the other case the legal representative of the beneficiary named in the act, made application on June 13, 1919, to respondent as state auditor for a warrant drawn upon the state treasurer in the amount due under the terms of the law; that respondent refused in each case to draw such a warrant, giving as a reason his doubt as to the validity of the law; and that relator has no plain, speedy, or adequate remedy in the ordinary course of the law. Each prays for a writ of mandamus to compel the issuance of the warrant.

In the Govan Case respondent has filed an answer, wherein he alleged, substantially, as follows: That, in October, 1917, Govan entered into a contract with the state for clearing, grading, draining, and surfacing a portion of state road No. 21, in accordance with the plans, stipulations, and specifications which were made a part of the contract. That among other things the contract provided:

"Payments shall be made for work and labor performed and materials furnished under this contract according to the schedule of rates and prices hereto attached and made a part hereof, and in no other manner whatsoever. The state highway commissioner shall determine the unit quantities and proper classifications of all work done and materials furnished under the provisions of this agreement, and his determination thereof shall be final and conclusive and binding upon the contractor."

That after entering upon the performance of the contract partial payments were made as provided therein; that about August 10, 1918, Govan made an assignment of all sums

due or to become due under the contract, to the Maryland Casualty Company. That the contract was completed in October, 1918, and a final estimate of all sums due, to wit, \$8,505.23, was made and approved by Govan; that the final estimate was approved by the highway commissioner on February 21, 1919, and in April, 1919, state warrants therefor were drawn by respondent payable and delivered to the assignee, Maryland Casualty Company, who accepted the same in full and complete payment of all sums due Govan and the casualty company by reason of the assignment referred to, and that the warrants were paid by the state treasurer; that said Govan, his executors, etc., have been paid in full for all services and material furnished; that by the appropriation the Legislature attempted to grant to Govan extra compensation for the performance of the services under the contract after the contract had been entered into and the services rendered in violation of section 25, art. 2, of the state Constitution; and that said appropriation is invalid for the further reason that it directs the expenditure of public money for a private purpose and takes the property of the taxpayers without just compensation and without due process of law in violation of sections 5 and 7, art. 8, and of sections 3 and 16, art. 1, of the state Constitution, and of the Fourteenth Amendment to the federal Constitution.

The answer in the Rydstrom Case is, mutatis mutandis, essentially similar. To such answers relators, respectively, have filed demurrers on the grounds as follows:

"I. That the court has no jurisdiction to determine or adjudicate the matters therein alleged.

"II. The court has no jurisdiction over the subject-matter and things therein alleged.

"III. That it affirmatively appears that the legislative department of the state has already determined and adjudicated the matters and things therein alleged, and the determination by the Legislature is conclusive upon the courts.

"IV. That the allegations contained in the affirmative answer are insufficient to constitute a defense herein."

[1-3] Although by a provision of the Constitution and an act of the Legislature in pursuance thereof the state has agreed it may be sued, nevertheless it has the power without litigation to provide relief by way of compensation on account of services rendered or material furnished for its benefit. If this is in fact such a law as it purports upon its face to be, there can be no question that it does not offend any of the provisions of the state and federal Constitutions invoked by the Attorney General. On the contrary, if it does not rest on such foundation, but proceeds from motives of the Legislature in spite of facts asserted in respondent's answer, it would possess none of the virtues or essentials of law under applicable constitutional limitations. However, by the demurrers in-

terposed relators contend that such a defense is not available to respondent, and with that contention we agree. Insisting there is power in the court to do so, respondent urges us to inquire into the allegations of fraud set out in the answers and to set aside the relief appropriation if those allegations shall be established by the evidence. Exactly what is sought by respondent is to have the court, as triers of facts, impeach the judgment of another and co-ordinate branch of the government, as triers of facts. In declining to do so we rely not alone upon a consideration of the well recognized delicacy of judicial interference with legislative powers, but also upon the cold and manifest reason that by the clearly defined and respected form of co-ordinate departments of our government we have no power to do so. Courts may declare legislative enactments invalid in some cases, but not because judicial power is superior in degree or dignity to the legislative; and it will be found, according to the general rule, that such declarations are the results of consideration of the enactments as they appear upon their faces, or influenced by facts within common knowledge and of which courts take judicial notice. *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230. The act in question is fair upon its face. Such an appropriation should rest upon facts justifying the relief granted, which is the case here, for, as was said in *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717:

"If evidence was required of a fact, it must be supposed that it was before the Legislature when the act was passed; and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding."

See, also, *Cooley*, Constitutional Limitations (7th Ed.) 257; *State ex rel. Attorney General v. County of Dorsey*, 28 Ark. 379; *Rumsey v. People*, 19 N. Y. 48.

[4] Still further, if the text of the act itself be examined and applied, the same result will be reached; for it says: "For services performed and materials furnished the state for which he has not been paid." Concerning the subject of inquiry by the courts into legislative motives and facts upon which their enactments rest, Judge Cooley, in his work on Constitutional Limitations (7th Ed.) at page 258, immediately following a statement essentially the same as that just above quoted from *Farquharson v. Yeargin*, has well said:

"And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the

judiciary, and they have never allowed the inquiry to be entered upon."

A few of the leading cases may be examined. *Farquharson v. Yeargin*, supra, was a case involving a special act of the Legislature creating a new county. The Constitution (section 8, art. 11) declares that:

"No new county shall be established which shall reduce any county to a population less than four thousand, nor shall a new county be formed containing a less population than two thousand."

An attempt was made in the case to show that these provisions had been violated by the act creating Ferry county. The court, in deciding that the legislative finding as to the facts was conclusive, and quoting from another authority, said:

"The legal presumption, therefore, is that, when the act creating the county of Ferry was passed, these facts had been proved to the satisfaction of the Legislature; otherwise, that body would not and could not have passed the act. All of the members of the Legislature were sworn to support the Constitution of the state, and it is not to be presumed that the Legislature would violate their oath of office by passing the act, without the proof necessary to enable them to do so. The act appears to have been approved by the Governor, and the same presumption attaches to his act of approval. As was said by the Supreme Court of West Virginia in *Lusher v. Scites*, 4 W. Va. 11:

"To exercise the power, the Legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the Legislature alone must determine; and, when so determined, it must conclude further inquiry by all other departments of the government; and the final action terminating in an act of legislation in due form must of necessity presuppose and determine all the facts prerequisite to the enactment; and that, too, as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like case."

Continuing, we said:

"Courts, in considering such acts, unless contrary facts appear affirmatively in the act under consideration, must assume that legislative discretion has been properly exercised."

In the case of *Barker v. State Fish Commission*, 88 Wash. 73, 152 Pac. 537, Ann. Cas. 1917D, 810, the plaintiff sought to enjoin defendants from enforcing the provisions of the Fisheries Code of 1915 on the ground that the law, if enforced, would deny to him and all other gill-net fishermen privileges and immunities granted to others, in violation of article 1, § 12, of the state Constitution and of the Fourteenth Amendment to the federal Constitution. A demurrer to the complaint opened the way for a discussion by the court of plaintiff's contention that the complaint presented a condition

calling for the taking of evidence in court, concerning which it was said, at page 80 of 88 Wash., at page 539 of 152 Pac. (Ann. Cas. 1917D, 810):

"The suggestion that the court should hear evidence touching the question of the constitutionality of a statute is somewhat startling when the possible far-reaching effect of such a course is, upon reflection, rendered apparent. Manifestly, such is not the rule, as has been clearly pointed out in numerous decisions, among which are *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 25 Am. St. [Rep.] 230, 14 L. R. A. 459; *Pittsburgh, C., C. & St. L. R. Co. v. State*, 180 Ind. 245, 102 N. E. 25, L. R. A. 1915D, 458, and notes."

Other cases in this court, not further referred to, while possibly not so nearly in point, declare principles in harmony with these views.

The case of *Stevenson v. Colgan*, referred to in the case of *Barker v. State Fish Commission*, was similar to the present case. The Legislature of California had passed a law for the relief of *Stevenson*, appropriating \$125 per month for 21 months, which he sought to enforce. The answer alleged that *Stevenson* never had any claim against the state, and that the appropriation was intended as a gift, and then set up the fact that work on his own responsibility in surveying and charting a bay and certain rivers in California constituted the foundation of the alleged claim. The answer appealed to provisions of the state Constitution, which prohibited the Legislature from making a gift to any individual, and which also provided that the Legislature should have no power to grant any extra compensation or allowance to any officer, agent, servant, or contractor, after services had been rendered or a contract entered into and performed wholly or in part. The court, after referring to the abuses the provisions of the Constitution were intended to reach, and stating that if the facts as alleged in the answer were true the act of the Legislature ought never to have been passed, said:

"But these facts do not appear upon the face of the act itself, and the question is thus presented whether it is competent for the court in this or any form of action to receive evidence aliunde to establish such facts, and thus to impeach and overthrow a law which, upon its face and independent of proof, is presumptively valid."

Further on the court said:

"In our opinion, the question which we have stated as the one for decision here must be answered in the negative. While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the Constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact the existence of which must be determined upon a trial, and as the result of,

it may be, conflicting evidence. When the right to enact a law depends upon the existence of facts, it is the duty of the Legislature before passing the bill, and of the Governor before approving it, to become satisfied in some appropriate way that the facts exist; and no authority is conferred upon the courts to hear evidence and determine, as a question of fact, whether these co-ordinate departments of the state government have properly discharged such duty. The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the Constitution upon those to whom it has given the power to legislate, and the decision that the facts exist is conclusive upon the courts, in the absence of an explicit provision in the Constitution giving the judiciary the right to review such action. We therefore hold that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice."

The reason why the motive or purpose of the Legislature, in adopting laws, may not be inquired into by the courts is fully and lucidly expressed in the case of *McCray v. United States*, 195 U. S. 27, at pages 54 and 55, 24 Sup. Ct. 769, 776 (49 L. Ed. 78, 1 Ann. Cas. 561), as follows:

"The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions."
* * *

"It is, of course, true, as suggested, that, if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

The Attorney General, criticizing the rule announced in *Stevenson v. Colgan*, *supra*, says:

"The court contradicts itself in the same paragraph because if it takes an explicit provision in the Constitution to empower the court to ascertain facts upon which the legislative action was based, then certainly it would require constitutional authority to enable the court to take judicial notice either of those facts or of such other facts as the court might deem material."

In respect to a judicial review, there is a vast difference between the finding by the Legislature of the existence of facts of a disputable sort and a declaration by it attempting to establish a right or prohibit a

wrong dependent upon the existence of facts of a character with reference to which there can be no dispute. This is clearly illustrated by the case of *Zimmerman v. Brooks*, 118 Ky. 85, 80 S. W. 443, cited by respondent. It involved the validity of an act of the Legislature of Kentucky creating a new county, the area of which was described in the act by metes and bounds, and taken from the territory of three counties theretofore established. The Constitution of that state provided:

"No new county shall be created by the General Assembly which will reduce the county or counties, or either of them, from which it shall be taken, to less area than four hundred square miles, nor shall any county be formed of less area. * * *

The court, in effect, held the act invalid because the area included within the calls of the description showed the new county attempted to be created would contain less than 400 square miles, and that it would reduce the area of counties, of which it must take judicial knowledge, from which it was taken, to less than 400 square miles. In such a case it is apparent the validity of the law appeared upon the face of the act and other acts of the Legislature creating the old counties, of which by all authority the court must take judicial notice, to the same effect as if the former acts creating the old counties were a part of the act under consideration to the same extent as if rewritten therein. It is true that after thus practically deciding the case the court, in resting its judgment, preferred to go further and allow the filing of a petition in intervention by one of the old counties, which presented questions of fact requiring a judicial inquiry, but for the expressed reason that a county, such as the intervener, being a corporation, its rights are as sacred as any other rights guaranteed by the Constitution to other corporations or private persons, and that the statute if allowed to stand would, under the situation, prejudice its private rights, and likened it to a case of attempting to take private property for public purposes without just compensation. This, like the rate cases relied on by the respondent, refers to an entirely different class of cases which involve private rights alone, and are protected by the due process of law clauses of the state and federal Constitutions.

The case of *County of Cook v. Industrial School for Girls*, 125 Ill. 540, 18 N. E. 183, 1 L. R. A. 437, 8 Am. St. Rep. 386, is one in which the statute involved contained no

finding of fact whatever, and by its nature and terms required none by the Legislature or the court. It was one making an appropriation to take care of dependent girls. The controversy was whether or not the plaintiff, a religious institution was entitled to collect pay for the care of such girls because of the inhibition of section 3, art. 8, of the Illinois Constitution against any payment from public funds in aid of any sectarian institution.

Respondent urges upon our consideration the case of *State ex rel. Consolidated Stone Co. v. Houser*, 125 Wis. 258, 104 N. W. 77, 110 Am. St. Rep. 824. It was a case in which the Legislature had made an appropriation to pay for material used in the construction of a public building. Upon refusal of the secretary of state to issue a warrant the beneficiary brought an action to compel him to do so. The trouble with the case, for the purpose of throwing any light upon our present inquiry, is that in the petition for a writ of mandamus the relator with much detail set out a state of facts which it was claimed by the petitioner induced the Legislature to pass the act, which conclusively showed that the act, as the court said, "was merely an attempt to donate from the public treasury the amounts therein mentioned to the private persons therein named in payment of Mr. Bentley's private indebtedness to them." The court held the appropriation act invalid, but in doing so received no evidence, but simply took the statute to mean what petitioner alleged it meant, nor did it discuss the question of a judicial review of legislative findings of fact necessary to support an appropriation for the relief of an individual.

Other cases cited by respondent have been examined by us, but are not discussed herein because not applicable to the particular question in this case.

We conclude that the appropriation act in question is a valid one, and in the *Rydstrom Case* the writ will issue as prayed for. In the *Govan Case* we notice the answer of respondent denies the death of David Govan, the beneficiary under the act, and denies the representative character of relator, Hugh Govan, which present issues of fact to be tried out. If the issues are more than formal, upon advice to that effect an order will be made for trial; otherwise the writ will issue in the *Govan Case* as prayed for.

HOLCOMB, C. J., and TOLMAN, MACK-INTOSH, and MAIN, JJ., concur.

STATE ex rel. LISTER v. CLAUSEN, State Auditor. (No. 15441.)

(Supreme Court of Washington. Aug. 6, 1919.)

STATES \S 131—APPROPRIATIONS TO INDIVIDUALS—VALIDITY.

The appropriation of \$5,000 from the general fund by the Laws 1919, p. 687, for the relief of Ernest Lister, was valid and enforceable, although the nature of services or value given to the state by Lister is not stated therein.

Department 2.

Proceedings in mandamus by the State of Washington, on the relation of Alma Lister, executrix of the last will and testament of Ernest Lister, deceased, to compel C. W. Clausen, as auditor of the State of Washington, to issue a warrant. Writ granted.

Hayden, Langhorne & Metzger, of Tacoma, for relator.

Lindsay L. Thompson, of Olympia, for respondent.

PARKER, J. The relator seeks a writ of mandate from this court to compel the state auditor to issue his warrant for the sum of \$5,000 against the general fund of the state, payable to her as executrix of the last will and testament of Ernest Lister, deceased, resting her claim thereto upon an item in the general appropriation act passed by the Legislature of 1919, reading as follows:

From the General Fund.

For the relief of Ernest Lister..... \$5,000.00
Laws 1919, p. 687.

It is admitted that since the passage of that act Ernest Lister has died, and that the relator is now the duly appointed and qualified executrix of his last will and testament, with power to administer the whole of his estate. Our recent decision in the cases of State ex rel. Govan v. Clausen, and State ex rel. Rydstrom v. Clausen, 183 Pac. 115, wherein the question of the validity and constitutionality of similar appropriations was involved and reviewed at length, is, we think, controlling of the law of this case. The only difference between this appropriation and the ones involved in those cases is that in those appropriations (Laws 1919, p. 299) the nature of the service rendered to the state by the ones to whom the relief was granted was briefly stated in the act of appropriation; while in this appropriation the nature of the service or value given to the state by the one to whom the relief is granted is not stated in the act of appropriation. We think, however, that the reasons given in that decision for the sustaining of the appropriations are equally applicable and controlling in favor of the relator in this case. We conclude that the

writ must be granted as prayed for. It is so ordered.

HOLCOMB, C. J., and MAIN, BRIDGES, and MACKINTOSH, JJ., concur.

ROSSI v. REX CONSOL. MINING CO.
(No. 15427.)

(Supreme Court of Washington. Aug. 19, 1919.)

1. CORPORATIONS \S 150—"DIVIDEND."

Assets of dissolved corporation which board of directors authorized to be distributed to its stockholders according to law was not a dividend, a "dividend," when spoken of in reference to an existing corporation and not one being closed up and dissolved, being funds which the corporation sets apart from its profits to be divided among its members.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dividend.]

2. CORPORATIONS \S 155(4) — DIVIDENDS — CONTRACT OF SALE OF STOCK.

Where a contract of sale of shares of capital stock of a corporation is placed in escrow without any reference being made to dividends, the vendee is entitled to dividends accruing to the stock while in escrow, upon payment of the purchase price.

Department 2.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Herman J. Rossi against Charles Hussey, in which the Rex Consolidated Mining Company intervened. From an adverse judgment, the plaintiff appeals. Affirmed.

Rosenhaupt & Grant and Lucius G. Nash, all of Spokane, and A. B. Comfort, of Portland, Or., for appellant.

Burcham & Blair, of Spokane, for respondent.

MOUNT, J. Plaintiff brought this action to recover \$2,701.16, claiming the same as dividends accruing to him by virtue of his ownership of 243,000 shares of the capital stock of the Rex Mining Company, a corporation. After issues made, upon a trial of the case the court denied recovery to the plaintiff, and this appeal followed.

The facts are somewhat involved and lengthy, and we think need not be stated.

The appellant presents two questions of law: First, are the assets of a dissolved corporation a dividend, where the board of directors authorized such assets to be distributed to its stockholders according to law? And, second, where a contract of sale of shares of the capital stock of a corpora-

tion is made and placed in escrow without any reference being made to dividends upon such shares of stock, is the vendor entitled to dividends?

[1] On the first question we think there can be no doubt that the assets of a dissolved corporation are not distributed as dividends, as dividends are commonly known. *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637. A dividend, when spoken of in reference to an existing corporation, and not one being closed up and dissolved, is understood as a fund which the corporation sets apart from its profits to be divided among its members. 7 R. C. L. p. 283. Upon the trial of this case the court concluded that the proceeds of the sale of assets of a dissolved corporation were capital assets and not a dividend. We are satisfied the trial court was right in this conclusion.

[2] Upon the second question we are satisfied that the vendor was not entitled to dividends even if the distribution of capital assets may be held to be a dividend. In 7 R. C. L., at page 292, § 267, under the title "Corporations," the rule is stated as follows:

"As between the vendor and vendee of shares of corporate stock, the vendee is entitled to all dividends declared thereon after the sale of the stock. According to some courts, although the transfer has not been recorded, the transferee has a right to the dividends as against the transferor; but there is authority to the contrary. * * * If, after a contract is made for the sale of shares of stock, but before the time appointed for paying therefor, a dividend is declared, the purchaser is entitled thereto on complying with his contract to purchase."

We are satisfied, therefore, that when the contract of sale was placed in escrow and no reservation of dividends was made by the vendor, the dividends which accrued to the stock while in escrow belonged to the purchaser of the stock upon payment of the purchase price.

We conclude, therefore, that the trial court was right, and the judgment is affirmed.

HOLCOMB, C. J., and PARKER, FULLERTON, and BRIDGES, JJ., concur.

STATE ex rel. CLAPP et al. v. URQUHART et al. (No. 15267.)

(Supreme Court of Washington. Aug. 19, 1919.)

1. MANDAMUS §4(5) — COUNTY COMMISSIONERS—FAILURE TO PAY CLAIM—EFFECT OF REMEDY BY APPEAL.

Mandamus will lie to compel county commissioners and county auditor to draw a warrant for legal services rendered county pursuant to

contract, since Rem. Code 1915, § 3909, authorizing appeals from rejection of claims by county commissioners, specifically provides that such remedy shall not prevent enforcing claims by direct action.

2. MANDAMUS §14(1)—COUNTY TREASURER — PAYMENT OF WARRANT — PREVIOUS DEMAND.

Mandamus will not issue to compel a county treasurer to pay a warrant where no such warrant has been presented to him for payment, and there is no allegation that finances of county are sufficient to make payment possible.

Department 1.

Appeal from Superior Court, Grant County; Wm. A. Grimshaw, Judge.

Mandamus by the State of Washington, on the relation of William M. Clapp and others, against Donald Urquhart and others, as County Commissioners of Grant County, Wash., and others. Judgment for relators, and defendants appeal. Affirmed in part and reversed in part.

N. W. Washington, of Ephrata, for appellants.

William M. Clapp, Daniel T. Cross, and O. G. Jeffers, all of Ephrata, for respondents.

MITCHELL, J. This is an action commenced in the superior court of Grant county for a peremptory writ of mandamus. The complaint or petition, supported by the affidavit of one of the applicants, so far as is material here, is, in substance, as follows:

That, upon the commencement of a suit in Grant county, Wash., to cancel and enjoin the payment of certain county warrants issued by the auditor of that county in payment of the amount due for the construction of a county building by the terms of a contract therefor with the county, the county commissioners of that county entered into a written contract with Messrs. William M. Clapp, C. G. Jeffers, and Daniel T. Cross, as lawyers specially employed to represent the county therein. That by the terms of the contract they were to act as attorneys in the case in the trial court and also in this court in case of an appeal by either party, and until the case was fully determined. That they were to be paid \$4,500 for their services, as follows: \$1,500 upon the signing of the contract and its approval by the judge of the superior court, \$1,500 upon the determination of the cause in the superior court, and the remaining \$1,500 at the expiration of 90 days from the date of the judgment of the superior court in case no appeal should be taken therefrom, but in the event an appeal was taken then the last payment to be made as soon as the Supreme Court had heard the cause. That the contract further provided:

"And the auditor of Grant county is hereby authorized and directed to draw warrants, within the time provided for by law for the payment of the several sums named herein and particularly for the payment of the first payment provided for in this agreement."

That the contract was approved and signed by the judge of the superior court of the county by his writing indorsed thereon according to section 3908, Rem. Code. That, pursuant to the contract, the parties represented the county in the suit in the superior court, which suit resulted in a final judgment favorable to the county, dismissing the action. That thereafter a duly verified statement of account in the sum of \$1,500, together with proof (a certified copy of the judgment of dismissal of the action) of having performed services as attorneys in the cause, was presented to the board of county commissioners, and the board arbitrarily, and without any right or investigation of either the law or the facts, rejected the same. That because of the terms of the contract that the auditor should draw warrants within the time provided by law for the payment of the several sums named in the contract, proof was furnished the county auditor of the legal services rendered, and he refused a demand to deliver a warrant in the sum of \$1,500 due, and said county auditor will not draw or deliver such warrant unless now directed to do so by the board of county commissioners or by order of court. That the county treasurer had declared he would not pay any warrant drawn for such services unless ordered to do so by the court, and that plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of the law. The prayer of the application is for a peremptory writ of mandate against the county commissioners, the county auditor to draw a warrant and the county treasurer to pay the same in the sum of \$1,500 due under the contract.

The county commissioners, the auditor, and the treasurer appeared in the action by a demurrer, upon which they chose to stand, upon the grounds:

"(1) That there is a defect of parties defendant.

"(2) That several causes of action have been improperly united.

"(3) That the complaint does not state facts sufficient to constitute a cause of action."

Upon consideration by the court, the demurrer was overruled, and thereupon the court received proof submitted by the plaintiffs in support of their complaint, upon which findings of fact, essentially the same as alleged in the complaint, and conclusions of law, were signed and filed, whereupon a judgment was entered, granting plaintiffs all the relief prayed for.

[1] Defendants have appealed, and the bur-

den of their contention is that the respondents here, who were plaintiffs in the trial court, have mistaken their remedy and were confined to an appeal from the rejection of the claim by the board of county commissioners.

The statute on appeals (section 3909, Rem. Code) expressly provides that such remedy shall not prevent a party from enforcing his claim in the courts by a direct action, after it has been presented and disallowed in whole or in part by the board of county commissioners. "Hence," as was said in the case of *Lewis County v. Montfort*, 72 Wash. 248, 130 Pac. 115, "in *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137, where a claim for salary was presented to the board of county commissioners and disallowed, a direct action brought by the claimant in the superior court against the county was sustained."

The uniform holding of this court, from the case of *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, to the case of *State ex rel. Taro v. Everett*, 101 Wash. 561, 172 Pac. 752, L. R. A. 1918E, 411, has been, as was expressed in *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, viz.:

"In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action."

The remedy of mandamus was successfully employed in the case of *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797, upon the authority of which the present case must be determined against the county commissioners and the county auditor. That was a case of an—

"application to the superior court of Douglas county by A. N. Maltbie, for a writ of mandamus requiring the auditor and commissioners of said county to issue a warrant for \$294.45, alleged to be due the relator for salary as county clerk."

The facts were that Maltbie, who was twice elected and served four successive years as county clerk, made claim for an increase of salary for a portion of his first term and a still further increase during his second term, because of changes in the classification of the county based on increased population during those years, which the court found had occurred. During all the time Maltbie had received only the salary suggested by the classification of the county as it existed at the time of his first election. Prior to the action he made demand upon the county commissioners for the increased salary, which demand was rejected; and a like demand on the county auditor for a warrant was refused. The trial court found that, during the clerk's first term and prior to the second elec-

tion, the classification of the county was changed so as to increase the clerk's salary \$50 per annum, but in its judgment refused any relief to the relator. Upon appeal the judgment was reversed and remanded, with instructions to grant a writ directing the issuance of a warrant for the additional salary of \$50 for each of the last two years. In the opinion, after discussing the constitutional provisions prohibiting the increase of compensation of any public officer during his term of office, and stating the conclusion that from the facts found the relator was not entitled to any increase during the first two years, but was entitled to an increase for the last two years, the court, concerning such conclusion and the procedure adopted, said:

"The respondents do not seriously dispute this conclusion, but contend that no relief can be given in this proceeding, further contending that an application for a writ of mandate will not be granted in part and denied in part; that it must be denied in toto if any part of the relief demanded should be refused, and that appellant, having asked for a sum greater than that to which he is entitled, can in this proceeding obtain no writ to compel the issuance of a warrant for any smaller sum. We do not think this position can be sustained. Under our Code an application for a writ of mandamus is the commencement of a civil action. It is one method of procedure for the enforcement of rights and the redress of wrongs. No alternative writ was requested or issued. The appellant has only asked that a peremptory writ be finally granted after trial. We think he is entitled to a writ in this proceeding directing the issuance of a warrant for such sum as he may be entitled to recover, even though it be less than originally asked by him. This conclusion results from former rulings of this court relative to the writ of mandamus, its functions and powers, and the proper procedure to be adopted on the trial of mandamus proceedings. State ex rel. Brown v. McQuade, 36 Wash. 579, 79 Pac. 207; State ex rel. Barto v. Board of Drainage Com'rs, 46 Wash. 474, 90 Pac. 660."

[2] Concerning the county treasurer, however, we think the case will have to be dismissed. While it is true the complaint alleges the then county treasurer hostile to the payment of such a warrant, it is a fact no such warrant has ever been presented to him for payment, and it is difficult to perceive that any hostility would be manifested by him against the payment of a warrant the integrity of which will have been established by this litigation; and, besides, there is no allegation here concerning the finances of the county with respect to the ability of the county treasurer to pay such a warrant under the statute requiring them to be paid in the order of their issuance.

As to the county commissioners and the county auditor, the judgment is affirmed, while as to the county treasurer it is reversed, with directions to dismiss.

Neither party will recover costs on the appeal.

HOLCOMB, C. J., and MAIN and TOLMAN, JJ., concur.

LUND v. GRIFFITHS & SPRAGUE
STEVEDORING CO. (No. 15318.)

(Supreme Court of Washington. Aug. 12, 1919.)

1. ADMIRALTY ⚓20—JURISDICTION—MARITIME INJURIES—WORKMEN'S COMPENSATION.

Amendment to Judiciary Act Oct. 6, 1917 (U. S. Comp. St. 1918, §§ 991[3], 1233) giving federal courts jurisdiction over all civil causes of admiralty and maritime jurisdiction, saving to claimants the rights and remedies under the Workmen's Compensation Law of any state, does not abolish admiralty or common-law remedies for maritime injuries, but merely gives injured employé additional remedy of state compensation act, where it affords a remedy.

2. ADMIRALTY ⚓20—JURISDICTION—TORTS—INJURIES TO STEVEDORE—WORKMEN'S COMPENSATION.

Stevedore injured in hold of steamship may sue employer at common law notwithstanding amendment to federal Judiciary Act of Oct. 6, 1917 (U. S. Comp. St. 1918, §§ 991[3], 1233), giving federal courts jurisdiction over all civil causes of admiralty and maritime jurisdiction and saving to claimants the rights and remedies under the Workmen's Compensation Act of any state, the Workmen's Compensation Act of this state being inapplicable to such injury.

3. MASTER AND SERVANT ⚓101, 102(1)—DUTY OF MASTER—SAFE APPLIANCES.

It is master's duty to furnish servants with reasonably safe appliances.

4. MASTER AND SERVANT ⚓258(17)—ACTION FOR INJURIES—PLEADING—DEFECTIVE APPLIANCES—KNOWLEDGE.

It is sufficient to allege the master's duty to furnish safe appliances and breach thereof, without specifically alleging that he knew or by reasonable diligence would have known that he had breached such duty.

5. TRIAL ⚓139(1)—CREDIBILITY OF EVIDENCE.

Credibility of evidence was for jury.

6. MASTER AND SERVANT ⚓278(14)—INJURY TO STEVEDORE—EVIDENCE—DEFECTIVE WINCHES—KNOWLEDGE BY MASTER OF DEFECTS.

In stevedore's action for injuries sustained by reason of defective winches, evidence showing structural defects in winches, discoverable by putting the winches into actual service, if not by actual inspection, held sufficient to warrant jury in concluding that employer by exercise of reasonable care could have known of defects.

7. MASTER AND SERVANT ☞264(12)—ACTIONS FOR INJURIES—VARIANCE BETWEEN ALLEGATIONS AND PROOF—DEFECTIVE WINCH.

In action for injuries to stevedore from defective winch, variance between complaint, alleging that winch was difficult to control by reason of insufficient play in the eccentrics and proof that the throttle valves caused the difficulty held immaterial under Rem. Code 1915, §§ 299, 301, as employer was not misled.

8. APPEAL AND ERROR ☞1002—REVIEW—VERDICT.

Where there is such a conflict in the evidence as to make the question one for the jury, Supreme Court will not disturb conclusion of jury, notwithstanding that it may believe them to be in error.

9. MASTER AND SERVANT ☞311—INJURY TO SERVANT—LIABILITY OF INTERMEDIATE SERVANT.

An intermediate servant is not liable for a negligent injury to a subordinate servant, where he is guilty of no independent wrong, and is but carrying out the directions of the common master.

10. MASTER AND SERVANT ☞316(1)—INJURY TO STEVEDORE—INDEPENDENT CONTRACTOR—LIABILITY FOR INJURY.

Stevedoring company, employing its own means and its own employees in loading a vessel under contract with owner, is an independent contractor, and is liable for injury to a stevedore as result of its negligence in furnishing defective winch, regardless of question of whether owner is also liable.

11. MASTER AND SERVANT ☞106(1)—INJURY TO STEVEDORE—DEFECTIVE WINCH—DUTY OF EMPLOYER.

Stevedoring company loading a vessel under contract with owner is liable for injury to a stevedore from a defective winch, though winch was in place and part of vessel's equipment at time contract was entered into, the winch being, nevertheless, an appliance furnished by the company to its employees with which to work, and company in furnishing winch to employees having duty of seeing that it was in good condition.

12. TRIAL ☞267(1)—REQUESTED INSTRUCTIONS—LANGUAGE.

Court may give requested instruction in its own language, however appropriate may be the language in which request was framed.

13. DAMAGES ☞132(6)—PERSONAL INJURIES—EXCESSIVE VERDICT.

Where plaintiff sustained injury to leg so that bones were crushed and splintered and protruded through flesh, making it difficult to get bones united, and where injury left leg permanently crooked, paining plaintiff whenever he used leg, and making it impossible to continue working as a stevedore, in which occupation he had been earning substantial wages, a \$6,300 verdict was not excessive.

Department 2.

Appeal from Superior Court, King County;
J. T. Ronald, Judge.

Action by John A. Lund against the Coastwise Steamship & Barge Company, Incorporated, and the Griffiths & Sprague Stevedoring Company. Judgment for plaintiff against last-named defendant, and last-named defendant appeals. Affirmed.

Grinstead & Laube and Trefethen & Findley, all of Seattle, for appellant.

Walter S. Fulton, of Seattle, for respondent.

FULLERTON, J. The respondent was injured while in the employ of the appellant working as a stevedore in the hold of the Steamship Anyox. The vessel named was the property of the defendant Coastwise Steamship & Barge Company, Incorporated, who was using it in the lumber trade. Being desirous of taking on a cargo of lumber at Seattle, it engaged the appellant, a stevedoring company, to load the vessel. A part of the equipment of the vessel consisted of two steam winches, sufficiently close together to be operated by a single winch driver. The winches were controlled by levers, so arranged that the winch driver could stand between them and operate a winch with each hand. When on center the ends of the levers intended to be gripped by the hands reached to the height of the hands of an ordinary man while standing, and the movement of a particular lever up or down caused the winch which it controlled to haul in or play out the line to which the lumber was attached while being carried from the wharf to the vessel. In loading the vessel at the time in question it was found necessary to use the winches. As a winch driver the appellants employed one A. B. Anderson. Anderson was a winch driver of long experience, and no question is raised as to his competency. The accident giving rise to the injury to the respondent happened when the first winch load of lumber was brought on board the vessel. This consisted of a square piece of timber weighing several hundred pounds. It was carried successfully from its place on the wharf to the deck of the vessel, and lowered partially into the hold. Just before being dropped on the floor of the vessel, Anderson in some manner lost control of the winches. He was unable to make them operate in unison, and the result was that the timber swung crosswise of the hold. In one of its vibrations it caught the respondent, crushing his leg against some part of the vessel, seriously and permanently injuring it.

The respondent brought this action against both the owner of the vessel and the appellant, who was employed to load it. As grounds of negligence he charged that the winches were defective in two particulars: First, that the winches were not adapted to the weight of the timber then being loaded

in that they were too touchy because of having an eccentric with only one quarter inch play, when to have been reasonably safe the eccentric should have had at least an inch play; and, second, that the defendants were negligent and careless in the maintenance of the winches, in that they had thereon spiral springs, intended to keep the levers thereof on center, but which were so constructed as to prevent the levers from being easily and readily operated by the driver of the winches, thereby making it impossible for such driver to control the winches; further alleging that the injury to him was the result of the negligence of the defendants in the respects mentioned.

The defendant first demurred to the complaint, and, after the overruling thereof by the trial court, answered, denying generally the allegations of negligence contained in the complaint, and pleading affirmatively contributory negligence, and that the accident was the result of negligence of a fellow servant of the respondent. The issues were submitted to the jury against both of the defendants, and resulted in a finding in favor of the defendant owner, and a finding against the appellant in the sum of \$10,300. The trial court, on the contention that the verdict was excessive, offered the respondent the alternative of accepting a judgment for \$6,300 or of submitting to a new trial. The respondent accepted the first branch of the alternative proposed, and judgment against the appellant was entered in his favor in the last sum named. The appeal is from the judgment entered.

The appellant first assigns error on the order of the trial court overruling its demurrer to the complaint. Among the grounds of demurrer was the ground of want of jurisdiction over the subject-matter of the action, the more particular contention being that such subject-matter was withdrawn from private controversy by the Workmen's Compensation Act. It is conceded that this court held in the case of *Shaughnessy v. Northland Steamship Co.*, 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1918B, 655, that the act referred to does not bar an action of this sort, founded as it is upon a maritime tort, but it is contended that the decision is rendered inoperative by the amendment to the federal judiciary act of October 6, 1917 (c. 97, 40 Stat. 395 [U. S. Comp. St. §§ 991 (3), 1233]). The act prior to its amendment vested in the federal courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The amendment added to the saving clause the sentence, "And to claimants the rights and remedies under the workmen's compensation law of any state." The argument is that the effect of the amendment is to establish the

jurisdiction of state workmen's compensation acts over personal injuries to workmen occurring on board ships, and that since our act makes the remedy exclusive in all instances where jurisdiction is given, it must follow that an injured workman cannot in this state resort to any other remedy.

[1, 2] But it will be observed that the federal act does not purport to abolish the admiralty or common-law remedies for maritime injuries. On the contrary, it still maintains these remedies in favor of an injured employé, and gives to him the additional remedy of the state compensation acts where such acts afford a remedy. But it is plain we think, that our workmen's compensation act does not afford such a remedy. As we held in the case cited, the act was intended to be mutual in its operation, protecting employers of labor in certain enumerated employments, on the one side, from actions in courts of law for personal injuries, and giving to a workman injured while engaged in the enumerated employments, on the other, a certain and sure relief for his injury, regardless of the manner in which the injury occurred, or to whose fault it might be charged, and was intended to operate only in those instances which are within the exclusive legislative control of the state. It must follow, we think, that the amendment cited has no effect upon the Workmen's Compensation Act of this state, or the remedies afforded thereby, however effective it may be in other states having a different system for relief in this regard. In the case of *Puget Sound Bridge & Dredging Company v. Industrial Insurance Commission*, 177 Pac. 788, decided since this appeal was taken, we held that the commission was not entitled to collect premiums for the industrial fund for the employes of the company whose work was confined exclusively to the company's dredges; this for the reason that the Workmen's Compensation Act did not afford them protection against actions for injuries received by such workmen. In the course of the opinion the amendment to the federal judiciary act was noticed, and it was held that it did not change the rule as formerly announced by this court. The case is in point on the question here presented. If the act does not so far operate against employers as to compel them to pay the premiums required by the act intended for the benefit of the injured workmen, clearly it will not protect them from the remedies the act leaves open to the injured workmen. It follows that the trial court correctly determined that the action will lie.

[3, 4] A second ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. In this court it is urged that the complaint is fatally defective because it is not alleged that the appellant had notice or knowledge of the

defect in the winches. But the allegation was unnecessary. A distinction exists in this respect between instances where the machinery is defective when furnished for use and machinery which is in good condition when furnished, but afterwards by use or other causes becomes defective while in the hands of the servant. It being the positive duty of the master to furnish his servants with reasonably safe appliances with which to do their work, it is sufficient, in an action to recover for a breach of this primary duty, to allege facts which show the duty and its breach; it is not necessary to go farther and specifically allege that the master knew, or by reasonable diligence would have known, that he had breached his duty. As we said in *McLeod v. Chicago, Milwaukee, etc., R. Co.*, 65 Wash. 62, 117 Pac. 749:

"When the act is such that it must, in the nature of things, make unsafe the servant's place of work, knowledge of that fact must of necessity be inferred from pleading the act. The principle contended for by appellant arises more frequently in connection with the duty to inspect and remedy defects than in any other class of cases. It would seem to be an application of a sound principle in an unsound way to invoke this rule strictly in a case such as here presented. Even where the primary negligence is the failure to inspect, provide, and maintain a safe place, the knowledge of the master, when it may be inferred from the facts pleaded, is sufficiently pleaded as against demurrer. *Gibson v. Chicago, M. & P. S. R. Co.*, 61 Wash. 639, 112 Pac. 919. 'Such knowledge by the defendant is generally regarded as sufficiently averred by an allegation that the defendant negligently permitted appliances to become defective and negligently suffered them to remain in a defective condition.' 6 Thompson, Negligence, p. 551, § 7529."

The principle is illustrated also by the case of *Kidwell v. Houston, etc., R. Co.*, 3 Woods, 313, Fed. Cas. No. 7,757, where it was held that a servant of a railway company suing for injuries caused by a defective car must allege, either that the car was defective when placed on the track, or that it afterwards became defective, and that the railroad company had knowledge thereof.

[5, 6] It is next contended that there was no proof that the appellant had notice that the winches were defective. The proofs followed the allegations of the complaint. There was evidence which tended to show structural defects in the winches, defects which if not discoverable by mere inspection were readily discoverable by putting the winches into actual service. It was the province of the jury to believe this evidence, and if they did so believe it they were warranted in believing that the appellant could, by the exercise of reasonable diligence, have known of the defects.

"Where the defect in the appliance is shown to be structural, and is of such a character as

renders it unsafe, it may be inferred that the employer was aware of the defect, and an employé who has been injured by such an appliance need not show that the master knew that it was defective." 26 Cyc. 1144.

[7] In the complaint it is alleged that one of the defects in the winches was insufficient play in the eccentrics, making the winches difficult of control, and thereby rendering them unsafe. The witnesses for the respondent, including the winch driver himself, described the defect as a defect in the eccentric, while it appears elsewhere in their testimony that another part of the machine, namely, the throttle valves, was intended to be described. These, according to the witnesses, were so constructed that a too slight movement of the levers would cause the winches to reverse, making it difficult for the driver of the winches to control them. It is urged that this is such a fatal variance between the allegations and the proofs as to entitle the appellant to a reversal. But we cannot so conclude. A mere variance between the allegations and the proofs is not sufficient in all instances to warrant a reversal. By the express provisions of the Code (Rem. § 299), a variance between the allegations and the proofs is immaterial unless it shall have actually misled the adverse party to his prejudice in maintaining his defense upon the merits. It is only where there is a failure to prove the allegations of the complaint "in its entire scope and meaning" (Id. § 301), that such a result follows. In this instance there was no contention in the court below that the defendant was misled to his prejudice by this difference between the allegations and the proofs, and certainly it is not a failure to prove a cause of action in its entire scope and meaning to allege that an appliance is defective because of a defect in one of its parts, and prove that it is defective because of a defect in a part other than the part alleged.

[8] A further contention in this connection is that there is no evidence showing that the winches were defective. The evidence on this question we have examined with some care, and we are convinced that the weight of the evidence is with the conclusion that the winches were not defective; that while they differed somewhat in construction from winches in more common use they were reasonably safe when operated by a winch driver familiar with these differences; and, further, that the injury to the respondent in this instance was caused rather by the driver's unfamiliarity with the working of the winches than by any defect, structural or otherwise, in the winches themselves. But there is evidence the other way. Experienced winch drivers testified in substance that these differences were radical, rendering the winches "touchy," and unsafe in the hands of any driver, however skilled or familiar with

them he might be. There was therefore such a conflict in the evidence as to make the question one for the jury to determine; and, since they determined the conflict in favor of the respondent, this court, notwithstanding it may believe they were in error, has no authority to interfere.

[9-11] Another contention is that the verdict in favor of the owner of the vessel operates as a release of the appellant. It is argued that the appellant was a mere agent of the owner for the loading of the boat, and is not liable while it was acting within the scope of the agency unless the principal is also liable. It is undoubtedly the rule that an intermediate servant is not liable for a negligent injury to a subordinate servant where he is guilty of no independent wrong and is but carrying out the directions of the common master. But the record here shows something more than this. The appellant was an independent contractor. Its contract was entire. It undertook to load the boat, employing its own means and its own servants. For any negligent injury to its servants it is liable, regardless of the question whether another party may be also liable. It is true that the winches which caused the particular injury were a part of the equipment of the boat, in place when the appellant entered into its contract. But they were nevertheless, as between the appellant and its servants, appliances furnished by the appellants to its servants with which to work, and the appellant owed the servant the same duty to see that they were in proper condition that it would have owed them had it procured the winches from some other source. It may be true also that the verdict of the jury in the light of the evidence is inconsistent—that there is no apparent reason why they should have found against one defendant and in favor of the other—but this, while it might be grounds for some other form of relief, is not a ground for holding the verdict equivalent to a verdict in favor of both defendants.

[12] The appellant requested an instruction to the jury touching the degree of care required of a master when furnishing appliances for the use of its servants. The court did not give the instruction in the language of the appellant, but gave it in substance in its own language. This was sufficient. In this state the trial court may give a requested instruction in his own language, however appropriate may be the language in which the request is framed. We are aware that the appellant contends that it was excluded from the benefit of the instruction, as it was limited in terms to its codefendant. As the instruction given is quoted in the appellant's brief, it is faulty in the respect claimed, but an examination of the instruction, as certified to this court, shows that the appellant

has not accurately quoted it. The concluding clause of the instruction as the appellant quotes it reads, "Then the steamship company would not be chargeable with negligence," whereas the certified copy reads, "Then neither the steamship company nor the stevedore company would be chargeable with negligence."

[13] Finally, it is contended that the verdict even as reduced by the trial court is excessive. The amount of the recovery allowed is substantial, but the respondent's injuries were severe and permanent. The timber struck the respondent's leg at the juncture of the middle and lower thirds. The bones were crushed and splintered, and a jagged hole made in the flesh through which the bones protruded. Great difficulty was had in getting the bones to unite, and when they did unite the leg was crooked, so much so that the weight of the body no longer rests in a vertical direction upon the leg, causing pain in ankle joint when use is made of it. The respondent was a stevedore by occupation when injured, capable of earning, and actually earning, substantial wages. His injury unfits him for this occupation, and he must seek some other means of earning a livelihood. In the light of these conditions we cannot think a further reduction in the recovery would be justified.

The judgment is affirmed.

HOLCOMB, C. J., and PARKER and MOUNT, JJ., concur.

STATE v. DONOVAN. (No. 15335.)

(Supreme Court of Washington. Aug. 18, 1919.)

1. LARCENY \S 5 — PROPERTY SUBJECT — OUTLAWED WHISKY.

Outlawed whisky may be the subject of grand larceny, where taken from one claiming ownership, although the law would not afford any one damages for its taking or give any one relief looking to its recovery.

2. LARCENY \S 28(1)—SUFFICIENCY OF INFORMATION.

An information for grand larceny, charging that defendant by trick and device, appearing as a police officer, took the property, consisting of whisky, held not to show upon its face that the liquor was taken into the custody of the law.

3. LARCENY \S 18 — PROPERTY IN CUSTODY OF THE LAW.

A police officer who has taken whisky into his custody is guilty of larceny, if he "shall secrete, withhold, or appropriate the same to his own use" before it is lawfully ordered to be destroyed.

4. CRIMINAL LAW §823(4)—FORM OF INSTRUCTIONS.

It was not prejudicial error to instruct, "Every person who with intent to deprive or defraud shall steal, or obtain property of another of the value of more than \$25, shall be guilty of the crime of grand larceny," where it was manifestly given merely to inform the jury that they must find that the property taken was of the value of more than \$25; the other instructions fully informing the jury as to all the elements of larceny.

5. INDICTMENT AND INFORMATION §125(42)—DIFFERENT OFFENSES IN SAME TRANSACTION.

An information against a police officer for grand larceny of outlawed whisky held to charge an original taking of the whisky by defendant with intent to defraud the owner thereof, as well as an embezzlement of the same after taking under Rem. Code 1915, § 2601, subd. 3, the taking and subsequent appropriation constituting one continuous transaction.

6. INDICTMENT AND INFORMATION §125(30)—DIFFERENT MODES OF COMMITTING LARCENY.

An information against a police officer for larceny of outlawed whisky, charges that he took the whisky from the prosecuting witness with the intent to defraud him of the same, etc., or that he appropriated the same after having taken it into his custody under the law, were not inconsistent theories, and were properly included in one information.

Department 2.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

James A. Donovan was convicted of grand larceny, and he appeals. Affirmed.

Mulligan & Bardsley and Robertson & Miller, all of Spokane, for appellant.

Joseph B. Lindsley, of Spokane, for respondent.

PARKER, J. The defendant Donovan was jointly charged with the commission of the crime of grand larceny with one Whalen, by information filed in the superior court for Spokane county, which information charged the commission of the crime as follows:

"The said defendants, James A. Donovan and J. T. Whalen, on or about the 21st day of September, 1918, in the county of Spokane, state of Washington, then and there being, and having then and there taken into their possession from one J. L. Smith, more than 175 pint bottles of whisky, the property of and belonging to said J. L. Smith by the trick and device of the defendant James A. Donovan, then appearing as a police officer of the city of Spokane, with authority, as such officer, to seize such whisky from said J. L. Smith, the said J. T. Whalen then and there accompanying the said James A. Donovan and confederating with him, and so having obtained and taken into their possession the said whisky, did then and there willfully, unlawfully, and feloniously take, car-

ry away, conceal, and appropriate to their own use the said whisky, consisting of more than 175 pint bottles filled with whisky, the property of and belonging to J. L. Smith, of the value of more than \$400, with the intent to deprive and defraud the owner thereof."

Donovan's trial in that court, sitting with a jury, resulted in a verdict of guilty as charged, upon which judgment was rendered against him, from which judgment he has appealed to this court.

[1] The first contention made by counsel for Donovan is that the information fails to charge him with the commission of any crime under the laws of this state. The principal argument made in that behalf is, in substance, that the information charges facts showing that the whisky alleged to have been stolen was at the time outlawed property, the ownership of which the law did not protect, and therefore was not the subject of larceny. It may be conceded that the facts charged show the outlawed character of the whisky as property; and that in so far as any claim of property therein is concerned the law would not afford any one making such claim any relief, looking to its recovery, or damages for its taking. We think, however, that the question of whether or not the whisky was subject to larceny by the taking of it from the one who was in possession and claiming to be the owner of it is quite a different question.

In *Commonwealth v. Rourke*, 10 Cush. (Mass.) 397, which seems to have become a leading case in this country, Justice Cushing, speaking for the court, having under consideration the question of whether or not an indictment could be sustained for the larceny of money which had been received by one from whom it had been stolen for the sale of intoxicating liquor, in violation of law, said:

"It has been very ingeniously argued by the defendant's counsel that money, so obtained, is destitute of the rights of property, and being thus in a manner outlawed, is not entitled to legal protection, and is incapable of being the subject-matter of larceny; in a word, that it may be stolen with absolute impunity. * * *

"We apprehend it would be no answer to an indictment for larceny properly drawn to say that the object larceniously taken belonged to nobody, provided the thing were in its nature property (2 East, P. C. 606; 2 Russ. on Crimes [6th Am. Ed.] 96), or that it belonged to some unknown owner; for then, by force of the statute, and by common law too, it would be protected in the hands of the possessor. But it is further contended that such possessor must be a lawful possessor; nay, if he be proved owner against all the world, yet, if the property be acquired by breach of law, the law will in no respect exert itself to aid the guilty party to retain the possession, or to regain it when lost. This position is advanced on the strength of the case of *Gregg v. Wyman*, 4 Cush. [Mass.] 322, and other cases of the same class, in which it has been adjudged as a doctrine of the com-

mon law that courts of justice will not afford their assistance for the enforcement of any contract based on a criminal or unlawful undertaking or act.

"We fully recognize the soundness of this doctrine, supported as it is by obvious considerations of public policy and justice. But the inference, deduced therefrom in argument, by no means follows. That same common law, which, in its integrity and wisdom, refuses to lend itself to be the instrument, even indirectly, for the execution of a criminal contract, will as little condescend to throw its mantle over crime itself. The law punishes larceny, because it is larceny. * * * And the law punishes the larceny of property, not solely because of any rights of the proprietor, but also because of its own inherent legal rights as property; and therefore even he, who larceniously takes the stolen object from a thief whose hands have but just closed upon it, may himself be convicted therefor, in spite of the criminality of the possession of his immediate predecessor in crime. This principle is coeval with the common law itself as a collection of received opinions and rules, for we have to go back to the Year Books to find its first judicial announcement."

And then, following a review of English and American decisions, the learned justice concluded as follows:

"We think it is well established at common law, therefore, that property, though unlawfully acquired, may nevertheless be the subject-matter of larceny; and we think the cases decided are broad enough to cover the present or any similar form of unlawful acquisition."

It is true that was the larceny of money which had been received by one from whom it was taken for the sale of outlawed liquor, and that the money, as such, apart from its being so acquired by the one from whom it was taken, of course was not outlawed property. Upon the law as announced in that decision, however, the same court, in the later case of *Commonwealth v. Coffey*, 9 Gray (Mass.) 139, held that intoxicating liquor, though unlawfully held by the one in possession thereof so that the law would not lend its protection to his property right therein, was a subject of larceny.

In *Bales v. State*, 3 W. Va. 685, there was involved the larceny of certain ivory checks used for gambling purposes, the property right in which was plainly outlawed. Answering the contention that such checks were not the subject of larceny, the court very pertinently observed:

"The important question therefore is whether these checks, kept and used for gambling contrary to the statute, can be the subject of larceny. That they could not have been recovered by action is clear on the general principle that no court would lend its aid to the guilty keeper or owner to recover his illegal articles. And the case of *Spaulding v. Preston*, 21 Vt. 10 [50 Am. Dec. 68], is directly in point. But still, the question recurs, whether larceny can be committed of such prohibited things. And to hold that it could not would be to run the

hazard of encouraging larceny by discouraging gaming.

"The law punishes gaming and the keeping for gaming purposes articles of like character with those mentioned, and provides the mode of seizing and destroying them by the hand of an officer and the order of the magistrate. And it is perhaps more politic that resort be had to the mode prescribed by law for that purpose than to encourage a resort to theft for discouraging gambling. The cases cited from Massachusetts, where the subject was twice fully considered, take this view of it. *Commonwealth v. Coffey*, 9 Gray [Mass.] 137; *Commonwealth v. Rourke*, 10 Cush. [Mass.] 397. * * *"

It is worthy of note that the court rested its decision upon the two Massachusetts cases above noticed. Among other decisions to the same effect we note *Commonwealth v. Smith*, 129 Mass. 104, and *State v. May*, 20 Iowa, 305, the latter involving the theft of outlawed intoxicating liquor. We are quite convinced that the information in this case does not fail to state an offense under our laws because of the fact that upon its face it appears to charge the larceny of outlawed intoxicating liquor.

[2, 3] Further contention is made that the information failed to charge a larceny of Smith's whisky, because it appears upon the face of the information that the whisky was taken into the custody of the law when taken by Donovan. Whether or not the whisky was then taken into the custody of the law we think depends upon the intent with which Donovan took it from Smith. We think it plain that the language of the information means that Donovan took the whisky, not in good faith as a public officer, but with intent to appropriate it to his own use. Otherwise the allegation that he took it by "the trick and device" of appearing as a police officer would be meaningless. We think the information does not show upon its face that the liquor was taken into the custody of the law, but that the facts therein alleged show to the contrary. But in any event we think it would be subject to larceny as Smith's whisky until lawfully ordered to be destroyed.

[4] Among other instructions given to the jury by the trial court was the following:

"Under the law of the state of Washington grand larceny is substantially defined as follows: Every person who, with intent to deprive or defraud the owner thereof, shall steal, or obtain property of another of the value of more than \$25.00 shall be guilty of the crime of grand larceny."

It is contended that this was erroneous to the prejudice of Donovan because it did not contain a statement of all of the elements of the larceny with which he was charged. We think it is plain that other instructions given by the court to the jury did fully inform the jury as to all the elements of larceny as charged in the information. This instruction

manifestly was given merely to inform the jury that in order to find Donovan guilty of grand larceny, they must find that he took property of the value of more than \$25. Section 2605, Rem. Code. No prejudicial error resulted to Donovan by the giving of this instruction, especially in view of the other instructions which were given.

[5, 6] Certain instructions given by the court told the jury, in substance, that Donovan could be found guilty under the charge of the information, if he took the whisky with intent to deprive the owner thereof and appropriate it to his own use, or if he seized the whisky in good faith as an officer of the law and then appropriated it to his own use, meaning, manifestly, appropriating it to his own use before the making of any lawful order for its destruction. This, it is contended, was error prejudicial to Donovan. Section 2601, Rem. Code, defining larceny and the several ways in which it may be committed, reads, in so far as we need here notice its language, as follows:

"Every person who, with intent to deprive or defraud the owner thereof—

"(1) Shall take, lead or drive away the property of another; or

"(2) Shall obtain from the owner or another the possession of or title to any property, * * * by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune telling; or

"(3) Having any property in his possession, custody or control, * * * as a public officer, * * * or by competent authority to take or hold such possession, custody or control, * * * shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto— * * *

"Steals such property and shall be guilty of larceny."

The argument seems to be that the information charges larceny by embezzlement only, under subdivision 3 of this section, and that therefore the question of Donovan's being guilty of larceny in the original taking of the whisky should not have been submitted to the jury. The information, as we view it, in effect charges the original taking of the whisky by Donovan and its appropriation to his own use with intent to deprive Smith, the owner thereof, of it, as occurring at the same time, or at least that the act of taking and appropriation followed in such close relationship as to constitute one continuous transaction, in so far as Donovan's criminal intent was concerned. There was ample evidence to support this view of the facts. It is not claimed that the information charges more than one crime, and we think it could not be successfully so argued. We think that these instructions did not erroneously submit to the jury both the question of Dono-

van's being guilty of larceny in the original taking of the whisky and the question of his guilt in appropriating it to his own use following the original taking; nor are these two theories of his guilt inconsistent.

Certain instructions requested by counsel for Donovan to be given were refused by the court to be given. As to the errors claimed in the refusal of the court to give such instructions, we think they are sufficiently disposed of by what we have already said touching the question of the whisky being subject to larceny, since the requested instructions touch that question only, in so far as we regard these assigned errors worthy of serious consideration here.

We have examined other claims of error made in behalf of Donovan, but think it sufficient to say that we regard them as without merit. A painstaking examination of this record convinces us that Donovan has had a fair trial, and that his judgment of conviction must be affirmed. It is so ordered.

HOLCOMB, C. J., and MOUNT, FULLERTON, and BRIDGES, JJ., concur.

STATE v. WHALEN et al. (No. 15425.)

(Supreme Court of Washington. Aug. 18, 1919.)

1. WITNESSES \S 307—CLAIM OF PRIVILEGE —"COMPEL."

A witness, in a prosecution for having in possession intoxicating liquors, who made no claim of privilege upon the ground that his testimony might incriminate him or upon any other ground, was not "compelled" to testify within the meaning of Laws 1915, p. 9, § 13, providing that no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify in such a prosecution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compel.]

2. WITNESSES \S 305(1) — PRIVILEGE — WAIVER.

A witness may waive his privilege of refusing to testify on the ground that his testimony might incriminate him, and when he does so he cannot thereafter claim it.

3. WITNESSES \S 306 — PRIVILEGE—RIGHTS OF SURETY.

Where a witness, in a prosecution for being in unlawful possession of intoxicating liquors, made no claim of privilege upon the ground that his testimony might incriminate him, sureties on his bail bond, he having been arrested by reason of having given testimony that incriminated him, cannot claim the privilege for him in a proceeding to forfeit bail, although Laws 1915, p. 9, § 13, provides that no person shall be prosecuted as to matter concerning which he is compelled to testify in such a prosecution.

Department 2.

Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Prosecution by the State of Washington against James A. Donovan and J. T. Whalen. From an order forfeiting the bail of J. T. Whalen, his surety, Ethel G. Whalen, appeals. Affirmed.

Robertson & Miller and Mulligan & Bardsley, all of Spokane, for appellant.

Joseph B. Lindsley, of Spokane, for the State.

MOUNT, J. This is an appeal from an order forfeiting the bail of J. T. Whalen.

The facts are not disputed. They are as follows: One James A. Donovan was charged in the justice court with unlawfully having in his possession 175 pints of whisky with intent to sell the same. When that case was tried before the justice of the peace, J. T. Whalen was subpoenaed as a witness on behalf of the state and testified therein voluntarily, without claiming any privilege or immunity. After that trial the prosecuting attorney filed an information in the superior court, charging both Donovan and Whalen jointly with the larceny of the 175 pints of whisky. Whalen was arrested and placed in jail. His bail was fixed at \$2,000 and the appellant, Ethel G. Whalen, supplied the bail by depositing in her own name \$2,000 cash. Whalen was thereupon released. Thereafter he filed his plea in the superior court, claiming exemption and immunity from prosecution because of the testimony which he had given upon the trial of James A. Donovan in the justice court. The prosecuting attorney filed a replication to the plea, and set up a transcript of the evidence given before the justice of the peace; and upon a hearing of this plea the superior court denied the plea, and the case was set for trial before a jury on the 13th day of January, 1919. Mr. Whalen did not appear for the trial, and the prosecuting attorney moved the court to forfeit the bail deposited by the appellant. Objections were made to this motion by counsel for Ethel G. Whalen because it was claimed the information did not charge a crime against Whalen, that Whalen was immune from prosecution, and that the bond was without consideration and given under duress. These objections were denied, and the bail was forfeited.

Ethel G. Whalen appeals from that order and makes the same contentions here that were made to the lower court at the hearing upon the motion for the forfeiture of the bail. The contention that the bond was without consideration and given under duress is based upon the contention that the information does not charge a crime against Whalen. We have held in the case of *State v. Donovan*, 183 Pac. 127, that this particular information does charge a crime. The case of

State v. Lewis, 35 Wash. 261, 77 Pac. 198, was a case where we held that sureties upon a bail bond were released because Lewis in that case was entitled to be discharged without trial. In the case of *State ex rel. Grass v. White*, 40 Wash. 560, 82 Pac. 907, 2 L. R. A. (N. S.) 563, we held that cash deposited in lieu of bail could not be forfeited where the party was arrested without authority of law or any charge being made against him, and that he was entitled to his discharge as a matter of right. Those two cases, relied upon by the appellant, have no application to this case, because here the information charges a crime, and the defendant was therefore not entitled to discharge without trial.

[1, 2] Appellant also argues that Mr. Whalen was immune from prosecution, even if the information does charge a crime, and bases this contention upon the statute, which is as follows:

"Sec. 13. In any action or proceeding under this act or under any other law relating to the unlawful disposition or possession of intoxicating liquor, no person shall be excused from testifying in any court or before any grand jury, on the ground that his testimony may incriminate him, but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime or misdemeanor, under the laws of this state." Section 13, c. 2, p. 9, Laws of 1915.

This statute is plain to the effect that no person shall be excused from testifying in any court on the ground that his testimony may incriminate him, but such person shall not be punished on account of any transaction concerning which he shall be compelled to testify. Appellant argues that under this section Mr. Whalen was immune from prosecution because he testified in a justice of the peace court concerning the possession of this same liquor which he is charged in this action with having stolen. Appellant relies upon the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, and the cases therein cited, particularly *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127. These cases were both cases where the accused parties had claimed their privilege and had been compelled to testify by an order of court. The record is plain in this case that Mr. Whalen testified voluntarily. He made no claim of privilege upon the ground that his testimony might incriminate him or upon any other ground. In short, he was not compelled to testify; and we are of the opinion that he cannot now claim the immunity provided for in that statute. The statute is specific that he must be compelled to testify. If the statute intended that a person shall be

immune from punishment when he shall testify, the word "compelled" is entirely superfluous. We must assume that the Legislature, in passing this act, meant what it said. The great weight of authority is to the effect that a person may waive his privilege, and when he does so he cannot thereafter claim it. *State v. Murphy*, 128 Wis. 201, 107 N. W. 477; *Scribner v. State*, 9, Okl. Cr. 465, 132 Pac. 933, Ann. Cas. 1915B, 381; *Tague v. State* (Okl. Cr. App.) 174 Pac. 1106; *State v. Sureties of Krohne*, 4 Wyo. 347, 34 Pac. 3.

In the case of *Scribner v. State*, supra, many authorities are collected and discussed, and the court there said, upon this point, 9 Okl. Cr. at page 484, 132 Pac. at page 940, Ann. Cas. 1915B, 381:

"A witness cannot voluntarily answer such questions and at the same time claim the immunity granted. It cannot be logically said that a right can be waived and asserted by the same act. In other words, compulsion is a condition precedent for immunity."

[3] It is plain, therefore, that since Mr. Whalen at the time he testified did so voluntarily without claiming his privilege, and since he was not compelled to testify, he cannot now claim the privilege. Nor can his sureties claim it for him. *State v. Sureties of Krohne*, supra.

Since the information states a crime against Mr. Whalen, and since he failed to appear at his trial which was set for a given date, the trial court properly forfeited the bail.

The order appealed from must therefore be affirmed.

HOLCOMB, C. J., and MAIN, FULLERTON, and BRIDGES, JJ., concur.

NELSON v. DAVENPORT. (No. 15331.)

(Supreme Court of Washington. Aug. 15, 1919.)

1. DAMAGES §163(1)—RECOVERY OF PROFITS—PROOF.

To recover prospective profits of which plaintiff was deprived by defendant's breach of contract, it is essential to establish the contract and its breach, and then to furnish proof with the proper measure of damages.

2. DAMAGES §40(2)—BREACH OF CONTRACT—RECOVERY OF PROFITS.

Prospective profits lost by a breach of contract are recoverable if they can be estimated with reasonable certainty.

3. SALES §420—ACTION FOR BREACH—LOSS OF PROFITS—JURY CASE.

In an action for breach of contract to furnish garbage from defendant's hotel, wherewith plaintiff fattened hogs for market, case held for

the jury under plaintiff's evidence, showing to a reasonable certainty a large and substantial loss of profits.

4. EVIDENCE §498 — OPINIONS — DAMAGES FOR BREACH OF CONTRACT.

In an action against a hotel keeper for breach of his contract to furnish garbage to plaintiff for use in fattening hogs, testimony of plaintiff and others qualified as to the amount of pork fat a ton of garbage would reasonably produce, the market for hogs that could be purchased to fatten, etc., held admissible to assist the jury in calculating plaintiff's lost profits.

5. SALES §416(2)—ACTION FOR BREACH—EVIDENCE.

In an action against a restaurant keeper for breach of his contract to furnish garbage to plaintiff for use in feeding hogs, plaintiff's testimony as to how long on an average during the last six months of the contract it took in feeding the material to make a marketable hog out of a stock or feeder hog, also evidence of the number of cans and the average weight per day of the garbage taken from defendant's place under the contract, held admissible.

6. EVIDENCE §178(2)—BEST EVIDENCE—LOSS OF WRITING.

In an action against a restaurant keeper for breach of his contract to furnish garbage to plaintiff for use in fattening hogs, testimony of a witness, who hauled the garbage with reference to the regularity of weight of the daily hauls, etc., held admissible, after plaintiff testified that certain written statements of the weight of loads had been lost before trial.

7. PLEADING §36(3) — CONCLUSIVENESS OF ALLEGATIONS.

In an action against a restaurant keeper for breach of his contract to furnish garbage for use by plaintiff in fattening hogs, where defendant in his answer alleged that plaintiff left silverware from the garbage in the hogpens, retained it for his own use, or gave it away, so that defendant warned him, defendant cannot contend he was unaware of plaintiff's business of feeding hogs, and its dependence on the garbage.

Department 1.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Action by Sven Nelson against L. M. Davenport. From judgment for defendant, plaintiff appeals. Reversed.

Plummer & Lavin, of Spokane, for appellant.

Wakefield & Witherspoon, of Spokane, for respondent.

MITCHELL, J. Appellant sued to recover damages for the alleged breach of a contract with respondent for furnishing garbage and refuse from respondent's hotel and restaurant, in Spokane, for appellant's use in feeding hogs. At the close of appellant's evidence the trial court sustained a challenge

to its sufficiency, and entered judgment accordingly, from which this appeal has been taken.

[1] The purpose of the action was to recover prospective profits of which appellant was deprived by respondent's breach of the contract. In order to recover, it is essential to establish the contract and its breach, and then furnish proof within the proper measure of damages. In this case it was admitted there was a written contract between the parties for a period of two years from March 15, 1916, and, if not expressly admitted, there is evidence to show respondent breached the contract on October 10, 1917.

The real controversy is over the measure of damages, sufficiency of the proof to take the case to the jury, and offers of testimony refused by the trial court. "This court is committed to the doctrine of allowing prospective profits." *Bogart v. Pitchless Lumber Co.*, 72 Wash. 417, 130 Pac. 490; *Kopczynski v. Bolcom-Vanderhoof Logging Co.*, 71 Wash. 93, 127 Pac. 601.

There was substantial evidence to show appellant had been in the business of raising or fattening hogs for sale for ten years, and at the time he made this contract had about 120 hogs; that during the 19 months the contract was observed appellant made a net profit of \$12,000, most of it in the last 6 months, by the exclusive use of this hog food; that fruitless efforts were made by appellant upon the breach of the contract to get the same kind of material elsewhere; that the garbage and refuse from the Davenport was the best of that kind of hog food found in the vicinity; that on account of war conditions neither grain nor shorts could be had on the market for feeding hogs, and appellant was compelled to use grain already on hand and a small supply of shorts, purchased at a distance, to take care of the 125 hogs on hand at the time of the breach of the contract, at such prices and quality of the food compared with that covered by the contract as to deprive him of any profit, and that he was forced out of business; that there was a regular market at which "stock hogs" or "feeders" for fattening could be purchased at prices two cents per pound less than the market price of fattened hogs; that the "feeders" when purchased averaged from 125 to 150 pounds each, and after a few weeks' feeding, when ready for sale, would average 250 pounds each; that there was a dependable market during the whole of the remaining 5 months and 5 days of the contract for the sale of hogs at 16 to 17 cents per pound; that the garbage and refuse from respondent's place of business (which continued to be run by him) during the balance of the term of the contract would have fattened 500 hogs; that appellant's operating expenses, including the contract price for the garbage and refuse for the remaining 5 months

and 5 days of the contract, would have been \$815; that appellant was at all times ready, willing, and able to take and pay for the material as provided by the contract; and that because of the precautions observed and arrangements made, based on experience and information in the business for the last few years, there was no reason for apprehension of disease among the hogs while they were being prepared for market. In much of the testimony appellant was corroborated by well-qualified witnesses, some of whom were, and for years had been, engaged in the same kind of business on a large scale in that vicinity, and who testified to market conditions and prices during the 5 months that appellant was deprived of the fruits of his contract, and also that the material involved in the contract was of the highest quality for the purpose intended.

[2] A litigant is not to be turned out of court because he does not keep a set of books, nor a hog fattener if he fails to record the exact purchase and sale weight of each of his hogs. The theory upon which prospective profits are allowed is that they can be estimated with reasonable certainty. As we said in the *Bogart Case*, *supra*:

"Such profits do not have to be accurately known. They are to be determined from a consideration of all of the tangible evidence upon the subject."

Then, after citing and quoting from other cases in this court on the subject, we further said:

"To ascertain the cost of performing any contract so as to arrive at the measure laid down in the above cases, resort must of necessity be had to the estimates of those who are competent to pass judgment and who have knowledge of the particular conditions."

While that was a case of the breach of a contract by which one was prevented from performing work at a stipulated price, the principle involved is applicable here.

[3] The proof in this case possesses a reasonable certainty of a large and substantial loss of profits, sufficient to have taken the case to the jury.

[4] As the case is to be taken back for trial it is necessary to pass on offers of proof made by appellant which were refused by the trial court. Appellant offered to prove by his own testimony and that of others well qualified to speak on the subject the amount of pork fat a ton of the garbage and refuse would reasonably produce; that after being fattened there was a ready market for hogs without any expense to appellant during the remaining 5 months of the contract, and that during such time stock hogs or feeders weighing from 100 to 150 pounds each were easily obtainable, without expense other than the regular market price; that on an average it would require from two to three weeks

to add 150 pounds to the weight of each hog, and that the amount of hog food produced by respondent during the 5 months remaining after the breach of the contract would have fattened 500 hogs, and the expense attached thereto about \$500. All such offered testimony was, upon the objection of respondent that it was immaterial and speculative, rejected and refused by the court. It happened that later some of such testimony at the instance of some witness was admitted. We think all of it proper, being of a tangible sort and calculated to assist the jury in arriving at the amount of a verdict if favorable to appellant.

[6] Also the court erroneously sustained an objection to the question asked appellant in his own behalf as to how long, on an average, during the last 6 months the contract was in force, it took in feeding the material to make a marketable hog out of a stock hog or feeder. Also the number of cans and average weight per day of the garbage and refuse taken from respondent's place under the contract was proper evidence, and should have been admitted.

[8] After a witness, who hauled the garbage, testified with reference to the regularity of weight of the daily hauls just prior to October 10, 1917, and that on a number of occasions he had them weighed, stating the weight, the court struck the testimony out, as not being the best evidence, upon discovering that a written statement was furnished each time the load was weighed. Thereupon appellant testified the statements had been lost before trial, and that he was unable to produce them, after which the court still refused the testimony as to weights. The ruling was erroneous.

[7] Respondent claims appellant's whole case is at fault for the recovery of prospective profits because there was nothing in the testimony to show, or from which it can be inferred, that the consequences of which appellant complains were within the contemplation of the parties at the time the contract was made. Admit the rule of law to be as counsel contends, his attitude in attempting to apply it to this case overlooks the fact that in the contract between the parties, which is set out in full in the complaint, there is a provision to the effect that appellant shall use care to discover and return any silver, dishes, or wares that he may find in the cans; and in his answer there is a positive allegation of a breach of this provision of the contract in that from time to time during the life of the contract appellant left respondent's silverware in the hog pens to be lost and destroyed, retained it for his own use, or gave it away, and that such conduct came to the knowledge of respondent, who on several occasions warned appellant in regard thereto. Under such circumstanc-

es respondent is not in a position to contend he was unaware of appellant's business and its dependence upon the material covered by the contract.

HOLCOMB, C. J., and MAIN, TOLMAN, and MACKINTOSH, JJ., concur.

COLUMBIA RIVER TIMBER & LOGGING CO. v. COMMISSIONERS OF DIKING DIST. NO. 2 OF WAHKIAKUM COUNTY et al. (No. 15166.)

(Supreme Court of Washington. Aug. 7, 1919.)

1. LEVEES ¶9—DIKING DISTRICT—POWERS OF COMMISSIONERS.

Diking district, when lawfully created, under Rem. Code 1915, §§ 4091 to 4136-5, becomes a legal entity as a public corporation, and its board of commissioners possess the usual discretionary powers of managing boards of public corporations as far as its powers and duties under sections 4091, 4097, 4102, 4103, 4104, and 4122 are concerned.

2. INJUNCTION ¶74 — JURISDICTION — PROCEEDINGS OF POLITICAL TRIBUNALS.

Courts of equity will not review proceedings of subordinate political or municipal tribunals; and, where matters are left to the discretion of such bodies, the exercise thereof in good faith will not be disturbed, in absence of fraud.

3. LEVEES ¶11 — DIKING DISTRICT — ACTS OF COMMISSIONERS — SUFFICIENCY OF EVIDENCE.

In action to have acts of commissioners of diking district declared void upon ground of fraud between commissioners and their attorney, and unreasonableness, expensiveness, and impracticability of the plans and specifications adopted by the commissioners, evidence held insufficient to show fraud or arbitrary or capricious action on part of commissioners in employment of attorney or engineers or in adoption of plans and specifications.

4. LEVEES ¶9—DIKING DISTRICT—DISCRETION OF COMMISSIONERS — EMPLOYMENT OF ATTORNEY.

Commissioners of diking district, constructing improvements at cost of \$168,000, held not to have abused discretion in payment of \$3,000 to attorney for district for rendering all necessary legal services incident to construction of improvement, acquiring of rights of way, and assessment of benefits and damages by eminent domain and assessment proceedings in court.

Department 2.

Appeal from Superior Court, Wahkiakum County; H. W. B. Hewen, Judge.

Action by the Columbia River Timber & Logging Company against the Commissioners of Diking District No. 2 of Wahkiakum County and another. From judgment rendered,

defendants appeal. Reversed, and action dismissed.

W. F. Magill, of Portland, Or., for appellants.

Crass & Hardin, of Vancouver, for respondent.

PARKER, J. The plaintiff logging company, owner of land situated in diking district No. 2 of Wahkiakum county, commenced this action in the superior court for that county, seeking to have the organization of the district declared void, and to have the acts of its commissioners declared void and of no effect. William Stuart was made a defendant because he had been employed by the commissioners as attorney for the district, and there had been issued to him warrants of the district in part payment of his compensation; the relief sought being rested on the ground of fraud on the part of the commissioners and Stuart. A trial upon the merits resulted in a decree being rendered by the court, adjudging that the district was legally organized, and that the commissioners were duly elected and qualified; adjudging that the plans and specifications prepared for the proposed improvement by Baar & Cunningham, the engineers employed by the commissioners, which plans and specifications were adopted by the commissioners, "are unreasonable, nonworkable, and impracticable, are excessively expensive, and were arbitrarily adopted by the board of diking commissioners without due consideration for the interests of the respective property owners within said diking district," and enjoining the commissioners "from continuing or proceeding further with, or by virtue of, the plans and specifications prepared by Baar & Cunningham and adopted by said diking commission"; adjudging that the contract of employment entered into by the commissioners with Stuart, as attorney for the district, was "constructively fraudulent," that the contract be annulled and set aside, and that the commissioners be enjoined from paying to Stuart any further sums under the contract, and that the payment of warrants already issued to him under the contract in part payment for his services be enjoined; adjudging that the employment of Baar & Cunningham as engineers for the district was unreasonable and excessive as to their compensation, that in the employment of such engineers the commissioners acted arbitrarily, and not for the best interests of the property owners of the district, and that Baar & Cunningham are entitled to receive only a reasonable compensation for the actual services rendered by them, and not payment for such services under their contract; and finally, adjudging and directing that the commissioners "proceed de novo in the matter of carrying out the improvement." From this disposition of the case the commissioners and Stuart have appealed to this court.

No appeal is taken by the plaintiff from that portion of the decree which adjudges the district to have been legally organized and the commissioners duly elected and qualified.

This diking district was organized under the diking law of 1895 and the amendments thereto, now found in sections 4091 to 4136—5, inclusive, Rem. Code. Let us first see just what the nature of a diking district is, and what the powers and duties of the commissioners are, under this law. Section 4091 reads in part as follows:

"Said district shall be known and designated as diking district No. — (here insert number) of the county of — (here insert the name of county) of the state of Washington, and shall have the right to sue and be sued by and in the name of its board of commissioners hereinafter provided for, and shall have perpetual succession, and shall adopt and use a seal. The commissioners hereinafter provided for, and their successors in office, shall, from the time of the organization of such diking district, have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts, employ and appoint such agents, officers, and employes as may be required, and prescribe their duties. * * *"

Section 4097 reads in part as follows,

"All diking districts organized under the provisions of this act shall have the right of eminent domain with the power by and through its board of commissioners to cause to be condemned and appropriated private property for the use of said organization, in the construction and maintenance of a system of dikes and make just compensation therefor. * * *"

Section 4102 reads in part as follows:

"Said board of dike commissioners hereinbefore provided for shall have the exclusive charge of the construction and maintenance of all dikes or dike systems which may be constructed within the said district, and shall be the executive officers thereof, with full power to bind said district by their acts in the performance of their duties, as provided by law. * * *"

Section 4103 reads in part as follows:

"Whenever it is desired to prosecute the construction of a system of dikes within said district, said district, by and through its board of commissioners, shall file a petition in the superior court of the county in which said district is located, setting forth therein the route over which the same is to be constructed, with a complete description thereof, together with specifications for its construction, with all necessary plats and plans thereof, together with the estimated cost of such proposed improvement. * * *"

This section contains considerable detail directions touching the preparing of data and filing of a petition in the superior court, looking to the trial in court of the question of compensation to property owners, in acquiring rights of way for dikes and ditches, and of the question of benefits to result from

the proposed improvement to the several tracts of land in the district. Section 4104 reads as follows:

"In the preparation of the facts and data to be inserted in said petition and filed therewith for the purpose of presenting the matter to the said superior court, the board of commissioners of said diking district may employ one or more good and competent surveyors and draftsmen to assist them in compiling data required to be presented to the court with said petition as hereinbefore provided, and such legal assistance as may be necessary, with full power to bind said district for the compensation of such assistants or employes employed by them, and such services shall be taxed as costs in the suit."

Section 4122 reads in part as follows:

"The board of commissioners of such district shall elect one of their number chairman and one secretary, and shall keep minutes of all their meetings, and may issue warrants of such district in payment of all claims of indebtedness against such district. * * *"

[1] These provisions of the statute render it plain that a diking district, when lawfully created, becomes a legal entity as a public corporation, and that its board of commissioners possess the usual discretionary powers of managing boards of public corporations, in so far as the powers and duties enumerated in the above-quoted sections of the statute are concerned. This being so, let us be reminded of the elementary principle so well stated by Judge Dunbar, speaking for the court, in *State ex rel. Pub. Co. v. Milligan*, 3 Wash. 144, 151, 28 Pac. 360, as follows:

"No principle of equity jurisprudence is better established than that courts of equity will not sit in review of proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies the exercise of that discretion in good faith will not, in the absence of fraud, be disturbed. *High on Injunctions* (3d Ed.) § 1240."

[2] This is the controlling law of this case.

The organization of the district having been completed, the commissioners employed Stuart as attorney for the district, agreeing to pay him the total sum of \$3,000 for rendering all necessary legal services incident to the construction of the improvement, including the acquisition of the rights of way for the necessary dikes and ditches and the assessment of damages and benefits to be determined in the eminent domain and assessment proceedings in court. The commissioners also employed Baar & Cunningham, engineers, to make surveys, prepare plans, and specifications for the proposed improvement, and to superintend the construction after the letting of a contract therefor, agreeing to pay them for such services "five and one-third per cent. of the total actual cost of the project." The engineers made final surveys, and prepared detailed plans and specifications for the improvement, estimating the cost

thereof at \$168,000. The commissioners then being about ready to present their petition to the superior court as provided in section 4103, above quoted from, looking to the acquisition of rights of way for the necessary dikes and ditches and the assessment of damages and benefits, the plaintiff commenced this action in equity in the superior court, which resulted in a decree, from which this appeal is prosecuted.

[3] We have painstakingly reviewed the evidence contained in this voluminous record, and cannot escape the conclusion that the decree of the trial court has no more substantial foundation to rest upon than that the evidence furnishes some ground for arguing that the commissioners did not decide the matters they were called upon to decide, which are here in question, as those matters should have been decided. We think the evidence wholly fails to show any arbitrary or capricious action on the part of the commissioners, or any intent on their part to exercise other than their best judgment in employing Stuart as attorney, employing Baar & Cunningham as engineers, and in adopting the plans and specifications prepared by them for the improvement.

Touching the question of the adoption of the plans and specifications, W. G. Brown, an engineer and owner of land in the district, testified in substance that, in his opinion, the plans and specifications called for an improvement more elaborate and extensive than was necessary, especially in that the adopted plans and specifications called for the construction of dikes somewhat higher than necessary, and that a sufficient improvement with lowered dikes could be constructed for approximately \$108,000. The evidence, we think, furnishes ample room for difference of opinion as to what the nature and extent of the improvement in this and some other particulars should be. Brown as an owner of land in the district had considerable to do with the promotion of the creating of the district and the defining of its boundaries, but did not prepare any detailed plans or specifications for the proposed improvement. He was an applicant for the position of engineer of the district, and had offered to the commissioners to do the engineering work for a compensation of 5 per cent. of the actual cost of the improvement, limiting his compensation to 5 per cent. of \$110,000. The claim that the improvement would be more elaborate and extensive than necessary, according to the plans of the engineers, is supported almost wholly by the testimony of Brown alone, while the testimony of Mr. Cunningham, one of the engineers, is, we think, equally positive and apparently as trustworthy, in support of the improvement being as elaborate as the plans and specifications prepared by his firm called for. Clearly we think it was not such an abuse of discretion on the part of the

commissioners, under the circumstances, to employ Baar & Cunningham and finally adopt their plans and specifications, as to warrant interference therewith by the trial court. Aside from the question of actual fraud touching these questions, it seems to us that the case involves nothing but a question of difference of opinion concerning matters which the commissioners were, by virtue of their position, called upon to decide as administrative officers.

The evidence touching the question of actual fraud was directed almost wholly to the alleged wrongdoing of Stuart and, according to the contentions of counsel for plaintiff, tended to show that Stuart had made improper proposals to one Randles, a contractor, and had entertained improper proposals from him, looking to the ultimate awarding of the construction contract to Randles without competition, by which Stuart in some way was to profit. Just how Stuart was to be able to bring about any such condition is not shown, except by the suggestion, which is practically wholly without support in the evidence, that he was going to be able to control the action of the commissioners when it came to awarding the contract. But we think the evidence touching these questions does not lend any support to the view that the commissioners were parties to any such contemplated wrong action on the part of Stuart. The evidence tending to show these alleged acts on the part of Stuart rests largely upon the testimony of Randles, which was taken by deposition, and which, in the main, was positively contradicted by the testimony of Stuart. True there was some other evidence lending some support by way of side lights to the claim that Stuart entertained some notion of improperly profiting in some way by the contract, or by the sale of the bonds of the district. But, upon the whole, we think it may be said that even as to this question the evidence was no more than fairly evenly balanced. But this, to our minds, is not a controlling question. It might be regarded as sufficient showing to warrant the commissioners in discharging Stuart as attorney for the district; but plainly it was not such as to warrant the court in interfering with the commissioners continuing the employment of Stuart as attorney for the district under his contract of employment, and fell far short of being a sufficient showing to warrant the court in interfering on the ground of fraud on the part of the commissioners.

[4] As to the employment of Stuart at a total compensation of \$3,000 for all of the legal work to be done in connection with the construction of the improvement, acquiring of the rights of way, and the assessing of benefits and damages by eminent domain and assessment proceedings in court, being "constructively fraudulent," as it is charac-

terized in the decree; such view of that action by the commissioners has no foundation other than the claim that the compensation is excessive. Plainly, we think, in view of the magnitude of the project and the probable amount of legal work to be performed under the contract, it cannot be said that the commissioners abused their discretion in agreeing to pay Stuart compensation in that amount.

We are quite convinced that to affirm the decree of the trial court would be but to sanction judicial interference with the discretion of the commissioners, in the exercise of which they are not guilty of either actual or constructive fraud, and that the decree must be reversed, and the action dismissed. It is so ordered.

HOLCOMB, C. J., and MOUNT, FULLERTON, and BRIDGES, JJ., concur.

COLUMBIA SECURITY CO. v. ÆTNA ACCIDENT & LIABILITY CO. et al.
(No. 15380.)

(Supreme Court of Washington. Aug. 6, 1919.)

1. PRINCIPAL AND SURETY ⇐149—BUILDING CONTRACTS—CONTRACTOR'S BOND—REASONABLENESS OF PROVISION.

The reasonableness and enforceability of a provision of contractor's bond, limiting time within which action shall be commenced for a breach, depends not alone upon the words of the bond and the contract, but also upon the facts of the particular case.

2. PRINCIPAL AND SURETY ⇐87—BUILDING CONTRACTS—CONTRACTOR'S BOND—BREACH.

Actual breach of contractor's bond occurs when liens are filed and established by the judgment of the court.

3. PRINCIPAL AND SURETY ⇐149—BUILDING CONTRACTS — ACTION ON CONTRACTOR'S BOND.

Provision of contractor's bond, requiring suit to be brought within six months after date fixed in contract for completion of work, did not preclude owner from bringing action on bond after expiration of such period, where surety had induced owner to delay commencement of suit.

4. APPEAL AND ERROR ⇐187(3)—RIGHT TO ALLEGE ERROR—PARTIES—ACQUESCENCE.

Surety on contractor's bond cannot complain of failure to make contractor a party to an action on the bond as required by bond, where court made order that contractor be made party defendant, which order was complied with and an unsuccessful effort was made to get service on him, and where, though contractor was called as a witness by the surety, surety did not insist that contractor be joined as party to the action.

5. PRINCIPAL AND SURETY ⇨129(2)—BUILDING CONTRACTS—ACTION ON CONTRACTOR'S BOND—INCREASE IN COST OF WORK.

Increase of more than 20 per cent, in cost of work without written consent of surety on contractor's bond in violation of provision of bond, was not fatal to action on bond, where such increase resulted from unauthorized order of architect, and where surety had signed bond with knowledge that changes in plans and specifications made such increase necessary.

6. PRINCIPAL AND AGENT ⇨99—ARCHITECT—GENERAL AGENT.

Architect is not, as such, a general agent, and persons dealing with him are bound by the general rules of agency.

7. PRINCIPAL AND AGENT ⇨101(4)—ARCHITECT'S AUTHORITY.

Authority given architect to interpret plans and specifications and condemn material as unsound did not empower him to recast drawings and specifications upon a matter already perfectly clear and explicit, thereby increasing the total building cost so as to threaten, if not defeat, owner's rights under bond, indemnifying owner against cost exceeding amount mentioned in the contract.

8. PRINCIPAL AND SURETY ⇨128(1)—MODIFICATION OF CONTRACT—EFFECT ON SURETY.

Mere silence on the part of a surety when informed of subsequent modification by the principal and creditor of an outstanding contract, theretofore signed by them and surety, does not imply assent on surety's part.

9. PRINCIPAL AND SURETY ⇨129(2)—CONTRACTOR'S BOND—CHANGE IN PLANS AND SPECIFICATIONS—ESTOPPEL OF SURETY.

Surety, having signed contractor's bond with knowledge of changes in plans and specifications, which changes were made prior to such signing, is estopped to assert invalidity of bond by reason of changes.

10. PRINCIPAL AND AGENT ⇨143(2)—BUILDING CONTRACTS—ACTION ON CONTRACTOR'S BOND.

Owner could bring action on contractor's bond, though its secretary and general manager was named as owner in bond.

Department 1.

Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Action by the Columbia Security Company against the Aetna Accident & Liability Company and another. Judgment that plaintiff take nothing by the action, and plaintiff appeals adversely to named defendant. Reversed, with directions.

O. C. Moore, of Spokane, for appellant.

Post, Russell & Higgins, of Spokane, for respondent.

MITCHELL, J. T. C. Elliott, his wife, and certain of their children own all the stock in the plaintiff corporation which was organ-

ized for the purpose of handling their property. T. C. Elliott, as secretary, treasurer, and manager thereof, handled and directed its business affairs. It was the owner of real property, including a store building in Pullman, Wash., and on May 25, 1916, through its manager, entered into a written contract with one J. M. Schuster for the remodeling of the building, according to plans and specifications provided, at the agreed price of \$1,200. By the terms of the contract the contractor was to provide all material and labor and complete the work by June 15, 1916. As a part of the same transaction it was understood the contractor should furnish a bond with surety to assure the faithful performance of the contract and, accordingly, upon the application of the contractor, for a consideration paid, the Aetna Accident & Liability Company, a corporation, as surety, with Schuster as principal, made and delivered the bond, in the sum of \$1,200, upon which this action was brought. The builder's contract and the bond run to T. C. Elliott, who is designated as the owner of the building. The work was finished June 15-17, 1916. After payment to the contractor of \$960 plaintiff, to protect its property and on the order of the contractor, was compelled to pay, but without a suit, a materialman \$340.27; and, further, a lien foreclosure suit by another materialman against this plaintiff, the contractor and T. C. Elliott, in which there was a judgment foreclosing the lien, together with the necessary expenditure by this plaintiff for its own attorney's fees and other charges in that suit, compelled plaintiff to pay the sum of \$602.19, making altogether \$702.46 in excess of the contract price, for the recovery of which, with interest, this suit was brought. The case was tried before the court without a jury, and resulted in a judgment that plaintiff take nothing by the action.

In addition to general denials respondent, the Aetna Accident & Liability Company, answered the complaint by three affirmative defenses, each of which withstood a general demurrer in the trial court, and was then traversed by a reply.

The first affirmative defense is to the effect that the action, which was started on June 12, 1918, was not commenced within the time limit fixed by the terms of the bond. The defense is based on the provision in the bond that no action on it shall be had or maintained against the surety unless it be brought and process served on the surety within six months after the date or time fixed in the contract for the completion of the work mentioned therein, which, as already noticed, was June 15, 1916. The evidence shows that shortly after the work was completed Elliott notified respondent at its home office in Hartford, Conn., and its local agent at Pullman,

Wash., that certain persons, naming them, made claims for material furnished in amounts specified, which, with payments already made to the contractor, would substantially exceed the contract price, and that respondent would be held responsible therefor under the terms of the bond; and that the contractor also made a charge for the same, claiming they were extras ordered by the architect, concerning which the notice stated they were without authority or the knowledge of the owner. Thereafter considerable correspondence took place between the parties, including notice to respondent that liens had been filed, and that if suits were brought, its assistance in defense thereof would be requested; and later on, within six months from the date fixed for the completion of the work, notice was given respondent that lien foreclosure suit had been filed, inclosing a copy of the summons and complaint, and requesting respondent to assume or assist in the defense. Respondent declined to take part in the suit, but at its request was kept posted as to its progress, including the judgment obtained by the plaintiff therein. After the judgment, which was paid by this appellant, appellant's demands that respondent pay the amount thereof were unavailing on the score that, as Schuster was thinking of appealing the case, respondent desired to wait until his attitude in that regard was settled. In this respect respondent's admitted adjusting agent, Mr. Comfort, on January 14, 1918, wrote, requesting a delay in taking any steps against the surety company, and further said:

"Before making any payment, our attitude is that the difficulty between Schuster and Elliott should be definitely settled so that Mr. Schuster will have no handling of the collateral."

And, again, on May 12, 1918, one month before this suit was brought, the respondent from its home office wrote:

"We should expect to hear from Mr. Comfort in a short time, and you have nothing to lose by waiting until we are a little more fully informed concerning the entire matter."

[1, 2] The reasonableness and enforceability of the provision of such a bond limiting the time within which an action shall be commenced for a breach depend, not alone upon the words of the bond and the contract, but also upon the facts of the particular case. The actual breach occurs when liens are filed and established by the judgment of a court. The limitation for commencing suit on the bond, in its strict sense, is not controlling in spite of a reasonable and valid excuse for delay beyond that time. *Beebe v. Redward*, 85 Wash. 615, 77 Pac. 1062; *Ovington v. Ætina Indemnity Co.*, 36 Wash. 473, 78 Pac. 1021; *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276.

[3] As alleged by appellant in its reply to

this defense, after setting out the facts, respondent by its conduct has foreclosed itself to any right it might otherwise have under this provision in the bond.

[4] The second affirmative defense is that Schuster, the principal in the bond, was not made a party to the action. The bond provides "that the principal shall be made a party to any action, suit, or proceeding had or maintained against the surety on this instrument," and it is contended the provision is a condition precedent to the bringing and maintaining of the action. At the commencement Schuster was not made a party to the action, but in the process of settling the pleadings the court, having its attention called to this defense, made and entered an order that Schuster be made a party defendant to the action. The order was complied with, and afterwards, prior to the trial, an unsuccessful effort was made through the office of the sheriff of the county in which the suit was pending to get service of the summons on Schuster. Thereafter no further insistence on the point was made by respondent in the trial court, although for the trial respondent procured the attendance of Mr. Schuster and called him as a witness. Under the circumstances respondent may not complain because of lack of service upon the principal, even if otherwise it could insist upon the provision of the bond requiring the principal to be made a party to an action against the surety, in the face of another provision of the bond that the principal and the surety bind themselves, jointly and severally.

[5] The third affirmative defense is that the plans and specifications were changed, whereby the cost of the work was increased more than 20 per cent. without the written consent of the surety, and in violation of one of the conditions of the obligation that—

"No change shall be made in the plans, specifications, terms, covenants and conditions of such contract which shall increase the amount to be paid the principal more than twenty per centum of the penalty of this instrument without the written consent of the surety."

In our view the proof answers this contention in two ways:

(1) The changes and additional cost of more than 20 per cent. arose, directly and indirectly, almost exclusively by order of the architect requiring, during the course of the construction, larger iron beams or lintels installed than those called for in the plans and specifications. It is clear that appellant or its manager knew nothing about the change until the larger beams were already on the ground and the contractor engaged in installing them, at which time, because of the lien statutes, liability to the one furnishing them had already accrued; and within a few days, upon completion of the work, on learning of the purpose to make an extra charge, or charge beyond the contract price, appellant

promptly protested to respondent, and later resisted the lien foreclosure suit, unsuccessfully, however, manifestly because under the lien statutes an architect or contractor having charge of the construction or repair of a building is held to be the agent of the owner for the purpose of the establishment of a lien for material furnished.

The builder's contract and the specifications are made a part of the terms and conditions of the bond. The only provisions of the instruments claimed by respondent to have any bearing upon the authority of the architect to order changes and bind the appellant are as follows:

Article II of the contract:

"It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architect."

Article III of the contract:

"The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby."

Portions of the specifications as follows:

"All material must conform to the specifications. * * * The work shall be under the supervision and direction of the architect and his decision in matters concerning the intent and meaning in interpreting drawings and specifications shall be final and binding. * * * The contractor shall call the architect's attention to any improper design or apparent discrepancy in drawings before progressing with the work."

[8, 7] An architect is not, simply as such, a general agent. He and all third persons dealing with him are bound by the general rules of agency. In the present case he had no authority to bind appellant beyond the terms of the contract with Schuster. The authority conferred was limited and defined. It was special and not general. The work to be done under the direction of the architect was the work mentioned in the contract which in the respect in question was made definite and certain by the specifications. His power to condemn and order taken down and removed from the grounds all material as unsound or improper, or as in any way failing to conform to the drawings and specifications, falls far short of giving him any right to recast the drawings and specifications, upon a matter already perfectly clear and explicit, by substituting something else

so increasing the total cost that standing alone would threaten, if not defeat, his employer's rights under the literal terms of a bond given to indemnify and assure the employer that the cost of the work would not exceed the amount mentioned in the contract. It was provided that all materials should conform to the specifications, that is, the specifications which were a part of the contract; and, while it was agreed that the decision of the architect in interpreting the intent and meaning of the drawings and specifications of the work under his supervision should be final and binding, this cannot be considered as creating a sphere wherein the architect could, *sua sponte*, make radical changes in the specifications, already precise and certain, to the substantial disadvantage of the owner of the building. Contrary to the contention of respondent, the rule applicable here is given in 6 Cyc. 29, quoted with approval in *Schanen-Blair Co. v. Sisters of Charity*, 77 Wash. 256, 137 Pac. 468, as follows:

"The mere fact that a person is employed as an architect does not constitute such person a general agent of his employer, his powers as agent being limited by the contract entered into between them. Thus, unless specially authorized, he is not entitled to change, alter, or modify the contract entered into by the builder and his employer; nor has he any authority to bind the owner by contracts for any work done upon or materials furnished for the structures concerning which he is employed; nor is he entitled to receive notice of an assignment of payments accruing on the contract so as to charge the owner with notice thereof."

(2) The application for the bond was made to one Chapman, respondent's agent, on June 3, 1916, and the bond was executed and delivered on June 13, 1916, two or three days before the work was finished. On June 5, 1916, respondent's agent, already provided with the plans and specifications, regarding the application for a bond, visited the contractor at the building and made inquiries into the matter. The agent was not a witness at the trial, but as to a part of what occurred at the time of the agent's visit for writing the bond Schuster testified as follows:

"Q. Did you confer with him? Did you go to Mr. Chapman himself? A. I went to Mr. Chapman, yes, and made application for the bond.

"Q. You advised him fully in regard to the work that was being done, and what the contract called for? A. Most decidedly, sir.

"* * * Q. Just tell me what he did do about it? You talked to Mr. Chapman about it? A. I had to get the bond. I just went to him and made the application, told him what I was going to do, and what the bond was to cover. * * *

"Q. You told Mr. Chapman that these changes had been made, a departure from the contract at the time he issued this bond? A. I certainly told him, because he came down to

the building when we were making the change.

"Q. What objection did he make? A. He didn't make any objection.

"Q. He had seen the specifications and the plans at the time? A. He had seen the plans and specifications. Had to have them to get the bond. * * *

"Q. But you did let Mr. Chapman, as agent of the bonding company, know the facts?

"Mr. Russell: I object to that as repetition. He has answered that question two or three times. I think Mr. Moore is trying to get him to answer it a different way.

"The Court: Overruled.

"Q. Isn't that true? A. I tell you Mr. Chapman was there, I know, when we were making the change, and talked about it. He wanted to know why Mr. Jacobs [the architect] made such a mistake. Of course in order to clear myself I told him and everybody that Mr. Jacobs had, that he got the college engineer."

By a quotation from *Thompson v. Metropolitan Building Co.*, 95 Wash. 546, 164 Pac. 222, respondent insists the applicable rule here is:

"It is well settled that mere silence on the part of a surety, when he is informed of a modification of the contract between his principal and the creditor, or that a new obligation has been substituted in lieu of the original one, does not imply assent on his part. In order to bind him to the new undertaking, it is not sufficient that he passively acquiesce; he must actively consent to be bound by the terms of the new agreement."

[8, 9] But that rule is not applicable here. It is applicable in the case of a subsequent modification by the principal and creditor of an outstanding contract theretofore signed by them and the surety; while in the present case the surety had not signed the contract which, so far as the surety was concerned, had already been modified, and of which its agent was advised at the time he was engaged in the serious business of making the contract for his principal as surety or indemnitor. Respondent will not be permitted to say it received compensation upon the basis of drawings and specifications already abandoned, within its knowledge, at the time of making its contract, or otherwise than according to the changes being followed, and of which it learned while seeking information for the purposes of its undertaking—the latter, not the former, was its contract.

[10] Besides the affirmative answers referred to it is contended by respondent that appellant can in no event have the benefit of the assurance contained in the bond, because it is not named as the beneficiary therein. At last, the bond was meant to protect the owner; that was the object to be accomplished. It mentions T. C. Elliott as owner of the building. He, or even the actual owner for whom Elliott was acting as agent, was but the obligee, while the risk assumed by re-

spondent was founded upon its trust and confidence in the conduct and ability of Schuster. The situation is controlled by the rule of law, relied on in the case of *Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602, Ann. Cas. 1918B, 125, well stated in 2 C. J. 873, as follows:

"As a corollary to the principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal, it is a well-established general rule that, where an agent on behalf of his principal enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract inures to the benefit of the principal, who may appear and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party, and the fact that the agent has made the contract in his own name does not preclude the principal from suing thereon as the real party in interest. * * *

The record shows appellant proved its case; and, concluding that none of the defenses was established, the judgment is reversed, with directions to the lower court to enter judgment for appellant for the amount demanded in its complaint, with interest from the date of the commencement of the action.

HOLCOMB, C. J., and TOLMAN, MAIN, and MACKINTOSH, JJ., concur.

HIRSCHBERG v. SOUTHERN PAC. CO. (L. A. 4264.)

(Supreme Court of California. July 31, 1919.)

1. WITNESSES ⇐219(4)—PRIVILEGED COMMUNICATIONS TO PHYSICIANS—WAIVER.

The privilege of a patient, under Code Civ. Proc. § 1881, of preventing physicians from testifying as to communications made by patient, is personal to the patient and may be waived by him.

2. WITNESSES ⇐219(5)—PRIVILEGED COMMUNICATIONS TO PHYSICIANS—WAIVER OF PRIVILEGE.

Plaintiff in a personal injury action, by testifying fully and allowing a physician to testify fully as to her condition after an alleged assault, did not waive her right, given by Code Civ. Proc. § 1881, to object to the introduction in evidence of information acquired by another physician while acting as her physician several years prior to the injury complained of.

In Bank.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Fannie Hirschberg against the Southern Pacific Company. From a judgment for plaintiff and order denying its motion for new trial, the defendant appeals. Affirmed.

Henry T. Gage, W. I. Foley, W. I. Gilbert, and C. F. Cable, all of Los Angeles, for appellant.

Peyton H. Moore and E. B. Drake, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal from a judgment of the superior court of the county of Los Angeles in an action for damages for personal injuries, in which the plaintiff was awarded the sum of \$3,500, with costs amounting to \$524.95. The complaint alleges that the injuries were sustained by the plaintiff at the hands of an employé of the defendant company. The case was tried by jury, and judgment was given by the court for the amount of the verdict. A motion for a new trial was thereafter interposed and denied. The record contains a statement on motion for a new trial settled and allowed by the court.

It appears that the plaintiff has resided in Los Angeles since July 27, 1910. On August 5, 1910, the plaintiff, accompanied by her son, went to the station of the defendant company in Los Angeles for the purpose of securing certain baggage belonging to her and her family. The baggage agent presented a statement of excess charges for payment before releasing the baggage. Plaintiff's son questioned the correctness of a certain item of 25 cents, and an altercation ensued, during which, plaintiff alleged, the baggage agent assaulted her by seizing her right arm and, throwing her violently and forcibly against the stone floor, causing her jewelry to be driven into the flesh of her chest, "bruising and lacerating the same and breaking the bones thereof." It is further alleged that she was "severely and permanently injured in the lower abdominal region, and especially plaintiff's uterus was misplaced, torn, crushed, and bruised, and her female functions were interfered with, and she has been caused to be sick, sore, and lame therefrom ever since"; and, further, that her left knee and right arm were severely sprained, her back wrenched, her face and head bruised, "and that her body became sick, sore, and disordered."

The only question presented for consideration on this appeal is whether the trial court erred in excluding the deposition of Dr. Emery Marvel of Atlantic City, N. J., which was offered by the defendant.

From the record it appears that the deposition was objected to by the plaintiff on the ground that the examination called for information acquired by Dr. Marvel while attending the plaintiff as a physician, within the meaning of subdivision 4, § 1881, Code

of Civil Procedure, and that the ruling of the court was based upon that conceded fact. It also appears that, while the deposition was taken upon the stipulation of the parties, it was taken "subject to all objections and exceptions, as if the said witness were personally present on the stand, but without objection to the time or place of taking the same. It being expressly agreed that plaintiff by this stipulation does not in any way waive the right to object to the introduction in evidence of all or any part of the testimony of Dr. Marvel on the ground that the same is privileged."

The appellant contends that the deposition of Dr. Marvel was admissible upon two grounds:

"First. Mrs. Hirschberg, by her own testimony and by disclosures made with her consent by her physician, waived any right which she may have had to the exclusion of the testimony of the physician.

"Second. She testified that Dr. Emery Marvel was not her physician, and that he had never treated her for any disease except that of lumbago. If he was not her physician, then certainly she could not object to his testifying in the case. In other words, if she claimed the privilege of excluding the communications between Dr. Marvel and herself from the consideration of the jury she could only do so upon the theory that he was her physician. She could not deny that the relationship existed, and in the same breath claim his testimony could not be offered because it was a privileged communication."

The plaintiff testified on direct examination that as a result of the injury she sustained a displacement of her uterus, and that "before the trouble I was a healthy woman." On cross-examination she was asked if in the years 1902, 1904, and 1907, at Atlantic City, New Jersey, she was not treated by Dr. Marvel for a displacement of her uterus. Her answer was flatly in the negative; she stated, however, that he had once treated her for lumbago.

On direct examination, Dr. Adolph Tyrola, plaintiff's personal physician, who treated her for the first time after the injury and was called in her behalf, described in minute detail the condition of the organs of the pelvic region, including a displacement of the uterus. He testified on cross-examination that—

"She did not tell me that the entire displacement resulted from the fall. * * * My opinion in this case is that the displacement began several years ago, long prior to my first examination."

In view of the delicate nature of much of the testimony touching the physical condition of the plaintiff, and the fact that the only question reserved for appeal is that of privilege, we do not think it necessary to make a more extended reference to such testimony.

[1] Section 1881 of the Code of Civil Procedure, as it was written at the time this action arose, reads as follows:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: * * * 4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. * * *

The purpose of the privilege "is to facilitate and make safe full and confidential disclosures by patient to physician of all facts, circumstances, and symptoms, untrammelled by apprehension of their subsequent enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient." In *re Bruendl's Will*, 102 Wis. 45, 78 N. W. 169. The privilege is personal to the patient and may be waived by him. *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688. What constitutes a waiver is stated in 40 Cyc. 2399, as follows:

"The privilege is waived whenever the person entitled to the protection of the statute voluntarily makes public matters of which a disclosure without his consent is forbidden, and so where the client or patient voluntarily introduces evidence of communications between himself and his physician the privilege is waived, and the attorney or physician may testify in respect thereto."

It has been held that if a patient offers the testimony of one of several physicians attending the case at the same time, or who were present at a consultation, the privilege has been waived, so that the testimony of all of them will be received. *Morris v. Railroad*, 148 N. Y. 88, 42 N. E. 410, 51 Am. S. Rep. 875; *O'Brien v. Western Implement Mfg. Co.*, 141 Mo. App. 331, 125 S. W. 804, and cases there cited. And likewise where different physicians have treated the patient at different times for the same injury and the patient calls one of the physicians to testify, it has been held that this constitutes a waiver as to all the physicians. *Lawson v. Morning Journal*, 32 App. Div. 71, 52 N. Y. Supp. 484; *Lampel v. Goldstein*, 167 N. Y. Supp. 576; *State v. Long*, 257 Mo. 199, 165 S. W. 748; *Priebe v. Crandall* (Mo. App.) 187 S. W. 605. However, there is authority to the contrary. *Dotton v. Albion*, 57 Mich. 575, 24 N. W. 786; *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790; *Mellor v. R. Co.* (Mo.) 14 S. W. 758; *Hope v. Railroad Co.*, 110 N. Y. 643, 17 N. E. 873; *Mays v. New Amsterdam C. Co.*, 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108; *Slater v. Sorge*, 166 Mich. 173, 131 N. W. 565.

But it is to be noted that in the foregoing cases it was sought to admit the testimony

of physicians who attended the patients after the injury complained of, and who, according to the testimony of the patients themselves on direct examination, had been consulted or had given treatment for the same injury. Such is not the case here. The testimony of Dr. Marvel purported to cover information acquired by him while attending the plaintiff as her physician several years before. And in the presentation of the case for the plaintiff the treatment by Dr. Marvel was in no way referred to, but, as already stated, the fact was introduced at the trial on the cross-examination of the plaintiff. Dr. Marvel did not examine or treat the plaintiff after the assault. This question, so far as we are able to find, has never been passed upon in this state. However, the case of *Missouri & N. A. R. Co. v. Daniels*, 98 Ark. 352, 136 S. W. 651, decided in 1911 by the Supreme Court of Arkansas, is so clearly analogous in its facts and presents so concisely the exact point of law here involved that we will quote from it at some length.

The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of a conductor of the defendant railroad company. It was alleged that the plaintiff had been thrown from the steps of a passenger coach to the floor of the station platform, and that as a result of the fall she had suffered a prolapsus of the uterus and that the injury was so severe that an operation was necessary. To prove the seriousness of her condition after the accident, she called Dr. Fowler, her attending physician, as a witness. We quote from the opinion:

"* * * During the progress of the trial the defendant introduced two physicians who had attended on the plaintiff about two years prior to the time of the alleged injury, and offered to prove by them that she had sustained a displacement of the womb at that time, and had suffered from that trouble long prior to the date of the alleged injury. The plaintiff objected to the admission of this testimony, and her objection was sustained by the court. It is conceded by the defendant that the information which the testimony of these witnesses would have disclosed was acquired by them while attending the plaintiff as physicians; but it contends that the evidence was admissible because the plaintiff had waived her right to object to the introduction of any testimony relative to her condition by reason of having herself introduced the testimony of Dr. Fowler, above referred to.

"It is provided by section 3098, Kirby's Digest, that 'no person authorized to practice physic or surgery, and no trained nurse, shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to describe as a physician or to act for him as a surgeon or a trained nurse.' * * * By virtue of the statute the patient is alone given the right to remove the ban of secrecy. The patient may be willing to waive the objection of incompetency as to a particular physician in whom

he reposes confidence, and yet be unwilling to waive this objection as to another, who treated him at a different time for the trouble complained of. The statute affords him this privilege, when the testimony of the offered witness does not relate to the same occasion as that from which the patient has removed the seal of secrecy. [Citing cases.]

"Counsel for the defendant upon cross-examination of plaintiff asked her if the physicians whom defendant desired to introduce as witnesses as to her condition prior to the alleged injury had treated her in 1907 for displacement of the womb. This she denied, and it is now urged by the defendant that it was entitled to have the benefit of these physicians' testimony in order to contradict the plaintiff. But, if the defendant's position in this respect should be upheld, then the above statute in regard to privileged communications would be easily evaded. In any cause where the opposing party desired to obtain the testimony of an attending physician, it could be secured in like manner, although against the objection of the patient. The plain provisions of the statute forbidding such testimony by a physician cannot thus be abrogated. *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89; *Burgess v. Sims Drug Co.*, 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359. We are therefore of the opinion that the plaintiff, by the introduction of the testimony of Dr. Fowler relative to his treatment of her as a physician after the injury, did not waive her privilege to object to the testimony of other physicians who had treated her prior to that time, although for the same alleged trouble."

See, also, *Butler v. Manhattan Ry. Co.*, 3 Misc. Rep. 453, 23 N. Y. Supp. 163; *Marx v. Manhattan Ry. Co.*, 56 Hun, 575, 10 N. Y. Supp. 159; *Treanor v. Manhattan Ry. Co.*, 16 N. Y. Supp. 536; *Webb v. Metropolitan St. Ry. Co.*, 89 Mo. App. 604; *Woods v. Incorporated Town of Lisbon*, 150 Iowa, 433, 130 N. W. 372.

The case of *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89, decided by the Supreme Court of Missouri, states with equal force and lucidity the law applicable to this question. Action was brought there for the recovery of damages for personal injuries alleged to have been caused to the plaintiff by falling through a hole in a defective sidewalk. A point similar to the one last discussed was there raised on appeal. In the course of its opinion the court said:

"The plaintiff testified upon her examination in chief that her general health was good, and upon cross-examination she was asked if Dr. Mathias had treated her, and what for. She replied that he had treated her for headaches; nothing else. Defendant thereafter introduced Dr. Mathias to show what he had treated her for. Now, defendant contends that, because plaintiff answered its questions to the effect that Dr. Mathias treated her for nothing else than headaches, she waived the protection of the statute, and that the defendant had the right to the evidence of Dr. Mathias for the purpose of contradicting her. If defendant's position in this

respect be the law, then the statute in regard to privileged communications is a failure in the purpose for which it was intended, for a party to a suit could evade it at any time where an attendant physician is introduced as an expert witness by asking him upon cross-examination, if he had treated the party in whose behalf he testifies, if he treated such party for anything else than what may be stated by such party, and, if so, by this means contradict him. The statutes of Iowa and New York with respect to privileged communications are in all essentials like the Missouri statute, and in the former state in the case of *Burgess v. Sims Drug Co.*, 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359, the facts were similar to the facts in the case at bar. In that case defendant asked plaintiff on cross-examination if a certain physician, viz. Dr. Amos, had treated him, and what the doctor had treated him for. Plaintiff answered the questions, without objection, and then defendant offered Dr. Amos as a witness, claiming that plaintiff had waived his right under the statute by answering the questions propounded him by the defendant. The court held that plaintiff had not thereby waived his privilege under the statute, and that Dr. Amos was not competent to testify in regard to plaintiff's ailments, or his treatment of him. The court says: 'If counsel saw fit, on cross-examination, to inquire into this matter, he must be bound by the answer, and cannot afterwards claim that the witness, by answering without objection, voluntarily waived the privilege.' The same rule is announced by the Supreme Court of New York in *Fox v. Union Turnpike Co.*, supra [59 App. Div. 363, 69 N. Y. Supp. 553]: 'There was no error in the ruling of the court upon this question.'

[2] In our opinion the rule applicable to this case is correctly stated in the foregoing authorities. We have found no authority that supports the contention of appellant that because the plaintiff and her physician testified fully as to her condition after the assault the ban of privilege was thereby waived as to information acquired by Dr. Marvel while acting as her physician several years prior to the injury complained of.

We will next consider the further contention of appellant that the plaintiff testified that Dr. Marvel was not her physician, and that he never treated her for any disease except lumbago. Preliminarily it is proper to point out that the appellant is not accurate in stating the effect of the testimony of the plaintiff. She did not testify that Dr. Marvel was never her physician. The record plainly shows to the contrary. The purport of her cross-examination was whether in the years 1902, 1904, and 1907 Dr. Marvel did not treat her for female trouble. The questions were so framed that an affirmative answer would carry the declaration either that he had or had not been her physician for the specified purpose. She invariably answered that he had never so treated her, but that he had been called in to treat her for an attack of lumbago. This was equivalent to a direct

declaration that he never had been her physician for the treatment of female trouble, but that he had been her physician for the treatment of lumbago. It was not disputed at the trial that Dr. Marvel had been the plaintiff's physician; the sole dispute was whether he had treated her for female trouble or for lumbago. Moreover, the fact of the relationship of physician and patient was admitted by counsel for the defendant at the trial, and it was upon this admission that the court based its ruling excluding the deposition, as is shown by the record:

"Mr. Gilbert (counsel for the defendant): Let the record show that the entire deposition of Dr. Marvel was offered.

"The Court: That is on the understanding that what he would testify to was information gained while attending her as a physician?

"Mr. Gilbert: Yes.

"The Court: With that understanding the objection will be sustained."

The argument of appellant, therefore, that plaintiff having denied that Dr. Marvel had been her physician could not object to his testifying in the case, is without force.

In view of this stipulation, and because we do not find that the point has been made in the briefs, it is not necessary to consider the question whether the privilege may be allowed as to information claimed by the defendant to have been acquired by Dr. Marvel in the treatment of the plaintiff for female trouble in the face of her testimony that he attended her for the treatment of lumbago only.

It is unquestionably true that the testimony of Dr. Marvel, if competent, would have been material and relevant to the inquiry whether the pelvic condition of the plaintiff as testified to by herself, Dr. Tyrola, and the other physicians at the trial, was in any degree due to the assault. No authority has been brought to our attention by counsel, and we have not been able to find any, which would support the admission of the deposition under the circumstances presented by the record.

And although the tendency of the decisions in recent years has been toward a less liberal application of the ban of privilege, and that the privilege in this state in cases of damages for personal injuries has been abrogated since this cause of action arose (Stats. 1917, p. 954), yet to hold that the deposition was admissible would be to deny to the plaintiff a substantial right. The ruling was proper.

For the reasons stated the judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.;
SHAW, J.; LENNON, J.; MELVIN, J.;
OLNEY, J.

MUSGRAVE v. RENKIN et al. (L. A. 5244.)
(Supreme Court of California. Aug. 6, 1919.)

1. MORTGAGES ⇨309(3) — RELEASE — DELIVERY.

Release of a mortgage, not delivered by the mortgagee in his lifetime, did not take effect.

2. MORTGAGES ⇨224 — ASSIGNMENT — VALIDITY.

A mortgagee's assignment of the mortgage to a trustee in consideration of the beneficiary's agreement to care for, nurse, and support the mortgagee during the remainder of his life, which agreement the beneficiary performed, was not a gift, and was not executory, but was a present transfer of title.

3. TRUSTS ⇨11(1) — PURPOSE — SUPPORT OF ASSIGNOR.

Assignment of mortgage to a trustee in consideration of the beneficiary's agreement to continue to care for, nurse, and support assignor during the remainder of his life, created a valid trust.

Department 1.

• Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Hattie W. Musgrave, as executrix of the last will and testament of James Henry Caldwell, deceased, against Ida B. Renkin and E. W. Renkin and others. From judgment for defendants, plaintiff appeals. Affirmed.

Isidor B. Dockweiler, of Los Angeles, James C. Williams, of Kansas City, Mo., W. D. Finch and Dockweiler & Mott, all of Los Angeles, for appellant.

Lucius K. Chase, Walter L. Mann, and George F. Renkin, all of Los Angeles, for respondents.

SHAW, J. At the time of the transactions complained of the decedent, Caldwell, held a mortgage and note, executed to him by the defendants, for the sum of \$4,450. The plaintiff's complaint purports to state a cause of action to set aside a release of this mortgage and an assignment of the same mortgage, in trust for certain purposes, made by the decedent in his lifetime, on the ground that they were obtained by fraud and undue influence, and on the further ground that the transaction was an attempt to make a gift, and that it was not completed during the lifetime of the donor. The court below found that the aforesaid contracts were not obtained by fraud, that they were executed without undue influence, and with full knowledge by the donor of their terms and effect, and that at the time his mind was clear and he was fully capable of transacting business. There was evidence sufficient to support these findings. Hence they are conclusive on appeal.

[1] The release was not delivered by the

deceased in his lifetime. Hence it did not take effect and need not be further considered.

[2, §] The assignment of the mortgage was made in March, 1915, and was accompanied by a declaration of trust by the assignor and an acceptance thereof duly executed by the assignee. The effect thereof was to transfer the complete title to the mortgage and note to the trustee, and he thereafter held the same subject to the terms of the trust. The trust declaration provided that in case Caldwell, the decedent, left the home of the Renkins during his lifetime, the trustee should reassign the mortgage and note to Caldwell. That condition did not happen. Under the remaining conditions of the trust, if Caldwell remained in the home of Mrs. Renkin and was cared for by her up to the time of his death, the mortgage was then to be assigned by the trustee to Ida B. Renkin. That condition happened, and the mortgage was transferred in accordance with the declaration. The consideration for the transaction was the previous care of the decedent by Mrs. Renkin and her agreement to continue to care for, nurse, and support him during the remainder of his life. He was old and so afflicted that he required constant care and attention. The agreement of Mrs. Renkin was fully performed. The assignment to the trustee was not a gift, it was not executory, but was a present transfer of the title. *Burkett v. Doty*, 176 Cal. 80, 167 Pac. 518. The trust was in all respects lawful and valid. The result is that the findings and judgment of the court below in favor of the defendant must be sustained.

The judgment is affirmed.

We concur: LAWLER, J., OLNEY, J.

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In re GOULD'S ESTATE. (S. F. 9058.)

(Supreme Court of California. Aug. 8, 1919.
Rehearing Denied Sept. 4, 1919.)

1. EXECUTORS AND ADMINISTRATORS §188
— ALLOWANCES TO WIDOW — SEPARATION
AND DIVORCE.

A widow is entitled, under Code Civ. Proc. § 1464, to a reasonable allowance for support, although she has not lived in a family relation with her husband for some years prior to his decease, and has been granted an interlocutory decree of divorce.

2. JUDGMENT §524—CONSTRUCTION.

Words in a judgment or decree should not be construed independently, but should be considered in relation to the context in which they are found and in the light of the circumstances under which they were used.

3. EXECUTORS AND ADMINISTRATORS §188
ALLOWANCE TO WIDOW—EFFECT OF AWARD
OF PROPERTY ON DIVORCE.

An interlocutory decree of divorce, requiring the husband to transfer to the wife certain property and allotting all other property of the community to the husband "free and clear of all claim of the wife," held not to defeat her statutory claim to a family allowance on his death.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Frank H. Gould, deceased. From an order allowing Nettie Gould, the widow of deceased, a sum as a family allowance, E. B. Gould, as special administrator, appeals. Affirmed.

Frank Freeman, of Willow, and Walter E. Drobisch, of San Francisco, for appellant.

Joseph A. Brown, Elmer E. Robinson, Fabian D. Brown, and Robinson & Brown, all of San Francisco, for respondent.

LENNON, J. This is an appeal by E. B. Gould, a special administrator of the estate of Frank H. Gould, deceased, from an order allowing respondent, Nettie Gould, the widow of the deceased, the sum of \$75 a month as a family allowance.

On January 19, 1918, the superior court of the city and county of San Francisco granted to Nettie Gould an interlocutory decree of divorce from Frank H. Gould, upon a cross-complaint filed by her in an action instituted by the said Frank H. Gould. This decree required the plaintiff, Frank H. Gould, to transfer to the respondent herein certain property, real and personal; it being at the same time ordered that—

"All other property of said community, real, personal, or mixed, and of every description, is hereby assigned and allotted to the plaintiff, Frank H. Gould, free and clear of all claim of the defendant [Nettie Gould]."

Frank H. Gould died on January 26, 1918. On March 1, 1918, Nettie Gould made her application to the superior court of the city and county of San Francisco for a family allowance. The application was resisted on the ground that Nettie Gould had not been for many years in fact a member of the family of Frank H. Gould, and moreover, that Frank H. Gould died possessed of no property save that which had formerly been the property of the community and which had been awarded to him free and clear of all claim of Nettie Gould, including, so it is contended, her claim for a family allowance. On March 12, 1918, the court made the order appealed from allowing Nettie Gould a family allowance beginning with February 1,

1918, and continuing until further orders of the court.

[1] When a person dies leaving a widow, under section 1464 of the Code of Civil Procedure, such widow is entitled to a reasonable provision for her support to be allowed by the superior court or a judge thereof. This provision is not conditioned upon her having lived in a family relation with her husband at the time of his death. It follows, therefore, that the right of Nettle Gould to a family allowance must be determined independently of the circumstance that she had not lived with Frank H. Gould for some years prior to his decease. *Farris v. Battle*, 80 Ga. 187, 7 S. E. 263, approved in *Smith v. Smith*, 112 Ga. 351, 37 S. E. 407; *King v. Executor of King*, 64 Mo. App. 301.

At the time of the death of the decedent, Nettle Gould was his wife. She is now entitled to such rights as the law confers upon her, under the circumstances, as his widow, including the right to a family allowance, unless the property of the community awarded to the decedent was allotted to him free and clear of all claim by her, including the claim to a family allowance. *Estate of Dargle*, 162 Cal. 53, 121 Pac. 320.

In the *Estate of Whitney*, 171 Cal. 750, 154 Pac. 855, Mr. Justice Sloss, speaking on behalf of this court, said:

"The widow's claim to a family allowance is strongly favored in our law. * * * A will may, of course, be so drawn as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance. So, too, the wife may, by agreement, surrender the privilege of applying for an allowance. Whether the right to demand an allowance is inconsistent with the will, or has been surrendered, is a question of interpretation of the will or the contract. In the case of a contract, we think the right should not be held to have been surrendered by an agreement between the spouses 'except by clear and explicit language.'"

In reason, the same principle should apply in construing the decree of a court dividing the property of the community between the spouses; the additional precaution being taken to avoid construing the decree so as to make it apply to rights which the proceeding was not intended to adjudicate.

[2, 3] In the *Estate of Whitney*, supra, the wife "waived all claims to her share of the community property and any and all other claims that she might have upon any of the estate disposed of by the said will." The will assumed to dispose of the entire estate of the husband. After careful consideration of the authorities in this state and other jurisdictions, the court decided that the wife had not waived her right to a family allowance. In view of the similarity of the language involved in that and in the instant

case, this decision is entitled to great weight. An examination of the cases wherein it has been held that the wife had waived her statutory rights as widow reveals the fact that in each case the words used clearly imported an intention to surrender the very right afterwards claimed. In the *Matter of Noah*, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, the wife agreed to relinquish "all her marital claims." In *Wickersham v. Comerford*, 96 Cal. 433, 81 Pac. 355, the wife relinquished all rights as wife in law or equity or by descent. In the *Matter of Yoell*, 164 Cal. 540, 129 Pac. 999, the language was even more explicit. It is true that the *Estate of Lufkin*, 131 Cal. 291, 63 Pac. 469, stands for the proposition that the word "claim" is sufficiently broad to include the statutory claim for a family allowance. But that case merely supports the conclusion that the words "free and clear of all claim of the defendant" contained in the decree here in question, would, standing alone, cover a claim for family allowance. We are bound, however, to construe these words not independently but in relation with the context in which they are found and in the light of the circumstances under which they were used. The preceding portions of the decree clearly and unmistakably indicate the subject-matter of the adjudication as the presently existing rights of the spouses in the property of the community. The first five clauses of the decree, which thus identify the rights to be determined, are followed by the general terms of the clause in question. "The general language of this clause must be held to relate to rights and interests of the same nature and description with those that have been already mentioned. The clause is in the nature of a 'sweeping clause,' and its use and object was to guard against accidental omissions; and the rule of construction in such cases is that the 'general words are restrained by the subject-matter.'" *Mahaffy v. Mahaffy*, 63 Iowa, 55, 18 N. W. 685. Construing, then, the general words "free and clear of all claim of the defendant" as restrained by the subject-matter, that is to say, the presently existing rights of the spouses in the property of the community, we are constrained to hold that they were not intended to and do not cover a claim for family allowance. It follows that the court did not err in granting the respondent's application for a family allowance.

The view which we have taken of the case makes it unnecessary for us to consider the question whether or not Frank H. Gould died possessed of any property save that which had formerly been the property of the community.

The order appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

LEMLE v. BARRY et al. (Sac. 2676.)

(Supreme Court of California. Aug. 7, 1919.)

1. VENDOR AND PURCHASER — 144(2) — DEFECTS IN TITLE.

Where there has been no fraudulent misrepresentation as to the vendor's title, the fact that he has an imperfect title or no title at all at time of execution of a contract of sale does not invalidate the contract of sale; it being sufficient if vendor has good title at time he is called upon to perform.

2. VENDOR AND PURCHASER — 148 — DEFAULT—TENDER OF DEED.

Where, under a contract of sale of land, the making of the deed and the payment of a certain part of the purchase price were dependent and concurrent conditions, and time was of the essence of the contract, vendor could not put the vendee in default until he tendered his deed.

3. VENDOR AND PURCHASER — 86, 334(1) — CONTRACTS OF SALE—ABANDONMENT.

Under a contract of sale of land, wherein the payment of a certain part of the purchase price within a specified time and the delivery of the deed were dependent and concurrent conditions, the vendee after the expiration of the time within which he was to make such payment could consider the contract abandoned, where the vendor after such time and without tendering a deed gave notice of termination of the contract and forfeiture on the theory that the vendee was in default, and the vendee was entitled to a return of installments of the purchase price theretofore paid.

4. VENDOR AND PURCHASER — 336 — CONTRACT—ABANDONMENT BY VENDOR—DEMAND BY VENDEE FOR REIMBURSEMENT.

Where, under a contract of sale of land, payment of a certain part of the purchase price and delivery of the deed were dependent and concurrent conditions, and vendor, after termination of the time within which vendee should make such payment, gave notice of forfeiture of installments theretofore paid without tendering the deed, thus giving vendee the right to treat the contract as abandoned, a demand of the vendee for reimbursement as to installments theretofore paid, although long delayed, had the legal effect of an immediate demand, where the vendor requested delay, but made no effort to correct a defective title or tender a deed.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Julius Lemle against Mary M. Barry and others. Judgment for defendants, and plaintiff appeals. Reversed.

Theodore A. Bell, of San Francisco, for appellant.

Frank Freeman, of Willow, and Frank L. Hatch, of San Francisco, for respondents.

WILBUR, J. This action is brought by the vendee to recover from the vendor the

initial payment of \$5,000 made by the vendee at the time of the execution of the written contract for the sale of land. Plaintiff appeals from a judgment rendered upon sustaining a general demurrer. The contract, which is set out as an exhibit to the complaint, was entered into July 31, 1912, for the sale of the "Barry ranch," containing 9,400 acres of land, at the price of \$15 per acre. The terms of payment were thus stated:

"\$5,000 to be paid on the execution of this agreement; one-half of the full purchase price to be paid on or before 60 days after the execution of this agreement; balance to be secured by note and mortgage payable on or before 3 years after date; said note and mortgage to be of approved form and with the usual covenants and conditions found in mortgages of real property. The same to bear interest at the rate of 6 per cent. per annum, payable annually," etc.

It also provided:

"It is expressly understood between the parties hereto that the said party of the second part shall at the expiration of 60 days from and after the second payment herein stipulated and agreed to be paid, and provided further that said second party shall have made said first payment as herein agreed and otherwise conformed to said stipulation and agreement, be entitled to enter upon and take possession of said premises and farm the same in a manner pursued for like land; but said party of the second part hereby and herein agrees not to sell, convey, or otherwise incumber the whole or any portion of said land until said deed and mortgage has been executed according to the terms herein and heretofore contained."

The agreement also contained the usual provision that time is of the essence of the agreement, including the following provision, to wit:

"And the said parties of the first part, on receiving such payments at the time and in the manner above mentioned, agree to execute and deliver to the party of the second part, his administrators or assigns, a good and sufficient deed to the property above described."

Apparently the parties contemplated that upon the making of the 60-day payment, the vendor would execute a deed and the vendee execute a note and mortgage for one-half of the balance of the purchase money. This construction of the contract seems to accord with the conduct of the parties, for, within 60 days from the date of the contract, the vendors furnished the vendee an abstract of title continued to August 12, 1912. On September 17, 1912, the vendee's attorney reported to the vendee his conclusion with reference to the abstract of title, and on or about said date the vendee communicated said report to the vendors with a written demand that the alleged defects therein be corrected. The attorney's report upon the abstract in question,

which is set out in full in the complaint, is to the effect that it appeared therefrom that the vendors owned the title in fee to an undivided four-sevenths of most of the property known as the Barry ranch, and that three-sevenths belonged to Mary M. Barry (five-fourteenths) and to John H. Barry (one-fourteenth). Other objections to the title are not clear, in the absence of the abstract, which is referred to in the report. One objection is that the abstract shows that one and one-third acres of land had been deeded to the trustees of the Cottonwood school district. It is alleged in the complaint that the vendors never at any time have corrected or remedied the defects in their title, and that they never have presented a good and merchantable title to said premises, and have never been able to convey to the plaintiff a good and sufficient and merchantable title to said premises, and it is also alleged that the vendors have never performed or offered to perform any of the covenants contained in their agreement or tendered the plaintiff any deed or conveyance to said property. It is further alleged that on June 4, 1913, the vendors delivered to the vendee a notice, set out in the complaint in part, as follows:

"You are hereby notified that you have forfeited any and all rights which you may hold in and to that certain agreement * * * dated the 31st day of July, 1912, * * * and said parties of the first part therein hereby declare such forfeiture by reason of your non-compliance with the terms and conditions of said agreement, and hereby terminate the same; * * * that subsequent to the service of such notice * * * the plaintiff demanded of the vendors the return to him of the \$5,000; which he had paid them;" that the vendors requested of plaintiff time to consider his demand, and particularly to consider the objections which the plaintiff had made to their title to said premises, which request plaintiff granted, and from time to time, at the request of the vendors, extended the time for the vendors to consider plaintiff's demand and the ground of his objection to said title until November 13, 1914, when the vendors, for the first time, notified the plaintiff that they would not return to him the \$5,000, or any part of the same.

It is further alleged:

That the abstract of title was returned by the vendee to the vendors September 17, 1912, and that it was retained by them until July, 1914, "when they caused said abstract to be delivered to William Grant, at San Francisco, who was then and there acting as attorney for plaintiff in an attempt to satisfy Frank Freeman, Esq., who was then and there acting as attorney for the vendors in the premises, that the vendors' title to said land was defective, and that, unless the defects in said title were corrected, the vendors should return to the plaintiff the \$5,000 paid to them as aforesaid, but thereafter, to wit, on or about September 1, 1914, said abstract was returned to the vendors, and has at all times since been retained by them, and not in the possession or under the control of this

plaintiff; that plaintiff hereby elects to treat said contract as terminated by reason of the vendors' said breach thereof, and the plaintiff hereby offers, upon the return to him by the vendors of said sum of \$5,000 with interest from June 4, 1913, at the rate of 7 per cent. per annum, to reconvey to the vendors, by a good and sufficient written conveyance, any and all interest which this plaintiff may have acquired in or to said premises by reason of the execution of said agreement, and to surrender said agreement to the vendors."

[1-4] The effect of a complete failure and of a defect of title of the vendor upon the relations of vendor and vendee has frequently been considered by the courts of this state. Where there has been no fraudulent misrepresentation as to the vendor's title, the fact that he has an imperfect title, or no title at all, at the time of the execution of the contract of sale, does not invalidate the contract of sale. *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Backman v. Park*, 157 Cal. 607, 610, 108 Pac. 686, 137 Am. St. Rep. 153; *Krotzer v. Clark*, 174 Pac. 657; *Kerr v. Reed* (App.) 179 Pac. 398. "In a case such as this it is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish." *Hanson v. Fox*, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72, quoted with approval in *Backman v. Park*, supra, 157 Cal. 610, 108 Pac. 687, 137 Am. St. Rep. 153. It is sufficient, therefore, if the vendor has good title at the time he is called upon to perform. One-half of the purchase price (inclusive of the initial sum of \$5,000) was to be paid 60 days after the execution of the contract. We may assume, as the parties seem to have done, and as we think the contract means, that the vendors were to make the contemplated deed upon such payment of one-half the price. The making of the deed and the payment of that part of the price were therefore dependent and concurrent conditions. In such case, even though time is of the essence of the contract, the vendor cannot put the vendee in default until he has tendered his deed. *Boone v. Templeman*, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126, and cases cited; *Sausalito, etc., Co. v. Sausalito Imp. Co.*, 166 Cal. 308, 136 Pac. 57. It follows that on June 4, 1913, the vendee was not in default for failure to make the payment due 60 days from the date of the contract, and that the attempt to declare a forfeiture on the theory that the vendee was in default was unavailing, and that the contract still remained in full force and effect. *Boone v. Templeman*, supra, 158 Cal. 298, 110 Pac. 947, 139 Am. St. Rep. 126. Under the circumstances the vendors' notice was, in effect, an unauthorized attempt to abandon

the contract. It is true that their action was predicated upon the erroneous claim that the vendee was in default for failing to make the 60-day payment. If the vendee, in fact, had been in default, a notice that the contract was terminated would have been proper, and the vendors would be no longer bound either to convey the land or refund the purchase money. Such notice would have been in strict accord with the contract. *Glock v. Howard*, 123 Cal. 1, 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Oursler v. Thatcher*, 152 Cal. 739, 93 Pac. 1007; *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 549, 23 Pac. 363; *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283; *Myers v. Williams*, 173 Cal. 301, 159 Pac. 982. As it was, the vendee immediately upon receiving the vendors' unwarranted notice had the right to treat the same as an abandonment of the contract, and to the return of the installment of the purchase price theretofore paid. *Glock v. Howard*, supra. The vendee, it is true, delayed his demand for reimbursement, and when made it remained under consideration for some months by the vendors, until November 13, 1914, when they finally refused to make such repayment and failed to go on with the contract. With reference to the long delay of the vendee in making such demand for reimbursement, it is sufficient to say that the vendors requested delay, and that, although the contract was in effect all this time, no effort was made by the vendors to correct the title, or to tender a deed, and they did not withdraw their declaration that the contract was terminated. Hence the legal effect of the demand of the vendee for the return of the purchase money paid was the same as though made at once.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.; OLNEY, J.; MELVIN, J.

LEMLE v. BARRY et al. (Sac. 2751.)

(Supreme Court of California. Aug. 7, 1919.)

1. VENDOR AND PURCHASER §342 — CONTRACTS OF SALE—ABANDONMENT BY VENDOR—REMEDIES OF VENDEE.

Where a vendor has failed to tender a deed under a contract of sale and to correct a defective title, the vendee may sue for damages for breach of the contract, or may sue to recover installments previously made, but cannot have both remedies, the former being based on the contract, and the latter on an abandonment of the contract.

2. VENDOR AND PURCHASER §342 — CONTRACTS OF SALE—DEFAULT—NECESSITY FOR TENDER.

In order to put in default the vendor in a contract of sale of land, under which payment of a certain part of the purchase price and delivery of the deed were dependent and concurrent conditions, and in which time was of the essence of the contract, the vendee must tender the purchase money.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Julius Lemle against Mary M. Barry and others. Judgment for defendants, and plaintiff appeals. Reversed.

Theodore A. Bell, of San Francisco, for appellant.

Frank Freeman, of Willow, and Frank L. Hatch, of San Francisco, for respondents.

WILBUR, J. [1] This is an action between the same parties as in Sac. No. 2676, 183 Pac. 148, this day decided. By stipulation of the parties both cases were submitted at the same time and upon the same briefs. In a written stipulation filed by the parties it is stated that the questions involved in the two cases "are identical." In the petition for transfer to this court respondents state that this is the same case as Sac. No. 2676. The appellant, however, claims that in Sac. No. 2676 "he was entitled to recover from the respondents the payment made by him upon the execution of the agreement of July 3, 1912, and in his second action (Sac. No. 2751) to recover damages for breach of said contract," basing his contention upon the same principle of law in both instances. In the transcript on appeal in one case the second amended complaint alone is brought to this court, and in the other the amended complaint. The original complaint is not brought up in the record. It appears, however, from the dates in the two cases that, while both complaints are based in large part upon the same facts, the case now under consideration is a separate and distinct suit in which plaintiff seeks to recover \$50,000 damages for the breach of the written contract, more particularly referred to in the opinion this day filed in Sac. No. 2676. The facts alleged in the two complaints are substantially identical, and, so far as necessary, are set out in the above-mentioned opinion, save that in this action for damages it is alleged not only that the plaintiff has fully performed each and every covenant contained in his said agreement by him to be performed, but that he has at all times been ready, willing, and able to pay to the vendors the one-half of the full purchase price of said premises, and to deliver the note and mortgage called for by the contract, and that he has been ready to perform each and every covenant and condition of

said agreement by him to be performed in the event that the vendors had corrected, removed, or remedied the defects in their title and were able to convey to the plaintiff a fee-simple title. In lieu of the allegations contained in the action to recover the purchase money, to the effect that the plaintiff had demanded a return of the \$5,000, it is alleged in this action that the defendants at all times since June 4, 1913, the date of the service of the notice that the contract was terminated, have failed and refused to correct the defect or to convey or to offer to plaintiff a good, sufficient or merchantable title to said land. As the parties have failed to make any distinction between the two actions or base any claim upon that distinction, it seems unnecessary for us to discuss at any length such differences. It seems to be agreed by the parties that both decisions should be either affirmed or reversed. It should be noted, however, that the remedies in the two cases are quite distinct and wholly inconsistent, and that the plaintiff cannot have both remedies. *McGibbon v. Schmidt*, 172 Cal. 70, 155 Pac. 460; *Elliott on Con.* vol. 3, § 2097. The action to recover the purchase money is based upon the theory that by the conduct of the vendors, acquiesced in by the vendee, the contract had been terminated, and the action is in the nature of one for money had and received, namely, money paid to the vendors for which, in view of the termination of the contract, the vendee has received no consideration. This is clearly pointed out in the case of *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899, which involved the application of the statute of limitations. It was there held that such an action was not an action upon the contract. See, also, *Shively v. Semi-Tropic Land, etc., Co.*, 99 Cal. 259, 33 Pac. 848; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Aikman v. Sanborn*, 52 Pac. 729; *Hellig v. Parlin*, 134 Cal. 99, 66 Pac. 186. On the contrary, the action for a breach of contract is one based upon the contract. *Ahlens v. Smiley*, 163 Cal. 200, 124 Pac. 827.

[2] As we have held in *Sacramento No. 2676*, when the final payment became due it was essential for the vendors to tender a deed in order to put the vendee in default and to enforce a forfeiture. It is also true that it is necessary for the vendee to tender the purchase money in order to put the vendors in default (*Townsend v. Tufts*, 95 Cal. 257, 261, 30 Pac. 528, 29 Am. St. Rep. 107; *Leach v. Rowley*, 138 Cal. 709, 716, 72 Pac. 403; *Sausalito, etc., Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 308, 136 Pac. 57), unless such tender was excused under all the circumstances (*Merrill v. Merrill*, 93 Cal. 334, 30 Pac. 542; *Id.*, 102 Cal. 317, 36 Pac. 675; 38 Cyc. 135).

It is a matter of some doubt, which is not discussed by the parties, whether the general allegations of the complaint sufficiently allege either a tender or a sufficient excuse

for a failure to make a tender. See *Lynn v. Knob Hill Imp. Co.*, 177 Cal. 56, 169 Pac. 1009. In view of the fact that the parties concede that both cases should be determined in the same way by reversal or affirmance, and that the plaintiff cannot recover in both cases, and that the recovery in each case would be substantially the same, and that the other case must be reversed for the reasons stated in the opinion, it follows that this judgment should also be reversed.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOB, J.; MELVIN, J.

SHAW, J. I concur in the judgment. The complaint does not allege that the plaintiff ever tendered to the defendants the one-half of the price that was to be paid upon the execution of the deed. The contract set forth in the complaint shows that the agreement of the defendants to convey the title and that of the plaintiff to pay the first half of the price upon such conveyance were dependent and concurrent covenants. In this respect the case differs from *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, where the payment of the price was made a condition precedent to the right to demand a deed. What is said in that case on the subject must be considered with this difference in mind. But under the contract here involved a tender would be necessary as a condition precedent to the accrual of a cause of action for damages against a vendor for a refusal to convey. This is the cause of action stated in the complaint. Such tender may be rendered unnecessary, however, by the conduct of the vendors, and where this occurs the tender is excused, and the action will lie without it. The question is discussed at length in *Gray v. Dougherty*, 25 Cal. 278. It is there said that, where the vendee "by any adversary steps makes it known that he does not intend to observe and perform his covenant except upon compulsion, thus in effect refusing in advance of a demand, neither law nor equity imposes upon the vendee the observance of a ceremony thus made idle and fruitless." Page 280. In this case the complaint avers that the defendants gave notice to the plaintiff that they had declared the contract rights of plaintiff forfeited and that the contract was terminated. This was notice in advance that they would not perform, and under the rule above stated it absolved the plaintiff from the necessity of making a tender of payment and demand for a deed in order to put the defendants in default and lay a foundation for the action. See, also, 39 Cyc. 1562; *Merrill v. Hexter*, 52 Or. 138, 94 Pac. 972, 96 Pac. 865; *Sharp v. West* (D. C.) 150 Fed. 461; 2 *Warvelle on Vendors*, § 756. For these reasons I believe the complaint stated a good cause of action, and that the court erred in sustaining a demurrer thereto.

It appears from the reference in the opinion of Justice WILBUR to case No. 2676 between the same parties that the plaintiff is at the same time pursuing two remedies against the defendants, based on the same transaction—one to recover the price paid, upon the theory that there has been a rescission or abandonment; the other to recover damages for the breach of the covenant to convey. In view of this fact, it seems proper to say that the two remedies are inconsistent, and that a recovery cannot be allowed in both actions. *McGibbon v. Schmidt*, 172 Cal. 75, 155 Pac. 460, and cases there cited. When the defendant wrongfully repudiated the contract of sale, the plaintiff had his election, either to consider it rescinded and sue for the part of the price he had paid, or to consider it still in force and sue for damages caused by the breach. When a contract is rescinded, it ceases to exist. If the action to rescind or an action based on an alleged rescission or abandonment is successful, the contract is forever ended, and its covenants cannot thereafter be enforced by any action. If it fails because the alleged rescission did not take place, it has been held that the prosecution of such action does not bar a subsequent action for damages for breach of the contract or to enforce the contract specifically. *Zimmerman v. Robinson*, 128 Iowa, 72, 102 N. W. 814, 5 Ann. Cas. 960; *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, and note; *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514; *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144, and note. But if the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by a breach of its covenants. The questions that may arise under such a dilemma are not presented upon this appeal; for the record in neither case shows the pendency of the other action, and the court cannot take judicial notice of it. The matter is mentioned in order to call the attention of the parties to the conditions that may arise in the subsequent progress of the two cases.

I concur: OLNEY, J.

THOMSON v. LA FETRA et al.
(L. A. 4719.)

(Supreme Court of California. July 30, 1919.)

WATERS AND WATER COURSES — 171(2)—
FLOODING LANDS—DIVERSION OF STREAM—
DAMAGES—"FLOOD WATER."

Where defendants, to prevent injury to their land from seasonal waters from a canyon, erect-

ed a wooden barrier which turned the waters on to plaintiff's land, they were liable to plaintiff as for a trespass; the rule as to waters which are a common enemy having application only to "flood waters," waters escaping because of their height from confinement in a stream and running over the adjacent country.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, 'Flood Water.']

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by Janet Thomson against T. W. La Fetra and another. From judgment for plaintiff, defendants appeal. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellants.

E. H. Allen and Porter, Morgan & Parrot, all of Los Angeles, for respondent.

LENNON, J. This is an appeal from a judgment upon the judgment roll alone which shows that the defendants maintain a dam which prevents the entrance and flow of certain surface waters upon and across their lands and so diverts these waters that they flow upon the land of the plaintiff.

The lands of the parties to the action are located near the city of Glendora in Los Angeles county. The lands are bounded on the north by a public highway which runs from east to west. The land of the plaintiff is situated several hundred feet to the east of that of the defendants. Some distance to the north are foothills. Seven hundred and fifty feet directly north of the defendants' lands is the mouth of a canyon. Following heavy rains there is a stream in this canyon, and, owing to the grade and to the fact that it follows the east wall of the canyon, this stream is given a southerly direction at the canyon's mouth. It originally proceeded in a southerly and southeasterly direction to a point 400 feet north of the defendants' lands, where, owing to the heavy growth of native vegetation, it became completely diffused. The water continued, however, to follow the slope of the country to the south and southeast toward the lands of the defendants, and some of it reached these lands. None of the water ever reached the plaintiff's land prior to 1915.

In 1900 a wooden flume was built to carry the water from the canyon. The flume was at that time carried no further than the former point of diffusion. The land at this point was cleared of the native vegetation and placed under a state of cultivation. In 1905 or 1906 this wooden flume was extended to the public highway by the upper proprietors, and by the county was continued by means of a culvert under the traveled portion of the highway which bounds the defendants' lands on the north. In 1914 this

wooden flume was replaced by one of concrete of somewhat increased dimensions. The latter fact, however, did not materially alter the situation, for the wooden flume was large enough to carry any stream which has ever followed the course described.

Between the years of 1905 or 1906 and 1914 the defendants erected and maintained an earthen dam by which they sought to protect themselves from the water discharged from the flume. This dam was erected on the highway south of the point of discharge from the culvert, but north of the north line of the defendants' property. It appears that in the years 1907, 1911, and 1914, which were the only years between 1905 or 1906 and 1915 in which any appreciable amount of water was carried in the flume, this earthen dam did not prevent the flow of the water over the defendants' lands. In 1914 the defendants replaced the earthen dam with the structure here complained of, a substantial wooden affair 5 feet high and over 300 feet long. This was built without the permission of the county authorities. This structure effectively turned the large volume of water carried by the flume following the heavy rains of 1915 and caused it to flow upon the lands of the plaintiff, where it occasioned the damage complained of.

With these facts as a basis, the plaintiff sought and secured injunctive relief and a judgment in the sum of \$329 as damages. The defendants have appealed, contending that the bulk of the water discharged from the flume would never have flowed naturally to their lands, and that the upper proprietors had gained no prescriptive right to have this water carried off by them. With these contentions as a basis, they argue that they had no duty to receive the water which they describe as a "common enemy" to themselves and the plaintiff. They claim the right to repel this so-called "common enemy" by means of the dam in question and assert that any injury which may be occasioned the plaintiff thereby is *damnum absque injuria*.

The rule applicable to waters which are a "common enemy" cannot be invoked under the facts of this case. That rule has application only to flood waters in the strict sense, that is to say, to waters escaping because of their height from the confinement of a stream and running over the adjacent country. The waters here involved are not of that sort.

The water not being in any sense flood water, the defendants, by changing its course and casting it upon the lands of the plaintiff, were guilty of a trespass. The fact that the water may have threatened injury to the defendants affords no justification or excuse to palliate the wrong done. If the injury threatened to the defendants' lands was the result of wrongful artificial changes made by

upper proprietors, resulting in an increased, accelerated, or concentrated flow of water upon and across the lands of the defendants, their remedy was to proceed by appropriate action against the wrongdoers to enjoin such changes or to have the nuisance abated, and not by an attempt to shift the burden of the wrong upon an innocent third party who but for their intervening willful act would have suffered no injury at all. *Larrabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143; *Castle v. Reeburgh* (Okla.) 181 Pac. 297.

The damage suffered by the plaintiff not having resulted from a lawful act, it cannot be considered *damnum absque injuria*. The view which we have taken of the case makes it unnecessary for us to discuss and decide the plaintiff's contention that the upper proprietors had acquired a prescriptive right to have the water in question carried off over the defendants' lands.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LAWLOR, J.; MELVIN, J.; OLNEY, J.

THOMPSON v. SOUTHERN PAC. CO. (L. A. 4913.)

(Supreme Court of California. July 28, 1919.)

1. PARTIES \S 95(5)—AMENDMENT OF DEFECTS —MISNOMER OF CORPORATE DEFENDANT.

Where the agent of the real defendant, a corporation, appearing specially, received the summons and knew the contents of the complaint, there was proper service of process, despite a misnomer of defendant, which the court, having acquired jurisdiction of the person of defendant, as well as the subject-matter of the suit, possessed the power to correct.

2. MASTER AND SERVANT \S 296(10) — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE — OBVIOUS DANGERS.

An instruction that it is not contributory negligence for an employé to neglect to investigate conditions as to the safety of appliances, and in such case he assumes only the risk of danger which he has knowledge of, or one so obvious he must know of it, or as to which he has been put upon inquiry by suggestion of danger, and which by gross carelessness he has neglected to notice, *held* not erroneous, as being too great a limitation on the doctrine of assumption of risk.

3. MASTER AND SERVANT \S 295(7)—INSTRUCTION — ASSUMPTION OF RISK — KNOWLEDGE BY SERVANT OF DANGER.

An instruction that knowledge by an employé of the defective or unsafe character of appliances is not a bar to recovery unless it also appears he understood and appreciated the danger, and thereafter consented to use the appliances, is not erroneous as laying on employer

the duty to prove employe's state of mind and the extent of his understanding.

4. MASTER AND SERVANT ~~§~~217(2)—ASSUMPTION OF RISK—KNOWLEDGE.

A servant is deemed to have assumed the risk when he knows, not only the defects in instrumentalities used by him, but the dangers and risks arising therefrom.

Department 2.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Paul Thompson against the Southern Pacific Company. From judgment for plaintiff, defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

Chas. E. Barrett, of Las Vegas, Nev., and Harry A. Hollzer and L. D. Collings, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff was successful in a suit for damages on account of personal injuries. Defendant appeals from the judgment.

In the complaint filed November 10, 1910, against Southern Pacific Railroad Company, it was alleged that the defendant was "a corporation organized and doing business as a railroad company in the state of California, and under and pursuant to the laws of the state of California." On that day summons was issued, and on November 1, 1911, an alias summons was given in said action. On December 29, 1911, a copy of said alias summons, attached to a copy of the complaint, was served upon F. H. Reed at San Francisco. Mr. Reed at that time was the duly authorized agent (upon whom process might be served in the state of California) of Southern Pacific Company, a corporation organized and existing under and by virtue of the laws of the state of Kentucky. An answer to the complaint was filed on January 18, 1912, by the Southern Pacific Railroad Company. On January 27, 1912, Southern Pacific Company, appearing especially for the purposes of the motion, gave notice of intention to move to quash the alias summons served on Mr. Reed and to set aside pretended service upon the grounds, among others, that said summons had not been regularly issued, and that said Southern Pacific Company was not a party to the action. This motion was heard and denied on February 19, 1912.

On December 10, 1914, plaintiff served and filed his notice of motion for leave to amend his complaint by striking out the word "Railroad" wherever it appeared as a part of the name of defendant. The motion was made upon the ground that the true name of defendant was "Southern Pacific Company" instead of "Southern Pacific Railroad Company," and

on the further ground that Southern Pacific Company had been properly served and had appeared in the action. On December 12, 1914, Southern Pacific Company served and filed its notice of objections and answer to said motion to amend plaintiff's complaint, pleading, among other things, that it was organized under the laws of Kentucky, and denying that it had any corporate connection whatsoever with the Southern Pacific Railroad Company. There was also an averment that plaintiff's alleged cause of action (which was based upon physical injuries received on November 12, 1909) was barred by the statute of limitations. This answer was accompanied by certain affidavits. One of these was made by D. P. Ewing. In it he deposed that he was assistant secretary of Southern Pacific Railroad Company, defendant in the action, which was a corporation formed under the general laws of California, Arizona, and New Mexico, and that he was not an officer of Southern Pacific Company, a Kentucky corporation. T. O. Edwards deposed that he was assistant secretary of Southern Pacific Company, a corporation created by the laws of Kentucky; that said corporation had not been served with process, and that said Southern Pacific Company was a "different, separate, and distinct corporation from the above-named Southern Pacific Railroad Company, the defendant in the above-entitled action." Plaintiff's motion for leave to amend was heard, Southern Pacific Company appearing in opposition thereto, and on December 16, 1914, leave to amend the complaint was granted by the court. On December 18, 1914, the amended complaint, naming Southern Pacific Company, a corporation (but without specifying its principal place of business), as the defendant, was filed.

On December 28, 1914, Southern Pacific Company, still reserving its special appearance theretofore made in opposition to the motion for leave to amend the complaint, filed its answer, in which objection was still made to the jurisdiction of the court.

The cause was thereafter tried, and a verdict was rendered, which was set aside. Upon the calling of the case for trial the second time, Southern Pacific Company made formal objection to the introduction of testimony upon the grounds that, upon the face of the record it appeared that within one year after the accident Southern Pacific Railroad Company had been sued; and had duly answered; and that after five years following the accident the Southern Pacific Company, a Kentucky corporation, had been brought into the case by the expedient of amending the complaint, the said amendment having been made "without process ever having been served upon the Southern Pacific Company."

Respondent insists that there is no record to support the history of the controversy over the pleadings, and that as all intendments are in favor of the correctness of the orders of the superior court, they must stand. It appears that the two orders attacked by appellant were made each by a different judge. Another judge, the Hon. Louis W. Myers, who presided at the second trial of the cause, authenticated the entire record sought to be here used. As the two judges who presided at the hearings of appellant's motions were on the superior bench when the appeal was taken and the record prepared, respondent insists that no bill of exceptions embodying the supposed proceedings before them should be recognized and used by this court unless each authenticated that part of it relating to the motion which he heard. In support of this position they cite such authorities as *Cummings v. Conlan*, 66 Cal. 403, 5 Pac. 796, 903, *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129, *Muzzy v. McEwen Lumber Co.*, 154 Cal. 685, 98 Pac. 1062, and *Waymire v. California Trona Co.*, 176 Cal. 395, 168 Pac. 563.

[1] It is unnecessary to decide at this time the interesting question raised by respondent, because, assuming that the record is properly authenticated, it fully supports the orders attacked by appellant. The case upon which appellant relies principally for support of its assertion that it was brought into court without service of process is *Alt-peter v. Postal Telegraph-Cable Co.*, 26 Cal. App. 706, 148 Pac. 241. There is, however, a wide and essential difference between that case and the one at bar. In that case no representative of the corporation against which plaintiff had a cause of action was ever served with summons. In this case the real defendant's agent received the summons and knew the contents of the complaint because the corporation appeared specially in the action. True, there was a misnomer of the party defendant in the pleading, but the court having acquired jurisdiction of the person of the defendant, as well as the subject-matter of the suit, possessed the power to correct the misnomer. This case on the point under discussion is essentially identical with and is ruled by *Nisbet v. Clio Mining Co.*, 2 Cal. App. 436, 83 Pac. 1077. Commenting upon that authority in the case of *Reclamation District, etc., v. Diepenbrock*, 168 Cal. 577, 143 Pac. 763, this court used the following language:

"In *Nisbet v. Clio Mining Co.*, 2 Cal. App. 441, 83 Pac. 1077, the authorities are discussed and the rule approved which sanctions an amendment to correct a mistake in pleading the corporate name of a party to an action. With the conclusions reached by the District Court of Appeal in that case we fully agree, and we find no error in the action of the court in the case before us, permitting the amendment."

The record reveals the following facts: Plaintiff, who was a painter, had been employed by defendant for a period of about three months before the occurrence of the injury to him. He was sent out to paint a semaphore near a station. He had never before been required to paint an entire semaphore. Opposite the station, not on a main track, but on a "house track," stood a box car, which was also near the semaphore. After painting a part of the semaphore from the ladder attached to the semaphore pole, and being unable, as he testified, to reach the other part of the semaphore from this ladder, plaintiff, with the assistance of another employé of defendant from whom he had formerly taken orders, procured from the platform a ladder, which was placed on top of the box car with the upper end against the semaphore pole. From this ladder plaintiff continued his work. Both the tower man (who signaled all trains and adjusted switches) and the station agent knew that plaintiff was then at work. While he was so engaged one of defendant's freight trains came in on the main track and stopped. Plaintiff was in plain view of the train crew, yet a car was uncoupled from the freight train and sent down the "house track" against a line of cars upon one of which rested the ladder on which plaintiff stood. As a result plaintiff was hurled to the ground and seriously hurt.

[2] Defendant attacks some of the instructions, among others the following:

"It is the duty of the master to provide reasonably safe and suitable appliances with or upon which his employé is to work. As to those things and appliances which it becomes the master's duty to furnish, the servant, or employé, has the right to assume that the master has done his duty, and that the appliances are reasonably safe and secure, and it is not contributory negligence for an employé to neglect to investigate and examine the conditions as to the safety of the appliances. In such a case the employé is held only to have assumed the risk of a danger of which he had knowledge, or the risk of a danger which was so obvious that he must have known of it, or of one as to which he had been put upon inquiry by discovery or suggestion of danger, and which by gross carelessness he has neglected to take notice of."

The last sentence of the instruction comes particularly under defendant's condemnation as being too great a limitation upon the doctrine of assumption of risk. Virtually the same language will be found in the opinion in *Silveira v. Iversen*, 128 Cal. 187-192, 60 Pac. 687.

[3, 4] Another instruction was as follows:

"Knowledge by the employé of the defective or unsafe character or condition of any ways, appliances, or structures of his employer is not a bar to recovery for any injury caused thereby, unless it shall also appear from a prepon-

derance of the evidence that such employé fully understood, comprehended, and appreciated the dangers incident to the use of such defective ways, appliances, or structures, and thereafter consented to use the same or continued in the use thereof."

It is asserted that this instruction entirely reverses the rule regarding "burden of proof," and lays upon defendant the duty of proving the state of plaintiff's mind and the extent of his understanding. The criticism is not well taken. The instruction merely states a well-known rule that a servant is deemed to have assumed a risk when he knows, not only the defects in the instrumentalities used by him, but the dangers and risks arising by reason of such defects. *Nofsinger v. Goldman*, 122 Cal. 609-618, 55 Pac. 425; *Pigeon v. Fuller*, 156 Cal. 691, 105 Pac. 976. In this case plaintiff must have known that he would almost certainly be injured if a car should be sent down against the cars on the "house track." But it was for the jury to determine whether or not he knew that there was any imminence of the use of that track for switching at that time and under the existing circumstances.

Two other instructions offered by defendant were given with modifications based upon the principles discussed above. The court committed no error in making the changes to which defendant objects. The charge to the jury was full and fair.

Defendant's motion for nonsuit was properly denied.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

BENNETT et al. v. POTTER. (L. A. 4946.)

(Supreme Court of California. July 30, 1919.
Rehearing Denied Aug. 28, 1919.)

1. PARTITION §114(6)—ATTORNEY'S FEES.

Code Civ. Proc. § 796, contemplates that allowances for attorney's fees in a partition proceeding be made to the party, and not directly to the attorneys.

2. ATTORNEY AND CLIENT §144—COMPENSATION—CONSTRUCTION OF CONTRACT.

In view of Civ. Code, §§ 1647, 1654, 1638, as to interpretation of contracts, under a contract between attorneys and client relating to attorney's compensation in action to partition land and for an accounting, providing that attorneys "shall receive as their compensation 10 per cent. of whatever is recovered, either by litigation or settlement, excepting that if the court makes an allowance for an attorney's fee in said partition suit or other suits then such fee shall belong to said law firm, exclusive of

the said 10 per cent. so to be paid by" the client, the attorneys were not entitled to 10 per cent. of the land set apart to the client in addition to a fee allowed, but were only entitled to such fee, as far as the partition suit was concerned, and 10 per cent. of the amount recovered in the accounting.

3. PARTITION §95—"RECOVER."

The land set off to one party in a simple partition suit to sever the unity of title and segregate the possession is not "recovered" by such party, partition in such case merely transforming the right of common possession of the whole tract into a right to the exclusive possession of the same interest or share as represented by a parcel set off in severalty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recover.]

4. ACCOUNT STATED §4—MODE OF STATING AND SETTLING.

An account stated may be shown by proof of an oral agreement as to the amount due, although no writing is exhibited at the time.

5. CONTRACTS §238(2)—MODIFICATION—"ACCOUNT STATED"—"EXECUTORY CONTRACT."

An account stated is a mere unperformed promise to pay a stated sum to another, and is therefore an executory contract, under Civ. Code, § 1661, and hence an oral statement of account cannot be shown to alter a written contract, under section 1698.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated; Executory Contract.]

6. ACCOUNT STATED §1—THEORY.

The theory upon which an action of account stated is allowed is that transactions have occurred between parties from which the relation of debtor and creditor has arisen, that one or both have rendered or made statements specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a sum is due from him on such account, together with express or implied promise to pay the same.

7. ACCOUNT STATED §1—NUMBER OF ITEMS.

Originally an account stated could exist only when the accounts were mutual, or where there was more than a single item, but it has now become settled there can be an account stated where but a single item is included or referred to therein.

8. ACCOUNT STATED §7—WRITTEN PROMISES—ORAL STATEMENTS.

Account stated cannot become a substitute for an action of debt upon a written promise in writing, the written promise being a higher evidence of the debt, and the debtor being already bound thereby, and there being no uncertainty to be settled which would constitute a consideration for a new oral promise to pay.

9. CONTRACTS §47—CONSIDERATION.

There must always be a consideration to support a valid promise.

10. ACCOUNT STATED — PREVIOUS TRANSACTIONS.

There can be no account stated where there have been no previous transactions between the parties from which the relation of debtor and creditor could arise.

Department 1.

Appeal from Superior Court, Los Angeles County; G. W. Nichol, Judge.

Action by Edmon Gordon Bennett and others against Howard J. Potter. Judgment for plaintiffs, and defendant appeals. Reversed.

William M. Hiatt and Irwin, Smith & Rosecrans, all of Los Angeles, for appellant.

Hugh Kelley and Bennett, Turnbull & Thompson, all of Los Angeles, for respondents.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiffs. The complaint is in four counts. The only controversy concerns the first and the third counts, each of which covered the same demand. The plaintiffs were attorneys at law and partners in the practice of law. The defendant was the owner as tenant in common with S. W. Slinkard and Laura Slinkard, his wife, of 160 acres of land and certain crops and other personal property used on the land in connection with its cultivation, the defendant having eleven-sixteenths interest therein and the Slinkards five-sixteenths interest. In July, 1914, he employed the plaintiffs, as attorneys, to prosecute actions for the partition of the land and the division of the property and for an accounting between himself and the Slinkards respecting their transactions as tenants in common of the land. The contract of employment was in writing. The plaintiffs began two actions, one for partition, the other for an accounting, and prosecuted the same to a final determination. The first count of the complaint states a cause of action on the written contract aforesaid, claiming \$2,750 as the amount due thereon. The third count alleges that on April 6, 1915, an account was stated between the parties embracing the services in the two actions, whereby the sum of \$2,750 was found to be due from the defendant to the plaintiffs, which sum remained unpaid. The decision of the case depends upon the meaning and effect of the aforesaid contract. It will be necessary to set out the important parts thereof in full.

It recited that the defendant and the Slinkards were the owners of the land and the personal property thereon as tenants in common, and stated their respective interests therein, and that the defendant desired to employ the plaintiffs "to prosecute on his behalf a suit for a partition of the said property, to the end that his interest in the said

property may be set aside and segregated from that of the said S. W. Slinkard and his wife, and to secure his interests in the personal property, improvements, etc., and also to bring suit for an accounting between himself and S. W. Slinkard and his wife, to the end that he may recover, or it may be determined just what his interests are in the profit and income from the property since he purchased the $11\frac{1}{16}$ interest on September 25, 1913." It then proceeded to state an agreement that plaintiffs should proceed with such litigation as they deemed necessary, and prosecute the same to a conclusion or settlement to the satisfaction of Potter. With reference to the liability of Potter to plaintiffs for the services the agreement was as follows:

"It is understood and agreed that the said law firm will advance the necessary expenses and other costs and shall receive as their compensation ten (10) per cent. of whatever is recovered, either by litigation or settlement, excepting that if the court makes an allowance for an attorney's fee in said partition suit or other suits then such fee shall belong to the said law firm, exclusive of the said ten (10%) per cent. so to be paid by the party of the first part."

[1] The court found that in the partition suit the court had allowed to Potter, plaintiff therein, the sum of \$1,000 as attorney's fees. This is inaccurate. The judgment in that suit was introduced in evidence, and it shows that the court allowed \$1,000 to Bennett, Turnbull & Thompson, as attorneys for Potter, declaring the same to be a lien on the land awarded to Potter, and \$500 to the attorneys for the Slinkards, and declared the same a lien on the land awarded to them. The allowance was made directly to the attorneys and not, as the law contemplates, to the parties. Code Civ. Proc. § 796.

1. As to the first count, the findings in the case at bar were to the effect that the plaintiffs were entitled to recover of Potter the sum of \$2,750 on account of the services rendered in pursuance of the written contract. Of this sum \$1,750 was allowed as 10 per cent. on the value of the land set off to Potter and \$1,000 on account of the fee allowed in the partition suit. The findings declare that the meaning of the contract of employment is "that as compensation for such services said plaintiffs were to receive 10 per cent. of whatever was allowed or recovered by said litigation or settlement, thereof; and in addition thereto, to receive any attorney's fees allowed to the defendant, Howard J. Potter, in such litigation."

[2] We cannot agree with this interpretation. The provisions of the contract regarding compensation are uncertain and ambiguous. Such a contract "may be explained by

reference to the circumstances under which it was made, and the matter to which it relates" (Civ. Code, § 1647); it is to be "interpreted most strongly against the party who caused the uncertainty to exist" (Civ. Code, § 1654); and the language does not of necessity govern its interpretation if it involves an absurdity (Civ. Code, § 1638). The contract was drawn by the plaintiff, Bennett. Hence it is to be interpreted most strongly against the plaintiffs. This rule is accentuated by the fact that the plaintiffs were attorneys at law and presumably familiar with legal terms and proceedings, and accustomed to the use of language appropriate to the framing of contracts, while the defendant was a business man, with no special knowledge of, or familiarity with, these subjects.

The partition suit was solely for the partition of the land. The judgment therein was for a partition in kind, setting off a certain parcel thereof in severalty to Potter and the remainder in severalty to the Slinkards. The complaint in the action for an accounting set forth the ownership of the land in common by the parties, that they had been farming the same together for the common benefit, their respective interests in the profits and the personal property in use being the same as in the land, as above stated; that Potter had expended certain sums of money in the enterprise; that the Slinkards had received profits therefrom for which they had failed to pay or account to Potter; and prayed that an account be taken, that the personal property be divided between the parties according to their interests, and that judgment be given to Potter for the amount found due him. Some alfalfa hay was divided between them by an agreement made while the action was pending, and is not mentioned in the judgment. The other personal property was sold by them and taken into the account. The judgment was for \$375 in favor of Potter. The complaint in the case at bar contains no allegations relating to the value of the services in obtaining the division of the hay.

The attorney's fee allowed in the partition suit was based on the allegation of the complaint in that action "that \$2,000 is a reasonable counsel fee for the services rendered and to be rendered herein." It is to be presumed that the amount allowed was considered by the court to be the full value of the services rendered, the more especially since an additional amount was allowed to other attorneys for services to the Slinkards. We must also presume that the provision of the contract that the plaintiffs should have "ten per cent. of whatever is recovered" was considered by the parties to be full compensation, so far as it applied to the particular suit, for all services to be rendered by plaintiffs as attorneys in that action, if, as might

be the case, no attorney's fee was allowed therein. An interpretation which would give them both, as that of the court below does, would involve the absurdity of giving them twice the value of the service rendered. Such construction cannot be allowed if any other reasonable interpretation can be found. Under section 1638, aforesaid, the language which is supposed to declare the absurdity does not necessarily "govern its interpretation." The two provisions should therefore be held not to be cumulative with respect to the partition suit.

[3] Furthermore, the language itself does not warrant the court's interpretation. Its conclusion was that the phrase "ten per cent. of whatever is recovered" means "ten per cent. of the value of whatever is recovered." But the contract does not mention value. It was 10 per cent. of the thing itself that the plaintiffs were to receive. If we assume that the land set off to a party in an action for partition is "recovered" by him, then plaintiffs would be entitled to a one-tenth interest in Potter's share of the land, and they could not maintain an action for the value thereof. Moreover, there was no issue in the partition suit, as to the title to the land, or as to the respective interests therein. It was a simple suit to sever the unity of title and segregate the possession. The land set off to one party in a partition suit of that character is not "recovered" by him. A simple partition does not change the title, nor transfer it from one to the other, nor return or restore to either party anything lost by him, or of which he had been deprived. It merely transforms the right of common possession of the whole tract into a right to the exclusive possession of the same interest or share, as represented by the parcel set off to him in severalty. He thereafter holds in severalty that interest which he previously held in undivided form. He does not recover the segregated parcel, nor even the possession thereof, but keeps such possession, and thereafter excludes the other tenants from that parcel. *Christy v. Spring Valley W. W.*, 68 Cal. 75, 8 Pac. 849; *Richardson v. Loupe*, 80 Cal. 503, 22 Pac. 227; *Cunha v. Hughes*, 122 Cal. 113, 54 Pac. 535, 68 Am. St. Rep. 27; *Rose v. Mesmer*, 142 Cal. 328, 75 Pac. 905; *Freeman on Cotenancy*, § 529. The only reasonable conclusion is that the two provisions are not cumulative, but are alternative, and that the intention was to substitute the allowed fee, if any, in the partition suit, as compensation for the services therein, instead of the 10 per cent. specified in the first part of the compensation clause of the contract. This is emphasized by the succeeding phrase, "exclusive of the ten per cent. so to be paid by the party of the first part." The word "paid" is significant. The 10 per cent. of the property set off to Potter could not be said to be paid, in

any sense of the word. But with respect to 10 per cent. of any money that might be recovered or obtained on the accounting, it would be in accordance with ordinary usage to say that it would be paid to the plaintiffs by Potter. The giving of the fee to be allowed in the partition suit to plaintiffs was not intended as compensation for their services in the other litigation. The meaning is that the receipt of the fee so allowed should not exclude the attorneys from receiving 10 per cent. upon the amount obtained in the accounting. This we believe to be the correct interpretation of the contract. It does not authorize a judgment which includes more than \$1,000 for the services in the partition suit.

It may be noted here that the money recovered in the accounting suit did not cover the alfalfa hay on the farm. It was divided by agreement, and the plaintiffs, under the contract, were entitled to 10 per cent. thereof. But the complaint needs amendment in order to present clearly and specifically the claim for that part of the compensation.

2. The court also found that there had been an account stated between the plaintiffs and the defendant, as alleged in the complaint, and that it was thereby ascertained and agreed that defendant was indebted to plaintiff in the sum of \$2,750 on account of the services rendered by them to Potter under the contract aforesaid. We think this finding is not supported by sufficient evidence.

The evidence does not show that any account was kept in writing, or that any written statement of account was ever presented or delivered to the defendant, or agreed to or acquiesced in by him. The finding is based exclusively on the testimony of the plaintiff, Turnbull, relating a conversation he says he had with Potter on the 6th of April, 1915, shortly after the judgments were given in the two actions.

[4] It has been held by this court that an account stated may be shown by proof of an oral agreement as to the amount due, although no writing is exhibited at the time. *Converse v. Scott*, 137 Cal. 239, 70 Pac. 13. The decision states the rule to be that such would be the case even if no written evidence of the account had ever existed. See, also, 1 *Corpus Juris*, p. 682, § 256. Somewhat in conflict with this is the case of *Coffee v. Williams*, 103 Cal. 556, 37 Pac. 504, where the court said:

"An account stated is a document—a writing—which exhibits the state of the accounts between the parties and the balance owing from one to the other,"

In *Gardner v. Watson*, 170 Cal. 574, 150 Pac. 994, and again in *Merchants' Natl. Bank v. Carmichael*, 173 Pac. 999, this court quoted

the above passage from *Coffee v. Williams* with approval. But neither of these cases involved the question whether or not the account as stated must exist in writing. *Converse v. Scott* has not been overruled on this point, and we may assume it to be correct.

Turnbull testified that in the conversation with Potter they agreed that the value of the land set off to Potter in the suit should be fixed at \$17,500 "for the purpose of fixing the percentage." The only testimony that tended to show an account stated was given on cross-examination. He said, "I did not make any statement to him that we would charge him any amount." He added that after Potter had assented to the proposal to fix the value of the ranch at \$17,500 he said to Potter:

"That makes \$2,750 for those two cases. We didn't have any words about it at all. We arrived at a figure of \$2,750—\$1,750 on the basis of 10 per cent. of \$17,500, plus \$1,000, which the court had agreed should be allowed to us, and at that time he gave us a check for \$200 and told us he expected \$1,500 from his ore shipment and would pay up the balance as soon as he could."

Potter denied that any such conversation occurred at any time, and he said that the \$200 was paid because Turnbull told him the firm had been under heavy expenses, that their fees were not coming in, and that they needed some money; that the first knowledge he had that plaintiffs proposed to charge 10 per cent. of the value in addition to the \$1,000 was on the day before this action against him was begun, and that he then vigorously objected to the double charge. But as the finding was against defendant we can consider only the testimony of Turnbull.

[5] We have already seen that the contract did not allow the plaintiffs double compensation for the services in the partition suit, or more therefor than the fee of \$1,000 therein allowed. For the services in the accounting suit the contract fixed the sum of \$37.50 (10 per cent. of \$375.00) as compensation. The testimony shows that the value of the personal property divided was not considered or fixed. Even if it had been valued, the value would be immaterial, for the contract gave plaintiffs no right to 10 per cent. of its value, but only 10 per cent. in kind for that service. The result is that if the oral account stated is good, it would have the effect of materially altering the written contract in these particulars, and it would practically double the amount which plaintiffs would be entitled to recover for the services thereunder. An account stated is a mere unperformed promise by one party to pay a stated sum to another, and it is therefore an executory contract. (Civ. Code, § 1661;

Pearsall v. Henry, 153 Cal. 325, 95 Pac. 154, 159. To allow a written contract to be thus altered by an oral statement of account, or by any statement not agreed to in writing by the debtor, would violate the rule of the Code that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Civ. Code, § 1698. This effectually cuts off any such claim in this case. Other reasons now to be stated lead to the same result.

[6, 7] The theory upon which the action on an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same. The action is based on the promise to pay, thus established; and, if it is not expressly made, facts from which such promise will be implied must be proven. Originally, an account stated could exist only where the accounts were mutual, or where there was more than a single item, but in the course of time it became settled that there could be an account stated where but a single item was included or referred to therein. 136 Am. St. Rep. 42, note.

[8-10] It was not every debt that could form the basis of such account stated or such action. It could not become a substitute for an action of debt upon a specialty, such as a promissory note or a bond for money. In such cases no subsequent statement of the amount due thereon, although agreed to by the payor, could supersede the special promise so as to form the basis of an action as upon an account stated to recover the original debt. *Young v. Hill*, 67 N. Y. 174, 23 Am. Rep. 99. The action in such a case must be upon the original promise in writing, and not upon account stated. The written promise being higher evidence of the debt, and the debtor being already bound thereby, there could be no necessity for a resort to a subsequent statement and promise to pay as the foundation of an action therefor. Moreover, the debtor being already completely bound for a specified sum, there is no element of uncertainty to be settled, and no difficulty in ascertaining the balance upon conflicting claims which could constitute a consideration for a new oral promise to pay, and therefore such promise would be a nudum pactum. There must always be a consideration to support a valid promise. From this the further rule follows that there can be no account stated where there have

been no previous transactions between the parties from which the relation of debtor and creditor could arise. "It may not be made the instrument to per se create a liability where none before existed." *Austin v. Wilson*, 11 N. Y. Supp. 566; *Stimson Mill Co. v. Hughes Mfg. Co.*, 8 Cal. App. 561, 97 Pac. 322. The case last cited is a good illustration of the proposition just stated. The plaintiff there had sold lumber and delivered it to one Coffey, and, claiming that it was really sold to the defendant, had thereafter rendered accounts therefor to the defendant as the debtor therefor, which defendant had kept for a long time without making any objection thereto, or any denial of its liability therefor, thus raising the inference that it acquiesced therein. In fact the lumber had been sold to Coffey and not to defendant, and defendant was in no wise liable therefor, unless upon account stated by reason of acquiescence in the aforesaid statements rendered to it. The court held that such "itemized statements could not be made to create an indebtedness." As an illustration of the proposition first stated there is the case of *Jasper Tr. Co. v. Lampkin*, 162 Ala. 388, 50 South. 337, 24 L. R. A. (N. S.) 1237, also reported in 136 Am. St. Rep. at page 33. Plaintiff held certain promissory notes of the defendant, and long after they had become due had sent to defendant written statements of the amounts due thereon for principal and accrued interest, and the defendant had assented to the accuracy of the amounts stated. We quote from the decision at length:

"At an early day in England it was held that where a debt was evidenced by an instrument under seal, a recovery could not be had in an action of assumpsit. One reason seems to be that there is no consideration for the new promise, because the party is already bound by a higher evidence of debt to pay, and the court says: 'There must be at least some additional consideration, such as items, for instance, foreign to the articles of agreement, introduced into the account and included within the promise, in order to take the claim founded upon it out of the operation of the agreement or contract under seal; otherwise, the plaintiffs below must be confined to their action of covenant, founded upon the articles of agreement, for the recovery of their claim.' *Gilson v. Stewart*, 7 Watts (Pa.) 100. It was also decided that, 'where a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account and promises to pay it, debt or simple contract on an account stated will not lie, but the action must be brought on the specialty,' the court saying: 'The defendant is charged with nothing but the money secured by the deed. There is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated.

It is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged, and all which is really done is to make out to what extent the defendant remains liable upon the deed.' *Middleditch v. Ellis*, 2 Ex. 623."

(The case of *Middleditch v. Ellis* will be found in 2 Welsby, H. & G. 623, and in 154 Eng. Rep. 640. The word "deed" may mislead the reader who has not the report at hand. What is meant is that the plaintiff held a bond, or note, for the payment of money, secured by a mortgage in the form of a deed.)

The above authorities do not depend on the ancient technical distinctions between the common-law forms of actions. They are, as the reasoning shows, founded on the fundamental difference between a mere promise to pay an existing debt made upon no new consideration and a promise to pay it which is founded upon a new consideration such as further forbearance, to which the creditor binds himself by accepting this new promise or by some other valid agreement, or a new promise which has the effect of merging the original obligation and in effect extinguishing it as a living contract. They are clearly applicable to the case at bar, so far as it depends on the alleged account stated. In the first place there was no liability from Potter to the plaintiffs for the services in the partition suit, except for the sum of \$1,000. That was ascertained and established by the original written contract. In so far as the so-called account stated attempted to enlarge this liability by the addition thereto of another item consisting of the 10 per cent. upon the value of the land segregated thereby, an item not mentioned in the contract, it would, if enforced, operate to "create a liability where none before existed," which, as the authorities state, cannot be done by means of an account stated. In so far as the oral account stated purported to bind Potter to pay more than the sum of \$1,000 for the services in the partition suit, it was based on no new consideration whatever. There was no promise to pay 10 per cent. of the value of the segregated land, and hence no necessity for coming to an agreement as to the value for the purpose of fixing the percentage. Therefore that process could not be a consideration for the new promise. No other consideration could possibly have existed, and consequently the new promise claimed upon the account stated is a nudum pactum and unenforceable, except for the services other than those rendered in the suit for partition.

For these reasons we are of the opinion that the judgment was erroneous.

The judgment is reversed.

We concur: LAWLOR, J.; OLNEY, J.

In re CARRAGHAR'S ESTATE. (Sac. 2938.)
(Supreme Court of California. Aug. 8, 1919.)

1. HOMESTEAD ~~§~~84—PROBATE HOMESTEAD—PROPERTY OWNED JOINTLY.

A probate homestead cannot be created or set apart from property owned by the husband or wife and a third party as tenants in common or joint tenants.

2. HOMESTEAD ~~§~~3—STATUTES ~~§~~167(2) —ADOPTION OF CODES—ABROGATION OF STATUTE.

St. 1867-68, p. 116, relating to homesteads, and providing that a party entitled, if in exclusive occupation, should have his right though the land was held in joint tenancy, tenancy in common, etc., was abrogated by the adoption of the Codes January 1, 1873.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Edward James Carraghar, deceased. From an order denying the petition of decedent's surviving wife for a probate homestead, she appeals. Order affirmed.

R. Platnauer, of Sacramento, for appellant.

Aram & Carraghar, of Sacramento, for respondents.

ANGELLOTTI, C. J. This is an appeal by the surviving wife of deceased from an order denying her petition for a probate homestead out of the only real property owned by the deceased at the time of his death, which was an undivided half of a lot in the city of Sacramento, and was his separate property. The other undivided one-half of said lot was owned by one Buckman. In the year 1898 deceased constructed a dwelling house on this land. From the year 1899 to the death of deceased in 1917, the premises were occupied by deceased and his wife as their residence, and during all said time deceased had said premises inclosed, and, with his wife, was in exclusive occupation thereof. The learned judge of the lower court concluded that in view of the decisions of this court a homestead could not be set apart from this property so owned by the deceased as a tenant in common with another person, and therefore denied the application.

[1] Whatever we might think if the question were a new one in this state, it is clear that the general rule to the effect that a homestead cannot be created or set apart from property owned by the husband or wife and a third party as tenants in common or joint tenants is too thoroughly established by a long line of decisions, commencing with *Wolf v. Fleischacker*, 5 Cal. 244, 63 Am. Dec. 121, and running down practically to this

time, to permit us now to hold otherwise. Most of these decisions were discussed in the comparatively recent case of *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999 (decided in January, 1906), in which it was sought to have the prior decisions on the question overruled, and where we felt compelled to say that "without expressing any opinion concerning the soundness or unsoundness of the decisions in question, we are of the opinion that they should be adhered to, leaving it to the Legislature to extend the right of the homestead to cotenants if it shall see fit." This conclusion was reached in view of the rule of stare decisis, especially with regard to the rules of law upon the subject of titles to real estate. More than 13 years have passed since that decision without any legislative action in the respect referred to, and, of course, what was there said applies now with much more force than it did in 1906. Since the decision in *Schoonover v. Birnbaum*, supra, this general rule has been fully recognized in *United States, etc., Co. v. Bell*, 153 Cal. 781, 96 Pac. 901, *Swan v. Walden*, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, and *Estate of Davidson*, 159 Cal. 98, 115 Pac. 49. In *Swan v. Walden*, supra, a case of a homestead selected by the wife during the lifetime of the parties, the homestead was upheld although the property was held in joint tenancy, but this was because the only joint tenants were the husband and wife, and the wife's selection was of the whole property, and the wife had the power under the law to declare a homestead upon the husband's separate property as well as upon her own property. As to this situation the court said:

"The homestead thus attempted to be declared is upon land, all of which is susceptible at the instance of the wife of having the homestead characteristics impressed upon it. There is no occasion for segregation or partition or delimitation of boundaries, since the homestead attaches to all of the estate and all of the land. The reasons which, in the view of this court, made it legally impossible for the husband to declare such a homestead when there was a cotenancy between himself, his wife, or third persons does not exist in the peculiar instance of the case at bar."

See, also, *In re Ballard*, 173 Pac. 170. As we have seen in the case at bar the other tenant in common is a third party. The reason expressed for the rule enunciated by our decisions, as stated in *Estate of Davidson*, 159 Cal. 98, 101, 115 Pac. 49, 50, is that "on account of the nature of the tenancy, there can be no segregation or delimitation of the boundaries of the particular estate, or interest in the property of the cotenancy sought to be impressed whereby it can be determined as to what particular part of the land the homestead attaches." In *Estate of Davidson*, supra, it was sought by the surviving wife to have set apart as a probate homestead the

deceased husband's undivided half of the property on which they resided at the time of his death, the wife being the owner of the other undivided half, and it was held by the same justices who participated in *Swan v. Walden*, supra, that, in view of the rule of our decisions, the husband's undivided one-half could not be selected as a probate homestead.

[2] Appellant's principal claim is that she is entitled to have her husband's undivided half of this property set apart as a homestead by virtue of the provisions of an act entitled "An Act Relating to Homesteads," adopted by the Legislature in the year 1868 (Stats. 1867-68, p. 116). It is probable, as was said in *Swan v. Walden*, supra, that this act was adopted to modify the rule of decision in this very matter. It substantially provided that whenever a party entitled to a homestead under the laws of the state is in exclusive occupation of any particular tract of land, having the same inclosed, and shall select and record and reside upon the same as a homestead, he shall be entitled to the same to the extent of his interest in the property, "although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest." It may be assumed that if this act is still in force, appellant is entitled to have her deceased husband's interest set apart as a homestead, for it was held under this act in *Higgins et al. v. Higgins et al.*, 46 Cal. 259, that the wife could select as a homestead the undivided interest of her husband in property exclusively occupied by him, to the exclusion of all other cotenants. But we do not see how it may reasonably be held that the act survived the going into effect of our Codes on January 1, 1873. The question whether this particular act was repealed by the Codes has never been determined or even discussed by this court, though the act was referred to in passing in both *Swan v. Walden*, supra, and *Estate of Davidson*, supra. The act does not appear to have been mentioned in either *Estate of Carriger*, 107 Cal. 618, 40 Pac. 1032, or *Rosenthal v. Merced Bank*, 110 Cal. 198, 42 Pac. 640, cases involving attempted selections since the Codes took effect. In each of these cases the right to a homestead was denied by the court, although, so far as we can see, the facts were such as to make the act of 1868 applicable, if still in force. The uniform course of our decisions on this matter has been the same since the adoption of the Codes as it was prior to the adoption of the act of 1868. We say this much simply for the purpose of showing that this court has never recognized the act of 1868 as surviving the taking effect of the Codes. When enacted in 1872 our Civil Code provided, as it still provides, as follows:

"No statute, law, or rule is continued in force because it is consistent with the provi-

sions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated. * * * Section 20. A similar provision was contained in our Code of Civil Procedure. Section 18.

There is no claim that the act of 1868 was expressly continued in force. In title 5 of part 4 of division second of the Civil Code (sections 1237 to 1269), which was entitled "Homestead," and chapter 5, title 11, of part 3 of the Code of Civil Procedure, as originally enacted in 1872, was contained what clearly appears to have been intended as a complete and comprehensive system of laws on the subjects of homesteads. What a homestead consisted of, how and from what it might be selected, when and to what extent it was subject to execution or forced sale, how it might be conveyed, incumbered, or abandoned, its value, the rights of parties in the matter of probate homesteads and the manner of setting the same apart—all these things were fully covered by the Code provisions. In other words, the whole matter of homesteads was one of the "cases provided for by" the Codes. The rule embodied in section 20, Civil Code, and section 18, Code of Civil Procedure, is the statement of a well-settled principle applicable in considering the effect of revisory statutes. As was said in *Mack v. Jastro*, 126 Cal. 130, 58 Pac. 372:

"Whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is designed as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two. Frequently, these cases arise where the latter statute covering the whole subject-matter omits or fails to mention certain terms or requirements found in an earlier, and it is insisted, as here, that those particular provisions of the earlier statute should be held to be still in force. But, as is said by the Supreme Court of the United States in *Murdoch v. Mayor*, etc., 20 Wall. 590 [22 L. Ed. 429], * * * 'It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion. * * * A careful comparison of these two sections can leave no doubt that it was the intention of Congress by the latter statute to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitted what

was not so intended, because complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.'"

See, also, *Sponogle v. Curnow*, 136 Cal. 580, 584, 69 Pac. 255; *State v. Conkling*, 19 Cal. 501. Our Codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein. That was the main purpose of their enactment. And section 20, Civil Code, and section 18, Code of Civil Procedure, were enacted for the very purpose of putting it beyond the realm of possible dispute that existing statutes on subjects covered by the Codes, whether consistent or not with the provisions of the Codes on the same subject, were abrogated, unless expressly continued in force. True it is that there is no express provision in the Codes purporting to provide for the particular contingencies provided for by the act of 1868. But what we have quoted from *Mack v. Jastro*, supra, fully answers the claim based on this situation. The act of 1868 was one of the existing acts on the general subject of homesteads, the provisions of which the Legislature, in making the revision of the entire law on the subject, must be held to have intended to abrogate. We are satisfied that it must be held that this act was abrogated by the adoption of the Codes.

The cases cited by learned counsel on this point are not opposed to our conclusions. None of them involved any act upon a subject as to which, as here, an apparently complete revision was attempted by the Codes, and all were decided upon the theory that the act involved was regarding a subject in no way treated in any of the Codes. Here, as we have seen, we have in the Codes as enacted an apparently complete and comprehensive revision of the law on the subject of homesteads, and the fact that the Legislature did not include therein provisions for the selection of a homestead where the circumstances were as specified in the act of 1868 does not render the latter act one as to a "case" not "provided for" by the Code.

The order appealed from is affirmed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

OLNEY, J. (concurring). I concur, but solely on the ground that the question is now determined by the previous decisions of this court. If it were not for those decisions I believe the rule should be that a homestead may be imposed in the instances provided by the statute regardless of the character of the title of the homestead claimant or his or her spouse, the homestead, of course, affecting only the interests of the claimant or spouse, whatever those interests may be. The only requirement of the statute in this respect is that the claimant be residing upon the prem-

ises, and to require more than this and make the validity of the homestead dependent upon the character of the interests affected is without statutory warrant, and contrary to the object of the statute. The injustice, I think, is manifest in the present case. It is now too late, however, for this court to reverse its previous decisions, for such reversal would necessarily be retroactive in effect, and would destroy interests and rights acquired in reliance upon the existing decisions. It is hardly necessary to say that this objection would not lie to a change made by the Legislature, which, of course, would operate only in futuro.

SAM KEE v. WILDE, City Clerk.

HOP WAH v. SAME.

(Civ. 2890.)

(District Court of Appeal, Second District, Division 2, California. June 10, 1919.)

MUNICIPAL CORPORATIONS — §800 — POLICE REGULATIONS — LAUNDRIES — RESTRICTED DISTRICTS.

Los Angeles Ordinance No. 22798 (New Series), a residence district ordinance, and No. 26555 (New Series), providing that in order to establish an industrial district within a residence district it is necessary to get a petition signed by property owners, etc., are constitutional and apply to laundries.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Proceedings in mandamus by Sam Kee and Hop Wah against Charles L. Wilde, City Clerk of the City of Los Angeles. From judgments in favor of plaintiffs, defendant appeals. Reversed.

Albert Lee Stephens, City Atty., Charles S. Burnell, Asst. City Atty., and Wm. P. Mealey, Deputy City Atty., all of Los Angeles, for appellant.

Dian R. Gardner, of Los Angeles, for respondents.

THOMAS, J. These appeals are from judgments of the superior court of Los Angeles county on the judgment rolls alone, ordering that peremptory writs of mandate issue commanding the city clerk of the city of Los Angeles to prepare and issue to the respective petitioners a license to conduct a laundry within the portion of the city set apart as a residence district. The issues are the same in both cases, and the pleadings, findings, and judgment are identical, save as to the name of the petitioner and the street address of his laundry. By stipulation, it is agreed that these two cases "may be presented, heard, and determined upon the same transcript and brief." The judg-

ment roll, accordingly, has been omitted from the transcript in the Hop Wah Case.

The appellant has stated the case so well in his brief that we feel that we can do no better than to adopt his language as our statement of the case. This we do. It appears from the record before us that—

"The petition avers that respondent Charles L. Wilde is the city clerk, A. B. Conrad the city tax and license collector, and John S. Myers the city auditor of the city of Los Angeles, and their respective duties as prescribed by the charter are set forth. It is alleged that the petitioner is the lessee of a building at No. 241 North Figueroa street (in the Hop Wah case petitioner's laundry was located in the same neighborhood), and is conducting a laundry therein, and that up to November 30, 1915, he paid the city a license of \$5 per month. The petition then sets forth section 3 of Ordinance No. 20000 (New Series), known as the license ordinance, providing that it shall be the city clerk's duty to prepare and issue licenses to persons liable under said ordinance to pay licenses, and to deliver said licenses to the auditor who shall sign and deliver them to the tax collector for collection. Section 81 of the same ordinance is also set forth; that section imposing a license of \$5 per month on persons conducting a laundry business. It then alleged that on December 1, 1915, petitioner tendered the tax collector \$5 for a license under said ordinance; that the tax collector refused to accept the money for the reason that the license had not been prepared and issued by the clerk; and that a few days later petitioner demanded of the clerk that he prepare, issue, and deliver to the auditor such license, and that the clerk refused so to do, whereupon petitioner again tendered \$5 to the tax collector, who refused to accept it, whereupon petitioner deposited the same, in the name of the tax collector, in a reputable bank, immediately notifying the tax collector thereof, and upon the same day again demanded of the clerk that he prepare and issue a license to carry on the laundry business aforesaid, which the clerk refused to do. It is also alleged that the petitioner is beneficially interested in securing the license and is entitled to have it issued, and that he has no plain, speedy, or adequate remedy in the ordinary course of the law.

"By amendment to the petition it is alleged that on December 15, 1912, the city council adopted Ordinance No. 25555 (New Series), entitled 'An ordinance prescribing the method of making and filing petitions for the establishing of industrial districts' (hereinafter called the 'petition ordinance'), which ordinance is set forth in full; and that after this ordinance became effective the city council adopted various ordinances creating industrial districts, which ordinances number 25 in the aggregate, and that all of them were adopted after a petition had been filed with the city council in accordance with said Ordinance No. 25555 (New Series), and that no industrial districts have been created during said time except upon such petitions. It is further alleged that petitioner prepared a petition under said Ordinance No. 26555 (New Series) to have the lot upon

which his business is located established as an industrial district, but he was unable to secure the signatures of the owners of the necessary proportion of the property fronting on the opposite side of the street, or of a majority frontage in the block.

"The respondent in his answer denied that the petitioner was entitled to have a license issued, and set up the adoption, on June 7, 1911, of Ordinance No. 22798 (New Series), which ordinance establishes a residence district and regulates and prohibits the conducting and maintaining of works and factories where power other than animal power is used within the boundaries of said district, and referred to the various amendments thereto; said ordinance, together with amendatory Ordinance No. 33393 (New Series), being attached to the answer as Exhibits A and B, respectively. Said Ordinance No. 33393 (New Series) merely amends the residence district ordinance by excepting from the residence district those portions of the city which have become annexed thereto subsequent to January 1, 1915. The residence district ordinance, as amended, establishes all of the city as a residence district, except (a) that portion included within fire district No. 1, (b) those portions included within the boundaries of such industrial districts as are or may hereafter be established as such by ordinances, (c) the portion of the city lying south of Manchester avenue, and (d) all territory annexed since January 1, 1915.

"The answer also sets forth Ordinance No. 19901 (New Series), entitled 'An ordinance fixing and establishing fire districts of the city of Los Angeles,' as amended. It is further alleged that the city council has from time to time adopted various ordinances excepting certain specified portions of the city from the residence district established by Ordinance No. 22798 (New Series); 103 ordinances having been adopted excepting from the residence district portions of the territory embraced therein. It is next alleged that petitioner's laundry is not within fire district No. 1, nor within the boundaries of any industrial district, nor within any portion of the city lying south of Manchester avenue or added to the city by annexation subsequent to January 1, 1915, but that it is within the residence district, and that the respondent refuses to prepare and issue a license for the petitioner, for the reason that under the provisions of the residence ordinance it is unlawful to maintain a laundry within said residence district.

"It is further denied that the petitioner ever prepared a petition under Ordinance No. 26555 (New Series), or otherwise, to have the lot on which his business is located established as an industrial district, and that he had endeavored to secure the signature of property owners to such, or any petition, or that any of them have refused to sign same.

"The first 15 findings of the court are identical in language with the allegations of the complaint. Finding No. 16 is identical in language with paragraph XV of the complaint, as added by amendment, while finding No. 17 is identical with paragraph XVI of the complaint; finding No. 18 is the same as paragraph II of the answer, except that Ordinance No. 22798 (New Series), as amended, including the amendments contained in Ordinance No. 33393 (New Series),

is set forth in full as a part of the finding. Finding No. 19 is identical with paragraph IV of the answer; finding No. 20 is identical with the first half of paragraph IV of the answer, alleging the adoption of various ordinances excepting certain portions of the city from the residence district established by Ordinance No. 22798 (New Series); while finding No. 21 is that 65 of the 103 ordinances set out in paragraph V of the answer were passed only upon petitions prepared in accordance with section 6 of Ordinance No. 22798 (New Series), and subsequent to the adoption of the residence district ordinance. Finding No. 22 is that the petitioner's laundry is not within fire district No. 1, nor within the boundaries of any industrial district established by ordinance, nor within that portion of the city lying south of Manchester avenue, nor within any portion of the city annexed thereto subsequent to January 1, 1915. The court failed altogether to find upon the issue made by paragraph XVII of the complaint, and by the answer, namely, as to whether or not the petitioner prepared and endeavored to obtain signatures to a petition to have the lot upon which his laundry is conducted declared an industrial district.

"As conclusions of law the court finds that the residence district ordinance, Ordinance No. 22798 (New Series), as amended, is void and unconstitutional so far as it affects laundries; and also that the petition ordinance, Ordinance No. 26555 (New Series), is void and unconstitutional in so far as it affects laundries; and that the petitioner is entitled to a license, and that respondent has failed to show cause why he has not issued the same.

"From the above it will appear that there is no controversy whatsoever as to the facts, except with respect to the one issue upon which the court has failed to find.

"Appellant, contends that the residence district ordinance is valid and constitutional, and that under it the petitioner was prohibited from conducting a laundry, and that he, as city clerk, properly refused to prepare and issue a license for the conducting, at a specified locality, of a business the conducting of which was prohibited within that portion of the city wherein it was sought to conduct the laundry."

The principal question presented, therefore, is the sufficiency of Ordinance No. 22798 (New Series), the residence district ordinance, and No. 26555 (New Series), the petition ordinance, of the city of Los Angeles, in their application to petitioners.

The contention here was, and the court so found, that these ordinances are, and each of them "is, void and unconstitutional, and of no force and effect, so far as the same applies, affects, or tends to affect laundries or the laundry business."

No service of value could, we think, be rendered by a discussion of the various ordinances set out in the pleadings and findings of the court, nor even by setting forth here in extenso the particular ordinances under consideration, as we are of the opinion that the question here presented has been so thoroughly settled in this state that we shall not burden the record nor impose upon the pro-

fession the hardship of reading any discussion by us of this case. There is such a wealth of decisions from all over the United States, many of them discussed at great length, presenting exhaustive, thorough, and able arguments, and covering, we think, the identical question here presented, that we content ourselves by simply citing a few of them. The constitutionality of ordinances such as, or similar to, those here involved, has, we think, been upheld by the courts in the following cases: *Ex parte Hadacheck*, 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B, 1248; *In the Matter of Montgomery*, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714; *San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 Pac. 797; *Ex parte Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; *San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *Ex parte Moynier*, 65 Cal. 33, 2 Pac. 728; *Laurelle v. Bush*, 17 Cal. App. 409, 119 Pac. 953; *Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991; *Hadacheck v. Sebastian*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

In view, therefore, of this fact, we are unable to agree with the learned trial judge in his conclusions, and hence we hold the said ordinances valid and constitutional; that the appellant, accordingly, very properly refused to issue a license to respondents; and that, from the record before us, he has shown good cause why a writ of mandate should not issue. No other point presented need be considered.

The judgments are reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

LOMPOC PRODUCE & REAL ESTATE CO. v. BROWNE. (Civ. 2752.)

(District Court of Appeal, First District, Division 2, California. June 16, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. SALES ⇨409—BREACH OF CONTRACT—TIME FOR SUIT.

Where defendant seller refused to perform a contract for sale of a bean crop, plaintiff buyer had an immediate right of action, although time for delivering the crop had not arrived.

2. SALES ⇨418(2)—BREACH OF CONTRACT—DAMAGES.

In buyer's action for breach of contract for sale of a bean crop, the market value of the

beans at time of breach is the proper measure of damages.

3. SALES ⇨196—CONTRACT—WAIVER.

Any breach by plaintiff buyer of a contract provision requiring him to purchase seed for defendant seller was waived, as a matter of law, where defendant retained a partial payment and kept the contract open for his own benefit for six months, without complaint regarding the alleged breach.

4. SALES ⇨413—BREACH—WAIVER.

Where defendant seller claimed plaintiff buyer had breached a sales contract, plaintiff may show that defendant's own testimony established a waiver of the alleged breach, although waiver was not pleaded, since any variance could not have surprised defendant and might be cured by amending complaint to conform to proof.

5. APPEAL AND ERROR ⇨1039(13)—HARMLESS ERROR—VARIANCE.

A variance between allegation and proof will not be prejudicial error, where, if complaint had been amended to meet the proof, the result would have been the same.

6. SALES ⇨182(3)—BREACH OF CONTRACT—WAIVER.

While waiver of a sales contract breach is a mixed question of law and fact, yet, when but one inference can be drawn from the facts, it is not error for the court to charge that these facts constitute a waiver.

7. TRIAL ⇨62(3)—REBUTTAL EVIDENCE—CONTRACTS—WAIVER.

Where defendant seller's own testimony showed he had waived an alleged breach of the sales contract by plaintiff buyer, the court did not abuse its discretion in refusing defendant permission to rebut claim of waiver, when permission was sought after defendant had rested and plaintiff's motion to withdraw issue regarding its breach of contract from jury had been granted.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by the Lompoc Produce & Real Estate Company against Maxwell Browne. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.
Oscar Samuels, of San Francisco, and Chas. B. Rosendale, of Salinas, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment in favor of the plaintiff for \$16,505.36 damages for the alleged breach of a contract for the sale of a crop of beans. The court directed the jury to find for the plaintiff, leaving to them the determination of the amount of the damages. The contract is in writing, and was entered into upon February 13, 1917. It provides that the defendant shall grow for the plaintiff certain quantities and varieties of beans at a

specified price. It acknowledges receipt by the defendant of \$2,000 to apply upon the purchase price of the beans, and also provides that the conditions printed on the back thereof are a part of the contract. Among those conditions is one to the effect that the plaintiff agrees to furnish the defendant sufficient seed for the crop bargained for, said seed to be selected by the defendant, and for the seed furnished by the plaintiff the defendant agrees to return with the crop an equal amount, without charge, as the equivalent of the seed furnished. The contract provides that a certain price was to be paid for beans delivered to the defendant on or before October 1, 1917, and a different price was to be paid for beans delivered after October 1, 1917. It is also provided that delivery should be made on or before November 1, 1917. On October 18, 1917, defendant wrote to the plaintiff refusing to perform the contract and returning the \$2,000 advanced to him thereunder. The plaintiff brought this action on October 25, 1917.

[1, 2] The defendant demurred to the complaint and urged as one ground of demurrer that the action was prematurely instituted because delivery was to be made on or before November 1, 1917, and the suit was brought before that time. This point was also urged upon the motion for a nonsuit made at the conclusion of plaintiff's proof. We believe this point is not well taken. The complaint set out the contract, and alleged that on October 18th the defendant had renounced the contract and refused to be bound by it or to deliver to plaintiff any portion of the crop, and that at said time a portion of the crop, approximately 200,000 pounds, was sacked and ready for delivery, and that, the balance was lying on the ground ready for sacking and delivery. We think that the absolute refusal of the defendant to perform conferred upon the plaintiff an immediate right of action. *Garberino v. Roberts*, 109 Cal. 126, 128, 41 Pac. 857; *Stum v. Hadrich*, 7 Cal. App. 242, 244, 94 Pac. 82; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Central Trust Co. of Illinois v. Chicago Auditorium Ass'n*, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580; *Cabrera v. Payne*, 10 Cal. App. 675, 678, 103 Pac. 176. The market value of the beans at the time of the breach was a proper measure of damages. *Masterson v. Mayor of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, quoted with approval in *Hale v. Trout*, 35 Cal. 229, at page 243; *Roehm v. Horst*, 178 U. S. 1, at page 21, 20 Sup. Ct. 780, 44 L. Ed. 953.

[3] The plaintiff alleged complete performance by it of all the conditions of the contract by it to be performed. In regard to the provision in the contract that the plaintiff should furnish seed to the defendant, which seed should be selected by the defendant, the

plaintiff proved that no seed had been selected by the defendant, and no request for any seed or for the privilege of selecting any seed had been made by the defendant to any authorized agent of the plaintiff company. The defendant denied that the plaintiff had performed its part of the contract, and introduced certain testimony of the defendant to the effect that he had selected certain seed from samples in the possession of one Grannas, who, it was claimed by defendant was ostensibly acting for the plaintiff company, and that defendant had requested Grannas to furnish such seed and that Grannas had refused because of the high cost of the same. But by his own testimony defendant also put in evidence facts which clearly indicate a waiver of this condition concerning the seed, even though we concede that the testimony established an ostensible agency in Grannas to act for the plaintiff company. Plaintiff, thereupon, at the close of defendant's case, made a motion to withdraw from the jury the issue of plaintiff's alleged breach of the seed provision, and upon this motion plaintiff urged that, even though it be conceded that the seed provision had been breached, yet it appeared from the defendant's own testimony that he had waived that breach. We emphasize the fact that it was upon defendant's own testimony that plaintiff asked for a directed verdict. This motion was granted and a verdict for plaintiff was directed. It appeared from the defendant's testimony that he had arranged for the purchase of certain seed known as the Soares seed from Mr. Soares before he made the contract with the plaintiff for the sale of his crop; that he mentioned this fact to Grannas, who, he claims, was acting for the plaintiff company; that later, after Soares had sold his seed to the plaintiff company, and they in turn had disposed of all of it, and after the contract between plaintiff and defendant had been entered into, the defendant asked Grannas for this Soares seed and was told that it had all been sold. He then selected other seed, a sample of which Mr. Grannas had in his office, which seed was known as the Santos seed, and which, it developed, was grown on the same land and was a part of the same crop as the Soares seed. Grannas then told him this seed was held at too high a price and that he could not buy it, and asked the defendant to try to purchase it himself. The defendant made no objection to doing this, but replied, "All right," and proceeded to purchase it. He never asked for reimbursement from the plaintiff for the amount he paid for the seed, and never objected that it had not fulfilled its contract in this regard, and did not return the \$2,000 advanced to him under the contract until October 18, 1917, approximately the time fixed for the performance of the contract, when he attempted to repudiate it

because of this alleged breach. On several occasions after he had purchased the seed he met representatives of the plaintiff company and allowed them to go over the ranch and inspect the crop, but he never at any time indicated to them that he considered the plaintiff had breached its contract in any respect or that the contract was not in full force and effect. Even if it be conceded that a breach of the contract by the plaintiff occurred in April, 1917, the defendant would not have been permitted to have retained the consideration paid him and to have kept the contract open for his own benefit for six months, making no demand or complaint, and permitting the plaintiff to believe that he was going to comply therewith, and then, at the last moment, when the price of beans had advanced, repudiate the contract. The evidence of the defendant, without contradiction, indicates a waiver of this condition.

[4, 5] The defendant and appellant objects that the verdict and judgment were obtained upon an issue of waiver, and that, as no waiver was pleaded, the plaintiff was not entitled to judgment upon this issue when the pleadings alleged performance by the plaintiff and not a waiver by the defendant. While we have not been cited to any case involving this precise question of pleading in relation to waiver, a similar question has arisen in certain cases involving the pleading of an estoppel. In the case of *Blood v. La Serena L. & W. Co.*, 113 Cal. at page 229, 41 Pac. 1017, 45 Pac. 252, it is said that had the plaintiff under the circumstances been called upon to rely upon an estoppel in order to maintain his action against defendant at all, it would have been necessary, of course, for him so to have pleaded. But such was not his cause of action, for he successfully made out a prima facie case, and might, without pleading it, use the evidence in estoppel to prevent the corporation from maintaining what, as against its acts, would be an unjust and unwarranted defense. In the case of *Donnelly v. S. F. Bridge Co.*, 117 Cal. 417, at page 422, 49 Pac. 559, at page 560, it is said: " * * * A party is not bound to plead an estoppel where he is without knowledge that his demand must ultimately rest upon it."

In the present case the plaintiff alleged and relied upon performance. It made out a prima facie case. The authority of Grannas, from whom it is asserted defendant selected and requested the seed, rested only upon an ostensible agency. It was not shown that he was the agent of the plaintiff in fact, but plaintiff throughout the trial denied his authority and objected to proof of any dealings with him by the defendant. The plaintiff, therefore, in its main case, relied upon the fact that the defendant had not selected seed from any of its authorized agents, and therefore there was no breach of the condition to

furnish seed. The defendant met this by proof which, for the purpose of this discussion, let us concede established an ostensible agency of Grannas to act for the plaintiff company, and then showed that he selected and requested seed from Grannas. The plaintiff, while denying the authority of Grannas to act for it in this matter, may rely upon the defendant's testimony and take advantage of the waiver proven by it, even though such waiver may not have been pleaded.

Furthermore, the defendant could not have been surprised or injured by this variance between the pleadings and proof, because the evidence concerning waiver was largely his own testimony. He may not complain that his own testimony is construed most strongly against him, and he cannot be damaged by a consideration of the facts which he himself has admitted. If it be true that there is a variance between the allegations and the facts shown, then it is apparent that defendant could not have been prejudiced by the variance, because if the complaint had been amended to conform to the proof the result would have been the same, and no good would result from sending the case back for a new trial, as it is apparent that the result would necessarily be the same, under the evidence of the defendant himself. It is said in the case of *Foster v. Carr*, 135 Cal. 83, 67 Pac. 43, that even where there is a variance such as ordinarily would be ground for reversal, yet if there is no dispute about the facts, and the evidence could not be varied upon a new trial, there is no prejudicial error which requires a reversal of the judgment. Code Civ. Proc. § 469. A judgment will not be reversed or a new trial granted for mere error when it clearly appears that the appellant has sustained no injury therefrom. *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821.

[6] Appellant also contends that the alleged waiver by defendant should have been submitted to the jury as a question of fact, and that the directed verdict was therefore improper. While waiver is a mixed question of law and fact, when, however, but one inference can be drawn from the facts, it is not error for the court to charge the jury that these facts constitute waiver. 40 Cyc. 270; *Spring Garden etc. Ins. Co. v. Evans*, 9 Md. 1, 96 Am. Dec. 308, 315. The uncontroverted evidence before the court in the present case was such that it would have been the duty of the court to set a contrary verdict aside as unsupported by the evidence. A directed verdict was therefore proper. *Estate of Baldwin*, 162 Cal. 471, 123 Pac. 267; *Meyer v. Lovdal*, 6 Cal. App. 369, 92 Pac. 322; *Bunt v. Sierra Buttes Gold Min. Co. (C. C.)* 11 Sawy. 178, 24 Fed. 847.

[7] The trial court did not abuse its discretion in refusing to permit the defendant to offer additional testimony to rebut the claim

of waiver. After the defendant had rested his case and the plaintiff had made a motion for the withdrawal of the issue of breach of the contract by the defendant from the jury, and after the court had granted that motion, the defendant asked leave to introduce further testimony to rebut the waiver which was shown by the defendant's own testimony. The court denied the application upon the ground that there was no showing made that such application could not have been made sooner and before the court had decided the matter. Apart from this objection, this is not a case of a refusal to permit a party to introduce evidence to overcome the testimony of the opposing party. All the testimony upon the subject of waiver was given by the appellant himself. He cannot claim to have been surprised by his own testimony, and should not object to its being given full credence. He should not be permitted to attempt to contradict it.

The judgment is affirmed.

We concur: BRITAIN, J.; HAVEN, J.

WESTERN CALIFORNIA LAND CO. v. WELCH et al. (Civ. 2892.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919. Rehearing Denied by Supreme Court Aug. 4, 1919.)

1. APPEAL AND ERROR §499(3) — BILL OF EXCEPTIONS — SPECIFICATIONS OF ERROR — NECESSITY.

Although a bill of exceptions does not attack insufficiency of evidence to sustain the findings and judgment, as required by Code Civ. Proc. § 648, no specifications are necessary to enable the reviewing court to consider errors of law in the rulings of the trial court on defendant's objection to the introduction of evidence, motion to strike them from the record, and for nonsuit on the ground of irrelevancy and immateriality, in the absence of proper foundation.

2. EJECTMENT §86(1)—EVIDENCE—PRESUMPTION OF TITLE AND RIGHT OF POSSESSION.

Actual possession establishes presumption of title and right to possession in an ejectment suit which can only be overcome by proof of anterior possession or title from a paramount source.

3. APPEAL AND ERROR §907(4)—REVIEW—PRESUMPTION ON APPEAL — BURDEN OF SHOWING ERROR.

The law will presume, where the extent and nature of the evidence in an ejectment suit is not sufficiently set forth in the bill of exceptions to show the contrary, that there was competent and sufficient evidence before the court to sustain its rulings and findings.

4. TRIAL §412, 414, 419—RULINGS ON MOTION TO STRIKE—EVIDENCE.

Where, after adverse rulings on objections to evidence, motion to strike and for a nonsuit, defendants proceed with the case and introduce evidence which supplies the defects in plaintiff's proof, the erroneous rulings of the trial court are cured.

5. APPEAL AND ERROR §907(2)—REVIEW—PRESUMPTION ON APPEAL.

Where plaintiffs in an ejectment suit offered a deed in evidence which was objected to as being irrelevant, and defendants introduced another deed without disclosing its contents in the bill of exceptions, it will, on appeal, be presumed that such deed, if its terms were shown, establishes a foundation for plaintiff's claim.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Ejectment by the Western California Land Company against Benjamin P. Welch and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James R. Jaffray, of Los Angeles, for appellants.

Gray, Barker & Bowen and Donald Barker, all of Los Angeles, for respondent.

SLOANE, J. This is an action in ejectment. The complaint alleges plaintiff's ownership and right to possession of the land in question, and that defendants were wrongfully in possession and withholding it from plaintiff. The answer of the defendants denies plaintiff's claim of ownership or right of possession, and alleges that defendants are in the rightful possession. The findings support the allegations of the complaint, and judgment was for plaintiff. Defendants appeal on the judgment roll and a bill of exceptions.

While the bill of exceptions contains a statement to the effect that all the evidence introduced on the trial is set forth therein, it affirmatively appears on the face of the bill that it does not contain all of the evidence. So far as the evidence on plaintiff's part is concerned, the bill of exceptions is as follows:

"Plaintiff offered in evidence a deed from the Title & Guaranty Company to plaintiff, Western California Land Company, dated December 11, 1915. (Here set out so much of said deed as is necessary to the action). Plaintiff offered a decree of this court in case No. B-29782, In Matter of Voluntary Dissolution of the Los Angeles Title & Trust Company, entered and docketed Nov. 4, 1915. (Here set out so much of said decree as may be necessary to the action) Plaintiff rests."

"Defendants objected to each and every part of such offered evidence on the ground that the same was and is irrelevant, incompetent, and immaterial, and without foundation, which objection was overruled by the court, and the evidence admitted. Defendant then moved the

court to strike out each and every part thereof, on the same grounds as objected to, which motion was overruled by the court. Defendant then moved the court to grant a nonsuit in this case on the ground that no evidence had been produced by defendant, or admitted in evidence, tending in any way to support all or any of the issues in favor of the plaintiff, which motion was denied by the court."

If defendants had rested their case at this point we would be justified in reversing the judgment.

[1] It is true, as respondent urges, that this bill of exceptions contains no specification of insufficiency of the evidence to sustain the findings and judgment, as is required by Section 648 of the Code of Civil Procedure and numerous decisions of the Supreme and appellate courts of this state, where the findings are attacked for insufficiency of evidence; but no such specifications are necessary to enable the court to consider on this appeal errors of law in the rulings of the trial court on defendant's objections to the introduction of these documents, their motion to strike them from the record, and for nonsuit on the ground of irrelevancy and immateriality of the evidence in the absence of proper foundation. *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; *Barfield v. South Side Irrigation District*, 111 Cal. 118, 43 Pac. 406; *Harper v. Gordon*, 128 Cal. 489, 61 Pac. 84.

[2] Notwithstanding the fact that the bill of exceptions fails to set forth, as therein suggested, the contents or substance of the deed and decree introduced by the plaintiff, it is difficult to conceive of anything these documents could have contained which, in the absence of a chain of conveyances or other basis of title by way of foundation, would show title or right of possession in the plaintiff as against the presumption of right and title in defendants arising from their actual and admitted possession at the time of the commencement of the action. There is no more firmly established rule of evidence than that actual possession establishes presumption of title and right to possession, which can only be overcome by proof of anterior possession or title from a paramount source. *Hawxhurst v. Lander*, 28 Cal. 331; *Morris v. Clarkin*, 156 Cal. 16, 103 Pac. 180; Civil Code, § 1006. It is unnecessary to review the long list of authorities submitted by appellants to sustain this proposition. Plaintiff's deed from the Title Guaranty & Trust Company, no matter what its terms, in the absence of a showing that the Title Guaranty & Trust

Company had title to convey, was entirely irrelevant and immaterial; and a decree in the matter of the dissolution of the Los Angeles Title & Trust Company, an apparent stranger to the title to this property, was equally ineffective, no matter what its recitals. So far as appears from the record of plaintiff's side of the case, the defendants' objection and motions should have been sustained.

[3] But we find, however, in the record of defendants' bill of exceptions that the defendants introduced in evidence a deed from the Los Angeles Title & Trust Company to plaintiff's grantor, the Title Guaranty & Trust Company, antedating the deed to plaintiff. The contents of this instrument are not set out. It does not even appear whether it was a deed to the land in question. Nothing, however, appears to the contrary. It may have contained recitals as to grantor's source of title that would estop defendants from claiming against it. This deed was put in evidence by defendants, and they would be bound by its recitals. The law will presume, where the extent and nature of the evidence is not sufficiently set forth in the bill of exceptions to show the contrary, that there was competent and sufficient evidence before the court to sustain its rulings and findings. The burden is upon appellant to affirmatively show, by production of all the evidence on the point, that the ruling or finding was erroneous.

[4] If, after the adverse rulings on their objection and motions to strike and for a nonsuit, the defendants proceeded with the case and introduced evidence which supplied the defects in plaintiff's proof, the erroneous rulings of the court are cured. *Robinson v. Nevada Bank*, 81 Cal. 106, 22 Pac. 478; *Russell v. Pacific Can Co.*, 116 Cal. 527, 530, 48 Pac. 616.

[5] The introduction of this deed by defendants, without disclosing its contents in the bill of exceptions, opens up a field for presumption which will support any conjecture as to its terms that might reasonably be made, and which would, if shown, establish a foundation for plaintiff's claim. Doubtless the failure to include the terms of these various instruments in the engrossed bill of exceptions was the result of an oversight, but, in the absence of any suggestion for the diminution of the record, the appeal must be determined by the record as it is presented. Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

ARNOLD v. CALIFORNIA PORTLAND CEMENT CO. (Civ. 2896.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

APPEAL AND ERROR ⇨ 1060(1) — **TRIAL** ⇨ 108½ — **HARMLESS ERROR** — **CONDUCT OF COUNSEL** — **EXAMINING JUROR** — **REFERENCE TO INSURANCE.**

Counsel may ask prospective jurors whether they are interested in any insurance company but persistent inquiries as to whether they would be prejudiced by knowledge that a casualty company had insured defendant, and directly implying that such insurance had been affected, constitute reversible error in an evenly balanced case.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Frank M. Arnold against the California Portland Cement Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. H. Shankland, R. H. McHargue, and Gurney E. Newlin, all of Los Angeles, for appellant.

Frank B. Daley, Daley & Byrne, and Frank T. Bates, all of San Bernardino, for respondent.

FINLAYSON, P. J. This is an action for damages for personal injuries sustained by plaintiff in a dynamite explosion at defendant's plant, near the town of Colton, while plaintiff was in defendant's employ as a "powder man." The accident occurred May 9, 1909. This was prior to certain recent legislation enlarging the responsibility of employers for injuries to employees. From a judgment in favor of plaintiff, upon the verdict of a jury, defendant appeals. The case was before the Supreme Court on a former appeal (161 Cal. 522, 119 Pac. 913), where a previous judgment for plaintiff was reversed by that court upon the ground of error in the admission of certain evidence.

The gravamen of the action is that defendant negligently furnished for plaintiff's use an electric battery that was too weak to explode the dynamite in nine holes that he was directed by his foreman to explode in the process of "springing the holes," that is, preparing them to receive the charges of black powder. The nine holes were connected by wire in a series. Plaintiff attempted to explode all of them at one time by a single discharge of the electric current from the battery. The battery failed to explode at least one of the holes. The failure to explode all the holes could not be detected from surface indications. For some reason, perhaps because he suspected that some of

the holes had failed to explode, plaintiff, immediately after his attempt to explode the nine holes at once, connected each hole separately with the battery, turning on the current each time. The connection so made separately with each hole caused no explosion. From this plaintiff concluded that all the charges had exploded with the first discharge of the current from the battery. Thereupon he commenced to drill the holes with a heavy steel drill for the purpose of cleaning them out and preparing them to receive the heavy black powder. He made no further examination, and took no precaution of any kind against any accident that might occur if it should turn out that the dynamite in some one or more of the holes had failed to explode the first time. While drilling in one of the holes, either the third or the fourth in the series, the dynamite that he had placed therein, and which had failed to explode when the current from the battery was turned on, exploded, and the injuries of which he complains were thus sustained. The battery had been used for several months, and at times had failed to discharge a blast when connected with but a single hole. Plaintiff had been at work for the defendant for about four months. He knew the battery was not new, and also, from his experience, that such a battery, which is but a mechanism for generating an electric current, gets weaker with use.

Inasmuch as the case must be reversed because of the misconduct of plaintiff's counsel while examining the jury panel upon their voir dire, we do not find it necessary to make a more extended statement of the facts. It will suffice to refer to the facts as stated in the opinion on the first appeal. In their essential aspects the facts brought out at the first trial do not differ materially from those adduced at the second trial.

Whether respondent was guilty of contributory negligence in assuming that the nine blasts were exploded by the first discharge of the electric current from the battery, and in failing to use any precautions against possible injury in the event that all the charges were not thus exploded, is a very close question. It is also a nice question as to whether the failure of the charge to explode when the current was turned on was due to weakness of the battery or to respondent's own negligence in failing properly to connect the wires from the battery with the charge of dynamite. We are not entirely satisfied that the evidence is sufficient to sustain the verdict. If it is, the margin is very slight indeed. However, since the case must be sent back for a new trial because of the error above suggested, and because the case for plaintiff on the next trial may be stronger than that disclosed by the record before us on this appeal, it will not be

necessary to consider the sufficiency of the evidence.

Considering the weakness of the evidence and the exceeding narrowness of the margin to support respondent's theory of the accident, it is obvious that any improper questions propounded to the jurors upon their voir dire, calculated to bias them in favor of respondent, must be deemed to have been prejudicial to appellant. Questions of that character, over appellant's objections, were propounded and allowed during the examination of the panel. The objectionable questions were asked in the presence and hearing of all the panel from which the jury that tried the case was selected. For this reason we think the judgment should be reversed.

While examining the jury panel upon their voir dire, respondent's counsel asked these questions:

"Now, if you were sworn as a juror, and during the trial of this case, near the end of it, you should learn that the New Amsterdam Casualty Company, one of these surety companies, was a surety at the time of this accident alleged, or an insurer against any injury to employees, would that in any wise affect your verdict in this case?" Also: "And if it came to your knowledge, if you were a juror in this case, and it came to your knowledge from any source whatever, that the New Amsterdam Casualty Company was a surety for any injury to the employees of the defendant company at the time of this alleged injury, would that knowledge of that fact in any wise influence your verdict in the case?"

Each of these questions carried with it the implication, if not the direct assertion, that appellant was insured by a casualty insurance company against any financial loss it might sustain by reason of the injury to respondent. To these questions, and others of a similar import persistently propounded, appellant's counsel strenuously objected upon the ground that the same were incompetent, irrelevant, and immaterial, and particularly upon the ground that each was an improper question to be asked the jurors upon their voir dire. The objections were overruled. It does not appear that the court in any manner or at any time endeavored to admonish the jury to disregard the damaging insinuation conveyed to their minds by this line of questioning. The questions were highly prejudicial, and it was error to overrule respondent's objections. *Pierce v. United Gas, etc., Co.*, 161 Cal. 176, 188, 118 Pac. 700; *Roach v. Llewellyn, etc., Co.*, 140 Cal. 563, 74 Pac. 147; *De Liere v. Goldberg, etc., Co.*, 30 Cal. App. 612, 159 Pac. 197; *Dameron v. Ansbros, 178 Pac. 874*; *Spinney's Adm'r v. Hooker (Vt.)* 102 Atl. 53; *Putnam v. Pacific Monthly Co.*, 68 Or. 36, 130 Pac. 986, 136 Pac. 835, 45 L. R. A. (N. S.) 338, L. R. A. 1915F, 782, Ann. Cas. 1915C, 256; *Horsford v. Carolina Glass Co.*, 92 S. C. 236, 75 S. E.

533; *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854; *Cosselman v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Rothenberg v. Collins*, 161 App. Div. 387, 146 N. Y. Supp. 762; *Eckhart, etc., Co. v. Schaefer*, 101 Ill. App. 500, 102 N. E. 778; *Crowley v. Streschreuter*, 174 Ill. App. 538; *Mithen v. Jeffery*, 259 Ill. 372; *Houston Car, etc., Co. v. Smith (Tex. Civ. App.)* 160 S. W. 435; *Beaumont, etc., Co. v. Dilworth (Tex. Civ. App.)* 94 S. W. 352; *Stratton v. Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881; *Inland Steel Co. v. Gillespie*, 181 Ind. 633, 104 N. E. 76; *Duncan Coal Co. v. Thompson's Adm'r*, 157 Ky. 304, 162 S. W. 1139.

There is a decided divergence of opinion among the courts of the several states as to the right of counsel for plaintiff in a personal injury action to suggest in any way, in the presence of the jury, that an indemnity insurance company is an actual party in interest. The cases are collected and reviewed in an exhaustive note to *Egner v. Curtis, etc., Co.*, L. R. A. (N. S.) 1915A, p. 153 et seq. From what is said in *De Liere v. Goldberg, etc., Co.*, supra, it is evident that, as yet, there is no decision in this state that has attempted to define the circumscribing bounds within which examining counsel, at their peril, must confine themselves. The question is one that, in so far as is reasonably possible, ought to be settled as a matter of general practice.

It is extremely difficult, if not impossible, to lay down a fixed rule that will apply on all occasions and define the restrictive limitations with absolute exactness. It is, however, possible and practicable to define the guiding principles applicable to such cases. Courts do not look with favor upon an attempt to impress the jury with the idea that, not the local defendant in the case, but an insurance company, which often is a foreign corporation, may be called upon to respond to such damages as the jury may assess. The knowledge that the defendant has such protection may have a tendency to make the jurors careless as to the amount of their verdict. As was said in a Maine case (*Sawyer v. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333):

"* * * To allow juries, in cases of this kind, to take into consideration the fact that an employer was insured against accidents would do more harm than good, and would increase the already strong tendency of juries to be influenced, in cases of personal injury, especially where a corporation is defendant, by sympathy and prejudice."

Notwithstanding the apparent diversity of the decisions, we think that a correct statement of the rule, supported by reason and the weight of authority, is substantially as follows: It is entirely proper for counsel to ask the jurors such questions as may rea-

sonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict. To this end it is proper for counsel, in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. *Rinklin v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125; *Grant v. National, etc., Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805. But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence. And if the amount of the verdict is large as compared with the nature of the injuries sustained, or the defendant's liability is a close question, such misconduct is prejudicial and ground for reversal.

The plaintiff has the right to inquire about any interest, direct or indirect, of the jurors that may affect their verdict, but he has no right to abuse his privilege or make of it a strategem by which he can prejudice the jury with irrelevant matter. As was well said in one of the cases, counsel, at his peril, must steer a clear course between the Scylla of an interested jury on the one hand and the Charybdis of pettifoggery on the other. Asking a juror whether he is interested in a specified casualty company, or, generally, in any insurance company, if the question be propounded in good faith, may be necessary in order to insure the plaintiff a body of jurors unbiased by any connection in favor of the party really interested in the defense of the action. But beyond this it is neither necessary nor proper to go. It is not permitted to counsel, under the guise of testing their qualifications as jurors, to go beyond what is necessary to insure a body of unbiased jurors and seek to create the impression that an insurance company, and not the defendant in the case, will be called upon to respond to such damages as the jury may assess. When questions propounded to prospective jurors overreach the limit, they may prove unprofitable to the party asking them. As was said in *Hoyt v. Davis Mfg. Co.*, 112 App. Div. 755, 98 N. Y. Supp. 1031:

"When counsel ask such questions, overreaching the limit, with a hope to gain a benefit

from them, it is but fair that he should take the risk, and in a close case the court may properly consider that such suggestion had the very effect which counsel intended it should have."

It appears from the questions propounded to the jurors in this case that respondent's counsel, not satisfied merely to ask the prospective jurors whether they knew any one connected with the New Amsterdam Casualty Company, or whether they were interested in that company as stockholders or otherwise, which questions they would have had the right to ask for the purpose of excluding their challenges, proceeded further, and, in effect, conveyed to the minds of the jurors, unnecessarily, the idea that the New Amsterdam Casualty Company was the real party interested in the defense of the action. And the court, by overruling the vigorous objections of appellant's counsel, stamped the statements with its approval. It is obvious, therefore, that counsel, presumably learned in the law, could not have asked the questions for any legitimate purpose, and, while we will not say they were deliberately made for the illegitimate purpose of prejudicing the jury, it is plain that they were well calculated to have that effect. The questions could have had no other tendency than to seduce a verdict on the ground that an insurance company, and not the defendant, would be the one really affected by a verdict in favor of the plaintiff. They certainly would have a tendency to render the jurors careless as to the amount of their verdict. It is possible in such cases for an attorney, who is acting in good faith and with a proper regard for the rights of his adversary, to elicit all necessary information without disclosing to the jurors the reason prompting the inquiry. Without attempting to mark out a definite course to be pursued in all cases, for that is neither necessary nor practicable, we hold that counsel here overstepped the bounds of fair and legitimate practice. The court erred in overruling appellant's objections. And, in view of the slight margin of evidence in favor of the proposition that respondent himself was not guilty of contributory negligence, we cannot say that the error was not without prejudice to appellant.

The conclusion at which we have arrived renders it unnecessary to consider appellant's complaint of certain questions propounded by respondent's counsel to the witness Mullen, and which appellant contends were an invasion of the province of the jury and of the kind held objectionable on the first appeal. Doubtless, on the retrial, respondent's counsel, in the examination of the witnesses, will so frame their questions as to avoid any risk of possible error.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

LOS ANGELES ATHLETIC CLUB v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 2886.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

1. INSURANCE ⇨542(6)—SURETY COMPANY—ITEMIZED STATEMENT OF CLAIM.

In an action on fidelity insurance policy for loss by reason of dishonesty of an employé, itemized statement of claim *held* sufficient.

2. INSURANCE ⇨665(7) — FIDELITY INSURANCE—NOTICE.

In an action on fidelity insurance policy, which required the employer to give notice by registered letter, addressed to the president of the insurance company at its office promptly after becoming aware of any act which might be made the basis of the claim, evidence *held* insufficient to show that the employer promptly gave notice after its executive officers received knowledge of the employé's dishonesty.

3. INSURANCE ⇨539(5) — FIDELITY INSURANCE—TIME OF NOTICE OF CLAIM.

Noncompliance with the provision of fidelity insurance policy, requiring prompt notice after the employer should become aware of any act which might be made the basis of a claim, cannot be excused on the ground that it was an immaterial provision, and that therefore, under Civ. Code, § 2611, a violation did not avoid the policy.

4. INSURANCE ⇨670—FIDELITY INSURANCE—EVIDENCE—FINDING.

In an action on a fidelity insurance policy, *held* that, while the court had the right to arrive at an estimate of the employé's misappropriations, which consisted largely of consuming the employer's stock of liquor, by an approximation of the daily articles consumed, the finding of the court was insufficient, where it did not show what proportion of the value taken by the employé accrued prior to the discovery of his dishonest acts.

5. INSURANCE ⇨508½, New, vol. 4 Key-No. Series—FIDELITY INSURANCE—LOSSES.

A fidelity insurer is not liable for any acts of fraud or dishonesty committed by the employé, after the employer became aware of any act which might be made the basis of a claim.

6. INSURANCE ⇨646(8) — FIDELITY INSURANCE—EVIDENCE.

In an action by an athletic club against a company insuring it against loss by reason of the dishonesty of the club manager, who, it was charged, in violation of his contract of employment, consumed without payment large amounts of liquors belonging to the stock of the club, *held* that the club had the burden of proving that the manager did not pay for the liquors consumed.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Los Angeles Athletic Club against the United States Fidelity & Guaranty

Company. From a judgment for plaintiff, defendant appeals. Reversed.

Newlin & Ashburn, of Los Angeles, for appellant.

Clyde E. Cate, H. W. Creighton, Sol. A. Rehart, all of Los Angeles, for respondent.

SLOANE, J. This action was brought to recover on a bond or policy of fidelity insurance. The plaintiff employed one Walter L. Patterson as manager of its clubhouse at a salary of \$300 per month, with the express agreement "that he was to receive no other remuneration, perquisites or consideration," and "that he should pay the customary price or charge so fixed by plaintiff for every article of said goods, wares and merchandise said Patterson should receive for himself and use to his own benefit"; and further, "that he was not, under any circumstances, to take, use or receive for his own benefit any articles of goods, wares or merchandise kept in stock by plaintiff as aforesaid without paying therefor the full price fixed by plaintiff as the selling price thereof to the members of its said club."

The defendant, a fidelity insurance company, for consideration, insured plaintiff against any pecuniary loss that might be sustained by reason of the fraud or dishonesty of said Walter L. Patterson up to and including the amount of \$5,000.

It stands admitted by the pleadings that Patterson was in the employment of the plaintiff under the agreement as stated from the 1st day of November, 1911, until the 2d day of May, 1914.

The trial court finds:

"That subsequent to the 1st day of July, 1912, the said Walter L. Patterson fraudulently and dishonestly, and contrary to and in violation of the terms of said agreement of employment, and without plaintiff's knowledge or consent, used, took, carried away, and converted to his own use goods, wares, and merchandise consisting of certain articles and commodities kept in stock by plaintiff for the use of its members, such as alcoholic and other beverages, cigars, candies, etc., of the reasonable value of \$2,015.08. That said Walter L. Patterson has not paid the plaintiff for any of said goods, wares, and merchandise, although demand was made on him therefor."

The court further finds that plaintiff had no knowledge of the taking and appropriation of these commodities by Patterson until "on or about the 1st day of April, 1914, and that thereafter, about said date, plaintiff advised the defendant corporation of the alleged acts of fraud and dishonesty on the part of Patterson."

Defendant appeals from the judgment against it for \$2,015.08, and costs. It is urged that the judgment should be reversed for the following reasons:

(1) Because plaintiff did not comply with the conditions of the insurance contract, which required "that the employer shall give notice by registered letter addressed to the president of the surety company at its office in Baltimore, Maryland, promptly after becoming aware of any act which may be made the basis of a claim," and also that "the employer shall, within ninety days after date of said notice, file with the surety company its itemized claim thereunder, duly sworn to."

(2) That the acts of Patterson on which the claim rests did not constitute fraud or dishonesty in the course of his employment, and were not such acts of dishonesty as were covered by the policy of insurance.

(3) Insufficiency of the evidence as to the amount and value of the goods taken by Patterson.

(4) Insufficiency of the evidence to sustain the finding that the articles taken and used were not paid for.

[1] On the second specification of the first ground of objection to the judgment, we are of the opinion that the requirement for an itemized statement of the claim was as fully and satisfactorily made as it could be under the circumstances, by the affidavit of various officers and employes of the club, which appear in the record, and which give in detail all the information as to the nature and amount of Patterson's alleged misappropriations which the various witnesses possessed. These affidavits were in reasonable time, before bringing suit, furnished to representatives of the defendant company.

[2] But as to the first specification, there does not appear at any time to have been a compliance with the express condition of the policy that notice should be given in writing to the president of the company; and it is more than doubtful if such notice as was conveyed to the local agents of the defendant was given with any degree of promptness after the officers of the plaintiff "became aware" of the acts of alleged dishonesty on which they base their claim.

It is claimed by plaintiff, and the trial court so found, that plaintiff had no knowledge of the alleged acts of dishonesty on the part of Patterson until on or about the 1st day of April, 1914. The only finding as to notice to the defendant is that "thereafter, and on or about said date, plaintiff advised the defendant corporation of the acts of fraud and dishonesty on the part of Patterson." This is perilously close to a vague and indefinite conclusion of law as to the matter of notice. Moreover, we are not at all satisfied that the evidence supports the finding as to the time of discovery of the facts, or of the alleged notice.

In the first place, there seems to have been a conspicuous lack of diligence on the part of the officers of the club in discovering Pat-

terson's habits in the matter of personal consumption of the supplies of the club. It seems to have been a matter of common notoriety among the employes of the club, including the bartenders who served him, that he was a constant and capacious patron of the bar for years. From his subsequent investigations the vice president of the club estimates that the aggregate of the goods and wares received by Patterson—most of which seem to have been openly procured by him from other employes at the bar—amounted in value to about \$8,000. Roberts, the head barkeeper, who was in that position throughout Patterson's employment as manager, testified that the latter received at his bar, on an average per day, four long whisky highballs, two cocktails, three to five pints of beer, two gin fizzes and two glasses of Lithia water; and that he smoked about eight cigars per day, and received from two to six quarts of whisky per week, and six pints of champagne per week—together with cigarettes, light wines, and other commodities not enumerated. The witness further states that he does not include in his list any liquor which Patterson might have drunk between 2:30 p. m. and 4:30 p. m. while the witness was off duty. Another bartender, named Sakai, testified that he was bartender of the club after July 14, 1913, and that he served Patterson drinks on an average of about four pints of Budweiser a day, a cocktail before dinner, another about 6:30 p. m. and about three pints of whisky a week; also occasional highballs and packages of candy. Shubata, another bartender, testifies to serving Patterson mostly highballs, Budweiser beer, and some champagne. He served him an average daily of from three to five highballs, about four pints of Budweiser, about three pints of whisky per week, a gin fizz in the morning, and sometimes wine, cocktails, and champagne.

All this was done openly, and from the service bar of the club. The witnesses further stated that Patterson paid very little, and that no account was kept by them.

One F. W. Lloyd, whose affidavit was admitted in evidence as part of the statement submitted to the defendant company, testifies: That he was the house detective of the plaintiff club. About March 1, 1914, it was reported to him "by numerous employes of the club that Patterson was in the habit of drinking quite heavily, and that he was frequently intoxicated, and that the said employes believed that said Patterson was not paying for the liquor which he drank and had sent out to his house from the club. That this affiant reported said rumors to Mr. Frank A. Garbutt, vice president of said club," and that Garbutt stated that he did not believe the rumors, but directed the witness to investigate. That on the expiration of a week, and "being convinced that said

Patterson was defrauding the club of many dollars' worth of liquor each day," the witness again reported to Garbutt the result of his investigations. This affiant further avers "that it was generally known among the employees of said club that said Patterson was mulcting said club out of large quantities of valuable commodities daily, but that this knowledge on the part of said employees was just on hearsay and upon their observations of Patterson's apparent intoxication." According to this witness, the information contained in his affidavit was conveyed to Mr. Garbutt, the vice president and a director of the club, early in March, 1914.

The testimony of Mr. Garbutt himself is rather confusing. He states in one of his affidavits that in his capacity as vice president of the club he did, "on or about the 25th day of January, 1914, become cognizant of said acts of fraud and dishonesty on the part of said Walter L. Patterson, whereby said Patterson was misappropriating goods belonging to said Los Angeles Athletic Club." In another place, in answer to the question, "Did Patterson ever do anything which you considered as a violation of the terms of his employment?" he answered, "On or about three months before Mr. Patterson was discharged it was brought to my attention that he was drinking at the club." Patterson was discharged May 2, 1914. At another place in his affidavit he states that—

"During the period between January 28, 1914, and May 2, 1914, Patterson misappropriated goods of the value of \$209.70," and "that the fraud and dishonesty of said Walter L. Patterson was not discovered or suspected by said Frank A. Garbutt, or any other officer of the Los Angeles Athletic Club, before or until the date last mentioned."

If this refers to the date of May 2d, the date when Patterson was discharged, it is inconsistent with all the other testimony on this point. It is more probable that he refers to the "period" somewhere between January 28th and May 2d. At another place in his affidavits Mr. Garbutt states that on or about the 1st of April, 1914, facts were reported to him tending to show that Patterson "was systematically defrauding the club." It is upon this date that the court fixes its finding, but it may be observed that the witness does not state in this connection that he had no information of an earlier date. We find in the record a letter, introduced by plaintiff, addressed to Mr. Garbutt, signed by one J. E. Murphy, of date March 3, 1914, purporting to confirm a previous interview with Garbutt, which letter calls attention to a liberal supply of liquors at Mr. Patterson's home, and a statement by Patterson that—

"Mr. Garbutt might be a shrewd business man, but he sure was easy when it came to club business, for he (Patterson) pulled it all over them

when it came to taking an inventory in the wine room."

The letter also contains a statement of the writer that on leaving the club on one occasion he saw the storeroom man come up from the wineroom and give Patterson three large boxes of cigars. There are also further statements in the letter calculated to reflect upon Mr. Patterson's integrity in his relations to the club.

The conclusion cannot be avoided that the officers of the club had information as early as the first part of March, 1914, sufficient to demand an investigation, and that every facility was close at hand and accessible for getting promptly at the facts. There seems to have been no hesitancy on the part of the various employees in telling what they knew, when asked.

In spite of this remarkable history of events, there is no pretense of any notice to the president of the defendant company, as required by the policy, and no evidence of any notice at all, so far as we have been able to discover, earlier than the last of May or the first of June, 1914. The only definite evidence on this point is contained in the testimony of Mr. Creighton, an attorney for the plaintiff, who states that he first became aware of the matters involving Patterson about April 1, 1914, when Mr. Garbutt called him into his office and told him that he had information tending to show that Mr. Patterson had been violating his contract. He says that he took the matter up with Mr. Shroder, of the Frank M. Kelsey Company (local agents of the defendant, we assume), some time during the month of May. Further on in his testimony he says:

"The first occasion of taking these facts up with Mr. Shroder, or anybody, was the latter part of May or the first of June."

Later on in his testimony, having examined certain correspondence of date May 7, 1914, he says that the claim was not presented to the Frank M. Kelsey Company "until after May 7, 1914." He states further that Mr. Shroder told him to place the claim in form and present it to him, and that he might wait until he had done so before sending formal notice to the president of the company. If any authority on the part of a representative of the local agent to make such a waiver of notice could be assumed under any circumstances, we are met by the provision of the insurance bond or policy that—

"None of its conditions shall be deemed to have been waived by or on behalf of said surety unless the waiver be clearly expressed in writing, over the signature of its president or secretary, or their duly authorized officer, and its seal thereto affixed."

We have here, then, an entire failure to give the required notice to the president of

the company, and a delay of about 60 days from the time the court found the plaintiff became aware of Patterson's alleged defalcations, and of from 90 days upwards from the time when they should have been, and probably were, sufficiently aware of these facts, before the matter was called to the attention of even the local agents of defendant. And the authority, by the way, of these agents to act for the company in any capacity does not appear in the record.

[3] Respondent contends that this condition of the policy, requiring prompt notice of the acts constituting the basis of a claim, is not material to the rights of defendant, and that under the Civil Code, § 2611, the violation of an immaterial provision of a policy does not avoid it, unless it is so expressly declared in the policy. The contention that this express condition for prompt notice is not material to the contract is not sustained by respondent's authorities, and is contrary to the generally recognized construction of such requirements in insurance policies. Respondent's citations to the effect that notice is not material unless it is shown that injury has resulted from the failure to give same, in nearly every instance, deal with the implied requirements of notice under the general law of guaranty and suretyship. Here the parties expressly stipulated in their written contract for prompt and specific notice. To quote from another opinion:

"The conditions in policies requiring notice of losses to be given, and proofs of the amounts to be furnished the insurer within certain prescribed periods, must be strictly complied with to enable the insured to recover. And it is not perceived that the conditions under consideration stand upon any different footing. The contract of insurance is a voluntary one, and the insurers have the right to designate the terms upon which they will be responsible." *Riddlebarger v. Insurance Co.*, 7 Wall. 386, 390, 19 L. Ed. 257, cited in *California Savings Bank v. American Surety Co. (C. C.)* 87 Fed. 118.

Construing and applying a requirement of notice similar to the one here, in a fidelity insurance policy, in the case of *California Savings Bank v. American Surety Co.*, supra, Judge Wellborn of the United States District Court, in his opinion, says:

"In case of loss upon an insurance against fire, an insurer is exonerated if notice thereof be not given him by some person insured or entitled to the benefit of the insurance without unnecessary delay. Civil Code, § 2633. * * * Whether or not in other kinds of insurance notice is essential, depends upon the contracts which the parties make. The foregoing section, however, does emphasize in the strongest possible manner the materiality of notice in the case of fire insurance; and it is believed that in fidelity insurance, which is of recent origin, notice of the fraudulent acts of the employé is of equal, if not greater, importance, for the rea-

son that prompt notification may often enable the insurer to avoid, or secure indemnity for, losses which otherwise would be inevitable or irremediable. The authorities cited by defendant to the effect that the requirement as to notice of loss is a material provision, and must be strictly complied with in order to enable the employer to recover, are numerous. *Ermentrout v. Insurance Co.* [63 Minn. 305] 85 N. W. 635 [30 L. R. A. 346, 56 Am. St. Rep. 481]; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Insurance Co. v. McGookey*, 33 Ohio St. 555; 2 Wood, Ins. §§ 436, 437; 2 May, Ins. § 461; *Tayloe v. Insurance Co.*, 9 How. 403 [13 L. Ed. 187]."

The opinion cited further states:

"The allegations of the complaint that the defendant was in May, 1892, fully advised and informed of the breaking of the bond and the loss resulting therefrom do not, in my opinion, excuse plaintiff's failure to give the prescribed written notice of the fraudulent acts of the employé, and such failure is nonperformance of the contract on the part of plaintiff as to defeat recovery."

It may be conceded that the insured is not called upon to act on mere suspicion in the matter of giving notice to the insurer; but in this case the plaintiff knew, or had every opportunity of knowing, all the facts early in March, or the first of April, 1914, at the latest.

Our conclusion as to the materiality of the requirement to give notice of the facts upon which respondent's claim is based, and the failure to make a reasonable, or any, compliance with its terms, make it unnecessary to discuss to any extent the other points of appellant's argument. It may be said, however, that while under the terms of the employment of Patterson any ordinary running of a bill at the bar or restaurant of the club, although remaining unpaid, might merely create a debt and not constitute a fraud, the nature and extent of his appropriation and consumption of the supplies of the plaintiff club as shown here, particularly the carrying away of liquors and cigars, are, we believe, such as to justify a finding of fraud and dishonesty in his transactions.

[4, 5] We are satisfied, too, that the court had a right to arrive at an estimate of the amount of Patterson's misappropriations by the method of approximation from the daily average of articles consumed. The fact alone that it is difficult, and perhaps impossible, to reach an accurate accounting, should not deprive the insured of all relief. But the difficulty presented by the finding of the court on this point is that it does not show what proportion of the value taken by Patterson accrued prior to the discovery of his dishonest acts. It is well-settled law, and is expressly provided by this policy of insurance, that the insurer shall not be liable for any acts of fraud or dishonesty committed by the employé after the employer shall become

aware of any act which may be made the basis of a claim. The court here finds that "subsequent to the 1st day of July, 1912," the said Walter L. Patterson fraudulently and dishonestly, and contrary to the terms of his agreement, appropriated to his own use the goods and wares of plaintiff to the value of \$2,015.08. Patterson's dishonesty was discovered not later than April 1, 1914. He continued in the employ of plaintiff until May 2, 1914. The evidence tends to show that his misappropriations continued throughout his employment. What proportion of the value found by the court accrued after April 1st cannot be determined from the record. The finding is insufficient in this respect.

[6] It is also doubtful if there is any sufficient evidence of nonpayment. The bartenders testified that Patterson paid them something, but not much. As to whether there was ever any settlement with the officers of the club, there is no evidence at all. If the action was against Patterson, the burden would be upon him to show payment. But in this action against his sureties it is certainly incumbent on plaintiff to show nonpayment. The action is not on the indebtedness of Patterson, but upon a contract to indemnify plaintiff against pecuniary loss from Patterson's dishonesty. The plaintiff must prove his loss, and to do this must establish the fact that Patterson has not paid for the goods taken.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

LUCKIE v. DIAMOND COAL CO. (Civ. 2907.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919. Rehearing Denied by Supreme Court Aug. 4, 1919.)

1. APPEAL AND ERROR ⇨856(5)—REVIEW—GRANT OF NEW TRIAL.

Where an order granting a new trial stated, "The motion of plaintiff for a new trial herein is hereby granted, upon the grounds specified in the notice of intention filed herein, except upon the grounds of insufficiency of evidence, as to which grounds said motion is denied," the question of the sufficiency or insufficiency of the evidence to justify the verdict for defendant cannot be considered on appeal.

2. APPEAL AND ERROR ⇨1078(6)—MATTERS REVIEWABLE—BRIEFS.

Where an appellee's brief urges only one ground why the court was warranted in granting a motion for a new trial, it will be assumed that there was no other valid ground for a new trial.

3. MUNICIPAL CORPORATIONS ⇨705(12) — AUTOMOBILES—LIGHTS—DUTY OF OWNER.

By the use of the alternative, "owned by him or under his control," in St. 1913, pp. 645, 646, §§ 13, 19, the Legislature intended to impose the duty of seeing that a motor vehicle carried a rear red light upon the owner when, and only when, he is in control of the motor vehicle, personally or through a servant, and to impose that duty upon some other person when such other person is operating the vehicle and it is under his control.

4. MASTER AND SERVANT ⇨315—INDEPENDENT CONTRACTOR—VIOLATION OF AUTOMOBILE REGULATIONS—"ALLOW."

The word "allow," as used in St. 1913, p. 646, § 19, providing that no person shall allow a motor vehicle owned by him or under his control to be operated in violation of the statute, means to acquiesce in, and, since knowledge, express or implied, is essential to guilt, a motor vehicle owner is not liable for the absence of a rear red light at night while the vehicle is in the hands of an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Allow.]

5. MASTER AND SERVANT ⇨316(1)—INJURIES TO THIRD PERSONS—RELATION—SERVANT OR INDEPENDENT CONTRACTOR.

Whether a motortruck lessee employed by the lessor to haul coal is a servant or independent contractor, at the time of injury to a third person, must be determined not alone from the written contract of employment, but from the subsequent conduct of each, known to and acquiesced in by the other.

6. MASTER AND SERVANT ⇨318(1)—INJURIES TO THIRD PERSONS—RELATION.

A conditional vendee and lessee of a motortruck, who is under a contract of employment to haul coal for the lessor, who has no right to control and direct the manner in which the hauling should be done, is an independent contractor, for the negligence of whose servants the lessor is not liable.

7. MASTER AND SERVANT ⇨316(1) — CONTRACT OF EMPLOYMENT—MODIFICATION.

Where the parties to a written contract of employment by mutual consent, inferred from their subsequent conduct, have modified their contract so as to create the relation of contractee and independent contractor, and have acted upon it as modified, it is valid in the modified form to the extent and during the period it was so acted upon and carried out.

8. EVIDENCE ⇨424 — PAROL EVIDENCE AFFECTING WRITING—THIRD PERSONS.

It is competent for one sued as master for the negligence of his alleged servant, where the written contract bears evidence of that relation, to show, by parol evidence, that he and his alleged servant by their conduct put a different construction upon their contract and treated each other as contractee and independent contractor.

9. MASTER AND SERVANT ⇨318(1) — INDEPENDENT CONTRACTOR.

The mere fact that a contract of employment gives employer right to terminate it at

any time he chooses does not necessarily show that the person employed is not an independent contractor.

10. MASTER AND SERVANT §318(1)—INDEPENDENT CONTRACTOR.

That a contract of employment of a motor-truck lessee and his truck, for making deliveries for the lessor, required that the lessee drive the truck, does not necessarily lead to the conclusion that he was a servant and not an independent contractor.

11. MASTER AND SERVANT §332(3) —INJURIES TO THIRD PERSONS—QUESTION FOR JURY—INDEPENDENT CONTRACTOR.

Whether the relation between a coal company and one to whom it had leased a motor-truck with option to purchase, compensation under a contract to haul coal for the company to be applied on the truck, was that of master and servant or contractee and independent contractor, *held* for the jury.

12. MASTER AND SERVANT §302(1) —RESPONDEAT SUPERIOR.

The doctrine of respondeat superior applies only where the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong, at the time and in respect to the very transaction out of which the injury arises.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Lorenzo Foster Luckie against the Diamond Coal Company. Verdict for defendant, and from an order granting a new trial it appeals. Reversed.

Harry A. Holzner and J. Crider, Jr., both of Los Angeles, and Guy Le Roy Stevick, of San Francisco, for appellant.

Delphin M. Delmas, of Los Angeles, for respondent.

FINLAYSON, P. J. Defendant appeals from an order granting a new trial after a verdict in its favor.

The action is for the recovery of damages for personal injuries sustained in an automobile accident, alleged to have resulted from the negligence of defendant's servants. Whether the persons whose negligence caused the accident were the servants of defendant or of one whom defendant claims was an independent contractor, is one of the principal questions presented.

[1, 2] The order granting the new trial is as follows:

"The motion of plaintiff for a new trial herein is hereby granted, upon the grounds specified in the notice of intention filed herein, except upon the grounds of insufficiency of evidence, as to which grounds said motion is denied."

The language of the order eliminates from consideration here the question of the

sufficiency or insufficiency of the evidence to justify the verdict. *Kauffman v. Maler*, 94 Cal. 270, 29 Pac. 481, 18 L. R. A. 124; *Siemsen v. Oakland, etc., Ry. Co.*, 134 Cal. 494, 66 Pac. 672; *Higgins v. Los Angeles Gas, etc., Co.*, 159 Cal. 851, 115 Pac. 313, 34 L. R. A. (N. S.) 717. Though respondent, had he elected to do so, could have presented to this court any good reason, disclosed by the record, why there should be an affirmance of the order appealed from, other than as to the sufficiency of the evidence, he has chosen to limit his attempted vindication of the order to alleged error in giving and refusing certain instructions. Respondent's brief here consists of a printed copy of his oral argument in the lower court upon his motion for a new trial. From this it appears that the sole grounds there urged why a new trial should be granted, which are likewise the sole grounds here urged as reasons why the order should be affirmed, are that the court erred in giving the instructions complained of, and in refusing the requested instructions. It will be assumed, therefore, that there was no other valid ground for a new trial. So that, if none of the grounds urged by respondent in his brief be tenable, the order should be reversed. *Piercy v. Piercy*, 149 Cal. 163, 86 Pac. 507.

On the evening of December 16, 1914, more than a half hour after sunset, in the city of Los Angeles, an automobile, in which plaintiff was riding as a passenger, collided with a heavy autotruck, known as a Gramm truck, on which was the sign "Diamond Coal Company." The truck was in charge of one Terry, as driver, assisted by one Cunningham, as helper. It was standing on Sunset boulevard near the corner of that thoroughfare and Alvarado street. Upon approaching the corner, Terry and Cunningham discovered that the light known in common parlance as the "tail light" had gone out. It was a stormy, rainy night. Failing to light a match in the blustering wind, Terry secured an ordinary hand lantern which was regularly carried on the truck, took it to a nearby garage, lit it, and hurried back. As he approached the truck with the lighted lantern, the automobile in which plaintiff was being carried as a passenger, traveling on Sunset boulevard in the same direction that the truck had been going, collided with the rear end of the truck, resulting in the injuries to plaintiff.

At the time of the accident, the truck was in the possession and control of one Foulks, under a written lease from defendant, or conditional sale contract, bearing date June 20, 1914. Contemporaneously with the execution of this lease defendant and Foulks had entered into another written agreement, hereinafter referred to as the "contract of

employment," wherein defendant is referred to as the first party and Foulks as the second party, and which, so far as is necessary to an understanding of the questions here presented, after reciting that defendant is desirous of securing the services of an autotruck and driver, and that Foulks, as the lessee of the Gramm truck, is desirous of securing a steady and permanent contract for the employment of himself and his truck, provides as follows:

"That said second party shall use and drive said autotruck in the service of said first party at least ten hours per day of each working day, continuously, until all claims said first party has against second party for payments on lease of said Gramm * * * truck have been satisfied. * * * Second party will furnish all gasoline, oil, and grease necessary in the operation of said autotruck, and will prudently use, care for, and keep same in good order and repair. * * * In case the truck is held up for repairs for more than one hour of any working day, the time which said truck is held up in excess of one hour shall be deducted. * * * The entire responsibility for the operation of the truck and for any damage to the truck or to persons or property through its operation shall be with the party of the second part, who alone shall be held responsible. * * * Said second party shall at all times keep said auto truck insured against personal liability and fire. * * * Payment by first party to second party shall be made \$275 per calendar month, from which shall be deducted \$175 one month and \$150 the succeeding month (amounts alternating each month), said amounts so deducted to be applied, first, on the payment of rental and interest of Gramm truck and, second, on the purchase price of the Garford truck."

The Garford truck referred to in this agreement was another autotruck which originally was owned by defendant, but which it had sold to Foulks, though the purchase price had not been paid at the date of this new arrangement. Upon this Garford truck defendant, early in the year 1914, had taken out a state license under the state motor vehicle act.

At the same time that defendant and Foulks entered into their written contract of employment, they executed their lease or conditional sale contract whereby defendant leased the Gramm truck to Foulks. This agreement, which was also in writing, declares that Foulks agrees to pay defendant, as rental, a certain sum for the Gramm truck, in equal amounts of \$125 per month on the 20th day of each month, to and including April 20, 1916, and a further sum, in certain monthly installments, for the Garford truck and for certain items for repairs and insurance. The agreement further provided that—

"When said hirer shall fail to pay said rentals or said interest or any part thereof in the manner and at the time above specified, or fail to keep or perform any of the agreements or

conditions contained in this contract, or whenever said coal company shall think it necessary in order to be secure against loss, although no breach of this contract has been committed by said hirer, with or without legal process, the said coal company may demand, take, and repossess said autotruck [the Gramm truck], notwithstanding anything herein contained."

It was further agreed that Foulks, at his expense, should pay all state, county, and city taxes and licenses, and keep the autotruck insured against liability and fire to an amount not less than \$2,750. Then follows a provision to the effect that if Foulks shall perform all the conditions of the lease and make all payments, he shall have the privilege of purchasing the Gramm truck from defendant for \$1, and, upon the execution of a bill of sale title should vest in him.

At or about the time when the written agreements were executed, the metallic plate upon which was inscribed the license number for the Garford truck was transferred to the Gramm truck, and remained fastened thereto up to and including the time of the accident. This, presumably, was done or caused to be done by defendant in conformity with the requirements of section 8 of the state motor vehicle act of 1913 (Stats. 1913, p. 643).

Defendant's sole right to the Gramm truck was by virtue of a lease to it under a written conditional sale contract with one Colyear, by whom the truck was owned in the first instance, and who had executed to defendant a conditional sale contract similar, mutatis mutandis, to that which defendant gave to Foulks.

Foulks had an independent calling. He was in the transfer and delivery business. In that business he used autotrucks. He testified that, at the time of the accident, and in connection with his business, he was making deliveries for persons other than defendant. He hired the driver Terry and the helper Cunningham. He kept the Gramm truck on his brother-in-law's premises when it was not in use. Though defendant insured the truck, Foulks paid the premium by permitting defendant to deduct it from his monthly wage. Foulks, after ascertaining on the morning of each day where the various deliveries were to be made, selected the routes of travel. Terry received his orders from Foulks, and no one else; and whatever Foulks said to Terry the latter did.

The court, of its own motion, after giving correct definitions of the terms "servant" and "independent contractor," and stating that if Foulks was an independent contractor and Terry and Cunningham were his servants and not defendant's plaintiff could not recover, instructed the jury that if the written agreements were signed and delivered by the parties thereto, the law presumes that they were delivered on the day they

bear date, to wit, June 20, 1914; that they are genuine and not sham, and were in force prior to and at the time of the accident; and that these presumptions, while satisfactory if uncontroverted, are not conclusive. The court further instructed the jury that if they found that these written agreements were genuine and in force at the time of the accident, and that, in carrying them out, Foulks selected and hired the men who were in charge of the truck at the time of the accident, fixed their duties, and had sole control over the details of their work, and that at that time they were performing some duty for Foulks, then the plaintiff would not be entitled to recover. Also that if the jury found that, under and by virtue of the contract relations between defendant and Foulks at the time of the accident, the latter was in the employ of the defendant for the purpose of using the truck in making deliveries for defendant, at such times and to such places as it should direct, and that he had the right to determine and control the manner or method and details of the operation of the truck in making such deliveries—being responsible to the defendant only for the making of deliveries at the time and places designated by it, but not for the method of making the same—and that Foulks had the right to operate the truck either by himself or, at his election, through some other person whom he might select and employ for that purpose, and that at the time of the accident Terry had been so selected and employed by him, and was then operating the truck under his direction and control as to the manner of its operation, then Foulks was an independent contractor, and Terry was not the servant of defendant, but was the servant of Foulks, and defendant would not be responsible for any negligent act or omission of Terry. Respondent contends that in giving these instructions the court erred.

Plaintiff requested, but the court refused, an instruction to the effect that the only right which the defendant acquired under the contract of employment between itself and Foulks was that of an employer of Foulks and the Gramm truck; that the duty of carrying a red light on the rear of a motor vehicle is imposed as a condition of the "license or privilege" of operating such vehicle upon the public highways of the state; and that responsibility for its neglect cannot be avoided by authorizing another person than the licensee to operate it. The court likewise refused an instruction, requested by plaintiff, instructing the jury, as a matter of law, that the relation created between defendant and Foulks by the written contract of employment was that of master and servant and not that of contractee and independent contractor. Respondent

claims that in refusing to give these requested instructions the court committed error.

For the reasons stated at the beginning of this opinion, the order granting the new trial must be reversed, unless at least one of the grounds expressly assigned in this court by respondent for its affirmance is tenable.

To support his claim that the court erred in refusing the requested instructions and in giving those which it gave of its own motion, respondent contended in the lower court, as he does here: (1) That because the truck was registered under the state motor vehicle act in defendant's name, as owner and licensee, it is liable, even if Foulks were an independent contractor; (2) that Foulks was a servant merely and not an independent contractor; and (3) that the court erroneously left it to the jury to construe the documents and determine therefrom whether Foulks was a servant or an independent contractor.

To maintain his contention that, because the license on the Gramm truck was issued in appellant's name, presumably upon its application therefor, the latter is liable, regardless of whether Foulks was appellant's servant or an independent contractor, respondent claims that where the public has given to a licensee the privilege of using the public highways, such licensee is liable for any injury resulting from the omission of any statutory duty imposed as a condition to the right to enjoy the privilege—citing in support of this principle, among other cases, *Lee v. Southern Pacific Ry. Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140. If this position be tenable, then the owner of a licensed automobile who may have loaned it for the day to a friend is liable for any injuries proximately caused by the friend's negligence in failing to observe any one of the numerous requirements of the motor vehicle act. If this be the law, then, harsh as it may be, ita lex scripta est, and there is nothing to do but enforce it. Is it the law? We think not.

[3, 4] Foulks was in possession of the truck under a conditional sale contract between himself and defendant, just as defendant, in its turn, under a similar contract with Colyear, had the right of possession as between itself and Colyear. We shall assume, however, that defendant, and not Foulks, was the "owner" of the truck within the meaning of the motor vehicle act (section 1 of the act [Stats. 1913, p. 640]); also that as such owner it was obliged to, as it in fact did, apply for and receive a license (section 3 of the act [Stats. 1913, p. 641]); and that it was defendant who caused the license plate to be affixed to the Gramm truck. It is provided by the motor vehicle act that—

"Every motor vehicle * * * while in use shall carry during the period from a half hour after sunset to a half hour before sunrise, * * * at the rear * * * a lighted lamp exhibiting one red light." Section 13 of the act (Stats. 1913, p. 645).

The act, however, does not impose this duty upon the owner and licensee regardless of whether he or some one else be in control of the vehicle. It is this that differentiates this case from those relied upon by respondent. The language of the act is:

"No person shall *allow* a motor vehicle owned by him or *under his control* to be operated * * * in violation of the provisions of this act." Section 19 of the act * * * (Stats. 1913, p. 646). (The italics are ours.)

We think it evident that, by the use of the alternative, "owned by him or under his control," the Legislature intended to impose the duty of complying with the requirements of the act upon the owner when, and only when, he is in control of the motor vehicle, personally or through his servant, and to impose that duty upon some other person—a friend to whom the vehicle may have been loaned, for instance—when such other person is operating the vehicle and it is "under his control." Aside from this consideration, the language of the act is that "no person shall allow," etc. This word "allow" materially limits the obligation of the owner, or the person in control, as the case may be. To allow is to acquiesce in or tolerate. Knowledge, express or implied, is essential before one may be guilty of either. *Sawyer v. Mould*, 144 Iowa, 185, 122 N. W. 813, 25 L. R. A. (N. S.) 602. The truck was in the possession of Foulks as lessee; and if at the time of the accident Foulks was using the truck as an independent contractor and not as a servant of defendant, no knowledge, actual or imputed, that the tail light was out, could be attributed to defendant; and in that case it could not be said that defendant had "allowed" any violation of the provisions of the motor vehicle act. If defendant did not "allow" any violation of the requirements of the act, it was not remiss in the due performance of any duty imposed upon it as a licensee of the state.

[5, 6] Both of respondent's remaining points, assigned by him as reasons for the affirmation of the order, appear to be grounded upon the assumption that the nature of the relation between defendant and Foulks at the time of the accident must be determined solely from the written agreements, particularly the written contract of employment. We think this an erroneous assumption. We think that the nature of Foulks's relation to defendant at the time of the accident, whether that of an independent contractor or servant, must be determined not alone from the terms of the written contract of employment, but from the subsequent con-

duct of each, known to and acquiesced in by the other.

We are not interested in the contracts between defendant and Foulks, or the right of either to enforce the same, save in so far as such contracts may afford evidence as to the nature of the true relation between them at the very time of the accident. For here the vital question is: What, at the time of the accident, was the actual relation between defendant and Foulks? Was their relation at that time that of contractee and independent contractor, or master and servant? Regardless of what may have been their written agreement six months before the accident, they unquestionably had the right to rescind it, or, by express verbal consent or by conduct mutually acquiesced in, wholly to disregard it, or to modify it, and create the relation of contractee and independent contractor, if, originally, their relation had been that of master and servant. So that if, with or without the written agreement, defendant, at the time of the accident, had the right to control and direct Foulks in respect to the manner in which the work was to be done, then the relation of master and servant existed. And, conversely, if, with or without the written agreement, defendant, at the time of the accident, did not have the right to control and direct Foulks in respect to the mode and manner in which the work should be done, the latter was an independent contractor, for the negligence of whose servants defendant would not be liable.

[7, 8] We do not think that the relation of master and servant, and none other, is conclusively established by the written contract of employment. But even if it were, that would not prevent the parties from changing that contractual relation and establishing another. Where the parties to a written contract of employment, by mutual consent inferred from their subsequent conduct, have modified their contract and have acted upon it as thus modified, it is valid, in the modified form, to the extent and during the period it was so acted upon and carried out. As between a third party and either party to the contract, such change or modification unquestionably could be shown by parol. In an action between a party to a contract and a third party, the rule that parol evidence cannot be received to contradict or vary a written contract does not apply, as the estoppel on which the rule rests must be mutual, and, since the third person is not bound by the contract as written, neither is his adversary in the action. Strangers to the contract are at liberty to show that the written instrument does not disclose the full or true character of the relation between the contracting parties. And if a stranger to the contract be thus at liberty, when contending with a party to the contract, the latter must be equally free to

show the true relation between himself and the one with whom he has contracted. Both must be bound by this conventional rule of law, or neither. *Dunn v. Price*, 112 Cal. 40, 44 Pac. 354. Accordingly, it has been held that, in an action of this character, while, *prima facie*, the relation of the parties to a written contract of employment is that which is expressed by the terms of their writing, nevertheless, in order to determine their true relation, such contract should be considered in view, not only of the circumstances under which it was made, but of the conduct of the parties while the work is being performed. *Klages v. Gillette-Herzog Co.*, 86 Minn. 458, 90 N. W. 1116. It is competent for the plaintiff in such an action to show that, as a matter of fact, the parties to a written contract creating the relation of contractee and independent contractor had put a different construction upon it by their conduct, and that the defendant has in fact exercised a supervision and control over the work in its details inconsistent with the presumed character of the other party to the contract as an independent contractor. *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; *Klages v. Gillette-Herzog Co.*, *supra*; 1 *Bailey on Personal Injuries*, § 39. This being the rule, the converse must be equally true; and it is competent for one sued as a master for the negligence of his alleged servant, where a written contract between them bears evidence of that relation, to show that as a matter of fact, he and his alleged servant, by their conduct, put a different construction upon their contract and treated each other as contractee and independent contractor. For these reasons we hold that the nature of the relation between defendant and Foulks at the time of the accident was not determinable solely from the written contract of employment, but from all the evidence in the case, particularly that which bore upon the question as to whether, at that time, defendant was assuming the right to control and direct Foulks respecting the manner in which the work should be executed by him. As to this the evidence was conflicting. We hold, therefore, that whether defendant and Foulks were, respectively, master and servant or contractee and independent contractor, was a mixed question of law and fact, and that it was for the jury to determine, under proper instructions, the real relation of Foulks to defendant at the time of the accident. *Greenberg v. Western Turf Ass'n*, 148 Cal. 126, 82 Pac. 684, 113 Am. St. Rep. 216; *Brophy v. Bartlett*, 106 N. Y. 632, 15 N. E. 368. This is precisely what the court did. And if all the evidence in the case—that allunde the writings as well as the writings themselves—was sufficient to justify a finding that the relation between defendant and Foulks was

that of contractee and independent contractor, respondent cannot complain that this question, as a mixed question of law and fact, was left to the jury to determine. That there was sufficient evidence to justify such a finding, we have no doubt.

The accepted doctrine is that, where the essential object of the employment is the performance of work, the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the job shall be done; or, in other words, not only what shall be done, but how it shall be done. *Labatt's Master and Servant*, § 64; *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721. "The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." *Green v. Soule*, 145 Cal. 96, 99, 78 Pac. 337, 339. He is deemed to be the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work, but in all the details. The legal test for the determination of the question is stated by Thompson as follows:

"An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of the work by his servants." 1 *Thompson on Negligence*, §§ 621, 622.

Foulks exercised an independent occupation. He was, to use his own words, in the transfer and delivery business. There was evidence that defendant did not exercise, or assume the right to exercise, any authoritative control over Foulks as to how his truck should haul the loads. Foulks determined what route the deliveries should take. Terry and Cunningham were his servants. Defendant exercised no control over them or the truck, so far as the driving or method of taking the loads to their destination, or the general care of the truck and its equipment, were concerned; nor did it assume to exercise any. It did not hire the driver or helper, and had no power to discharge them. The driver and his helper were paid by Foulks with his money, though it seems that at times the money for one or the other of these men was furnished by defendant; but the evidence shows that this was done as a matter of accommodation to Foulks. We think there is ample evidence to sustain a finding that Foulks represented defendant only as to the result of the work his truck did—the delivery of the loads at their respective destinations—and not as to

the manner of the performance of the work. The driver of the truck and his helper, by delivering the loads, caused them to be dumped in heaps at their respective destinations. This, in its essence, was a "result," as much as if, being a building contractor, Foulks had orderly arranged steel, brick, and mortar so as to produce a stately structure. Upon the facts as above stated, Foulks was not the servant of defendant, but an independent contractor, for whose negligence defendant was not responsible. *Burns v. Michigan Paint Co.*, 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816; *Foster v. Wadsworth*, 168 Ill. 514, 48 N. E. 163; *Jahn's Adm'r v. McKnight & Co.*, 117 Ky 655, 78 S. W. 862; *Driscoll v. Towie*, 181 Mass. 416, 63 N. E. 922; *Western Indemnity Co. v. Pillsbury*, *supra*.

Respondent argues that Foulks was a servant and not an independent contractor because: (a) Under the lease contract or conditional sale agreement between Foulks and defendant, the latter had the right at any time, and for no reason other than its own untrammelled will, to terminate the lease contract, and thus indirectly terminate the contract of employment; and (b) the contract of employment provides for the personal services of Foulks, in that it requires him to drive the truck.

[9] The contract of employment did not expressly give to defendant the right to discharge Foulks. Nor did the other contract—the so-called lease contract—give to defendant the right to terminate the lease or the truck merely because the manner whereby Foulks was performing his contract of employment might not be satisfactory to defendant. The so-called lease contract provides that it might be terminated by defendant if the latter shall deem it necessary to do so in order to secure it against loss, that is, loss under that particular contract. However, even if the contract of employment had given defendant the right to terminate it at any time it chose to do so, it would not necessarily follow that the relation between it and Foulks was that of master and servant. Though the fact that a contract provides that the employer may discharge the other party at any time is a circumstance that may be considered in determining the relation, and, in a doubtful case, may become an important circumstance, still it is not a controlling factor. It is not a "master fact"—it does not lead necessarily to the conclusion that the person employed to do work is not an independent contractor. *Gall v. Detroit Journal Co.*, 191 Mich. 405, 158 N.

W. 36; *New Albany, etc., Co. v. Cooper*, 131 Ind. 363, 30 N. E. 294; *Thomas v. Altoona, etc., Ry. Co.*, 191 Pa. 361, 43 Atl. 215. For failure satisfactorily to accomplish the results contracted for, a contractee may discharge the contractor. Yet such right to discharge the contractor does not necessarily give the contractee the right to interfere with the manner the contractor may choose to use to accomplish the results contracted for.

[10, 11] Assuming, though not conceding, that the written contract of employment contemplated that Foulks should personally drive the truck, the fact remains that Foulks did employ others to drive it and deliver the loads; that these other persons received their orders and directions, as well as their pay, from him and not from defendant; and that defendant acquiesced in this course of conduct. And even if Foulks himself had been required to drive the truck, it would not necessarily follow that he was a servant and not an independent contractor. See *Gall v. Detroit Journal Co.*, *supra*. The fact is there were many circumstances adduced at the trial, none of an absolutely controlling nature, but each pointing to the character of the employment—some squinting at the relationship of master and servant and others at that of contractee and independent contractor. For this reason different and discordant inferences were deducible from the attending circumstances, so that the question became one for the jury, under proper instructions.

[12] Furthermore, the doctrine of respondeat superior applies only where the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong, at the time and in respect to the very transaction out of which the injury arises. Foulks was in possession of the truck as lessee, or purchaser under a conditional sale contract. Upon him alone, under the terms of his contract with defendant, rested the obligation to take care of, house, and repair the truck. At the time of the accident the truck, which had been in a repair shop for certain repair work, was being taken from the repair shop to the place where Foulks habitually kept it overnight. At that time the truck was not being used in the service of defendant. At that time Foulks was the only master in whose business the driver and his helper were engaged. Order reversed.

We concur: SLOANE, J; THOMAS, J.

DOYLE v. BRADSHAW et al.
(Civ. 2800; S. F. 8900.)

(District Court of Appeal, First District, Division 2, California. May 22, 1919. On Rehearing in Supreme Court, in Bank. July 21, 1919.)

1. EXCEPTIONS, BILL OF \S 56(4)—SIGNATURE—TIME FOR PRESENTATION OF ENGROSSED BILL.

Order relieving appellants from effect of failure to have bill engrossed within ten days after original proceeding was valid, though made after expiration of six-month period limited by Code Civ. Proc. \S 473, where proceedings for obtaining such relief were commenced within such period.

2. APPEAL AND ERROR \S 1024(5)—FINDINGS OF TRIAL COURT—REVIEW.

An order of the lower court based on conflicting affidavits must be sustained on appeal.

3. BOUNDARIES \S 46(3)—AGREED LOCATION.

Where there was uncertainty as to true location of boundary line between lots, a dispute regarding it, possession, and payment of taxes for period required to establish adverse possession, the agreed line became in law the true line between the properties, regardless of the accuracy of the agreed location as made to appear by subsequent survey or measurement.

4. QUIETING TITLE \S 85(1)—PLEADING TITLE AND POSSESSION.

An allegation in a suit to quiet title that the plaintiff is the owner of the land in possession of it is sufficient, even though plaintiff's right of recovery depends upon whether or not there was an agreed boundary line.

5. ADVERSE POSSESSION \S 66(1) — AGREED BOUNDARIES.

In action to quiet title by one claiming by adverse possession, question of whether or not plaintiff's original entry was by virtue of an agreement for a boundary line has no bearing upon the character of his adverse possession up to such line.

6. BOUNDARIES \S 35(3)—EVIDENCE — MATERIALITY.

In an action to quiet title, evidence of surveys as to the location of the measured boundary line is immaterial, where there is an agreed boundary line.

On Rehearing in Supreme Court.

7. APPEAL AND ERROR \S 873(1)—ORDERS OF TRIAL COURT—CONCLUSIVENESS ON APPEAL.

Order of trial court relieving appellants from effect of failure to have bill of exceptions engrossed within ten days after original proceeding, although made after the expiration of the six-month period limited by Code Civ. Proc. \S 473, was not void; and, where no appeal was taken therefrom, is conclusive on appeal from the judgment.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Suit by John M. Doyle against R. H. Bradshaw and others. A decree for plaintiff is affirmed by the Appellate Court, and the Supreme Court denies a petition for rehearing.

Elston, Clark & Nichols, of Berkeley, for appellants.

Dixon L. Phillips, of Hanford, for respondent.

BRITAIN, J. [1, 2] The defendants appeal from a decree quieting plaintiff's title to a lot on the south side of University avenue, east of Milvia street, in the city of Berkeley. At the outset respondent contends appellants' bill of exceptions should not be considered, because it is claimed it was not engrossed within ten days after it was settled. The delay in the engrossment of the bill was caused by the fact that on the proceedings for its settlement the court ordered the transcript of the reporter's notes as to certain matters to be incorporated in the bill. The reporter who had taken the evidence at the trial had left the city of Oakland, no reporter's transcript had been prepared, and his notes were not available. Within six months from the original proceedings on the settlement of the bill, with an affidavit showing diligence on the part of the appellants to ascertain the whereabouts of the missing reporter, a notice of motion was served and filed, upon which motion the court on August 16, 1918, after the expiration of the six months' period limited by section 473 of the Code of Civil Procedure, made an order in terms relieving the appellants from the effect of their failure to have the bill engrossed within ten days after the original proceeding. In opposition to the making of the order, an affidavit was presented on behalf of the respondent showing the reporter was in Oakland until shortly before the original proceeding. It is argued the appellants should have anticipated that the transcript would be required. While the relief sought was not granted until after the expiration of the time limited in the Code section, the proceeding was commenced within that time. This procedure has been approved. *Baker v. Borello*, 131 Cal. 617, 63 Pac. 914. The order of the court was made on conflicting affidavits, and must therefore be sustained. *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1001.

The parties claim from a common source of title. The land actually in dispute is a narrow strip lying along the eastern boundary of the plaintiff's lot designated as lot 13. The defendants own the adjoining lot, No. 12, on the east. Doyle, the plaintiff, first received a deed to the property in 1879 and went into possession under that deed. Later the property was sold for delinquent taxes to Simon Fischel, who then owned lot 12. Fischel made a quitclaim deed of lot 13 to Doyle in

1889, under which he conveyed whatever he acquired under the tax deed. Doyle built a house on lot 13 40 years ago, and, except between 1880 and 1889, while it was in the possession of his tenant, he lived on the property from the time the house was built until his testimony was given in this suit. After receiving the quitclaim deed from Fischel, Doyle paid all taxes assessed upon lot 13.

In 1890 a dispute arose between Doyle and Fischel as to the location of Doyle's house, which extended to the eastern boundary of his lot. Fischel moved the house, and Doyle sued him to quiet title. The suit was settled by a payment by Fischel to Doyle. The latter then built his house up to the eastern line of lot 13, and built a fence along that line with Fischel's knowledge, and to the cost of which fence Fischel contributed.

[3-5] The fence line so established was at all times after 1890 recognized by the parties as the division line between lots 12 and 13. These facts meet all the requirements of an agreed boundary, there having been uncertainty of the true location of the line, a dispute regarding it, and possession and the payment of taxes for the period required to establish adverse possession. *Clapp v. Churchill*, 164 Cal. 745, 130 Pac. 1061. In such a case the agreed line becomes in law the true line between the properties, regardless of the accuracy of the agreed location as made to appear by subsequent survey or measurement. *Price v. De Reyes*, 161 Cal. 484, 119 Pac. 893; *Schwab v. Donovan*, 165 Cal. 363, 132 Pac. 447; *Silva v. Azevedo* (Sup.) 173 Pac. 929; *Stanford v. Trombly*, 28 Cal. App. Dec. 959.¹ The appellant contends that the establishment of such an agreed boundary rests in estoppel, and relies upon the cases holding that, where estoppel is relied upon, it must be pleaded by the plaintiff. In a suit to quiet title the allegation that the plaintiff is the owner of the land and in possession of it is sufficient. *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Gray v. Walker*, 157 Cal. 381, 108 Pac. 278. The plaintiff alleged and proved adverse possession of lot 13 up to the agreed line. The question of whether or not his orig-

inal entry was by virtue of the agreement for the boundary line had no bearing upon the character of his adverse possession. It is contended that the finding of occupancy of the land by the plaintiff was outside of the issues. The complaint alleged ownership and possession of lot 13 by the plaintiff. The evidence showed and the court found the division line between lots 12 and 13 to be in accordance with the agreement of the parties when the location of the line was uncertain.

[8] On the trial a motion was granted striking out the evidence of the surveyors as to the location of the measured line. If there was an agreed line, under the rule of *Price v. De Reyes*, the location of the measured line was immaterial, and there was no error in striking out the evidence.

In the closing brief of the appellants it is argued it was not shown the plaintiff had paid taxes on the land up to the fence. In the complaint, and in the findings, in addition to the description by called distances, the plaintiff's lot was described as lot No. 13, in block No. 1, etc., and the plaintiff testified without objection that he had been in possession and had paid all taxes on the lot occupied by him up to the division fence.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

On Rehearing in Supreme Court.

PER CURIAM. [7] With relation to what is said in the opinion as to the consideration of the bill of exceptions, it is sufficient to say that it is conceded that no appeal was taken by respondent from the order relieving the appellants from any possible effect of their failure to engross the bill within the time prescribed. The order certainly was not void, and is conclusive on this appeal. See *Ryer v. Rio Land & Imp. Co.*, 147 Cal. 462, 82 Pac. 62. We express no view as to the correctness of what is said in the opinion on this subject.

The petition for rehearing in this court is denied.

All concur, except MELVIN, J., and OLNEY, J., absent.

¹ Rehearing granted by Supreme Court June 23, 1919. 185 Pac. —.

WEICHERS v. DEHAIL. (Civ. 2791.)

(District Court of Appeal, First District, Division 2, California. June 12, 1919. Rehearing Denied by Supreme Court Aug. 11, 1919.)

1. LANDLORD AND TENANT §48(2) — DAMAGES—INSUFFICIENCY OF EVIDENCE.

In action by hotel lessee against lessor for breach of covenant because of inadequate heating facilities, etc., evidence that some patrons had left the hotel, but not showing what portion of lessee's losses were due to the causes of which he complains, *held* to sustain an award of only nominal damages.

2. TRIAL §397(2)—FINDINGS—NECESSITY.

In action by a hotel lessee against the lessor for failure to provide proper heating facilities, court's conclusion that appellant lessee was entitled only to nominal damages rendered unnecessary an express finding regarding the adequacy of the heating plant.

3. APPEAL AND ERROR §1071(6)—HARMLESS ERROR—FINDINGS.

A judgment will be sustained though the trial court failed to find on a material issue, unless a finding in appellant's favor on that issue would require a reversal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. J. Weichers against Elmo Dehall, administrator, etc. Judgment for plaintiff for nominal damages only, and he appeals. Affirmed.

Arthur H. Barendt, of San Francisco (William Klein, of San Francisco, of counsel), for appellant.

Albert J. Sherer, Robert Young, and Ingall W. Bull, all of Los Angeles (Henry T. Gage and W. I. Foley, both of Los Angeles, of counsel), for respondent.

BRITTAINE, J. The plaintiff appeals from a judgment in his favor for damages in the sum of \$1 in a suit in which trial by jury was waived, upon a cause of action of the lessee of a portion of a building in San Francisco, for hotel purposes, for breach of an express covenant of the lease and of claimed implied covenants. The record is voluminous, and since the judgment must be sustained no purpose will be served by an extended recital of facts. It is enough to say that since the lease was for hotel purposes, the appellant claims there was an implied covenant that the heating and hot water plants should be adequate for the use to which the building was to be devoted. It is claimed the evidence shows that neither the heating nor hot water plant was adequate, and, because there was no direct and express finding upon the

issue of adequacy that the judgment must be reversed.

On behalf of the respondent it is contended the rule of implied covenants does not go to the extent claimed by the appellant, and that the evidence upon the question of adequacy was conflicting; further, that a finding to the effect that the heating plant was installed and ready for use when the lessee entered into possession sufficiently met the issue of adequacy.

After the lease was executed, the landlord leased a portion of the ground floor of the building to other tenants, who installed an autotruck repair shop. There was evidence to the effect that the operation of the repair shop, by reason of vibration and noises as well as by the filtration of smoke and noxious gases into the hotel, constituted such an injury to the leasehold as to amount to a constructive eviction under the implied covenant for quiet possession. The finding of the court and the conclusions of law support the position of the appellant in regard to this matter.

There was an express covenant in the lease, the substance of which was that if the hot water tank of the building should be found to be inadequate, the landlord would install a second hot water tank. Plaintiff demanded the installation of such a tank. At the time of trial it had not been installed. The court found that the defendant had offered to install the tank, and that his offer had not been accepted. On behalf of the appellant it is argued that under the covenant when demand was made for the installation of the tank, the duty of the landlord to make the installation was fixed, and that he should be held liable for damages by reason of his failure.

[1] The questions of law and fact presented upon the matters involved in the foregoing statement are argued at length in the briefs. On behalf of the appellant it is most strongly urged that upon his proof of injury he was entitled to substantial damages, and that the \$1 awarded him was wholly inadequate. There was evidence that some roomers left the hotel, that others insisted on having their rooms changed from a point over the autotruck shop to other parts of the hotel, and that one possible patron of the hotel refused to take a room there because of the conditions of which complaint was made. There was also evidence that by reason of those conditions the plaintiff had been compelled to reduce the price charged for certain of the rooms in the hotel. There is no evidence concerning the price placed upon any rooms by the lessee, nor the reduced price, nor the number of rooms involved in the reduction of the price. There is no evidence that there were not other vacant rooms in the hotel, nor anything upon which to base even

inferentially the amount of damages suffered by the plaintiff. In such a case nominal damages only may be awarded. The suit is upon the contract and not in tort. "The amount of recovery was not to be left, upon general principles, to the 'sound discretion' or 'dispassionate judgment' of the jury. It is an action to recover the actual and proximate damages caused to plaintiff by failure of defendant to perform his contract. Where there is a legal measure of damages, the jury must determine the amount as a fact; otherwise the law which so measures the damages would be of no avail." 1 Sutherland on Damages, 2. "It is often said to be a paramount principle that the person injured shall receive compensation commensurate with his injury, and no more. By reason of the breach of his contract, if he did break it, the defendant here became liable for the full amount of damages which resulted 'naturally' (that is, in usual course of things) and proximately from the breach. These were to be proved with reasonable certainty. The particulars of damage were so far capable of ascertainment, and upon the plaintiffs was imposed the obligation of proving them. The matter should not have been left to the conjectures of jurymen." Parke v. Frank, 75 Cal. 364, 369, 17 Pac. 427, 429.

The rule announced in Parke v. Frank has never been questioned in this state, nor, so far as the court is advised, in any other state. Damages, 13 Cyc. 214, and cases cited in the note. In the appellant's brief the only evidence called to the attention of the court on this subject is contained in a letter addressed to the landlord by the attorney for the tenant, in which upon the basis of the number of rooms in the hotel at fixed prices per room, less an arbitrary deduction of 10 per cent. for vacancies, it was computed the net income of the hotel should have been \$2,196 per month. Following this computation is the statement:

"This is what Mr. Weichers should take in from this hotel if it were in proper condition, located as it is on the main artery of the city. As you know, his income has ranged from \$1,000.00 to \$1,200.00 a month. The largest month he ever had was \$1,600.00. In other words he has been running behind from nine hundred to a thousand dollars a month. Somewhere in these figures a basis of adjustment must be reached."

In the absence of any evidence upon the subject, it cannot be assumed that but for the conditions of which the appellant complains there would have been no vacancies other than the arbitrarily fixed 10 per cent. There is some evidence which would indicate that a portion of the failure of the lessee to receive

what he ought to have received from the building was due to other causes than any default upon the part of the landlord. The trier of the facts would not have been justified in guessing what portion of the \$900 to \$1,000 a month the hotel proprietor was losing was due to causes of which he complained, nor without any basis of measure to render a judgment for unproved and speculative profits.

[2, 3] In view of the entire lack of evidence of the amount of damages resulting naturally and proximately from the claimed breaches of the lease, the conclusion of the court that the plaintiff was entitled to damages in the sum of \$1, based on findings in favor of the plaintiff, rendered unnecessary an express finding on the adequacy of the heating plant. Even though the trial court fails to find upon a material issue unless a finding in favor of the appellant upon that issue would work a reversal, the judgment will be sustained. "The rule is that if all material issues are not found upon, a reversal will not be ordered, unless the findings on those issues in favor of the appellant would entitle him to a judgment. Morrison v. Stone, 103 Cal. 94 [37 Pac. 142]; Gould v. Adams, 108 Cal. 365 [41 Pac. 408]." Blochman v. Spreckels, 135 Cal. 664, 67 Pac. 1061, 57 L. R. A. 213. "Although findings are required upon all material issues, a judgment will not be reversed for want of a finding, unless it shall appear there was evidence before the court from which it was required to make a finding which would countervail its other findings." Bliss v. Sneath, 119 Cal. 528, 51 Pac. 849.

In this case, if the court should adopt the theory of the appellant that there was an implied covenant that the heating plant should be adequate, and the facts warranted a finding that the heating plant was entirely inadequate and the lessee had sustained injury thereby, in the absence of evidence from which the measure of damage for that injury could be ascertained, he would be entitled only to a judgment for nominal damages under the rule announced in Parke v. Frank, supra.

Criticism is directed in appellant's brief to certain other findings, but they fall within the same rule as that applied to the absence of the finding on inadequacy of the heating plant. If they were in any degree defective, and appellant's contentions in regard to them could be sustained, still there was no evidence to warrant a judgment for more than nominal damages.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVENS, J.

**CITY OF ORANGE v. CLEMENT, City
Treasurer. (Civ. 3056.)**

(District Court of Appeal, Second District, Division 1, California. June 9, 1919.)

**1. MUNICIPAL CORPORATIONS ⚡89—ACTION
OF BOARD OF TRUSTEES—NECESSITY OF NOTICE—SPECIAL MEETINGS.**

Where no written notice of a special meeting of the board of trustees of a municipal corporation was delivered to any member of the board, and one member was absent, the meeting and all proceedings therein were void, in view of Municipal Corporation Act, § 858.

**2. MUNICIPAL CORPORATIONS ⚡89—BOARD
OF TRUSTEES—SPECIAL MEETING WITHOUT NOTICE—RATIFICATION OF VOID PROCEEDINGS.**

Where a municipal board of trustees at a special meeting, invalid because of want of written notice, resolved to purchase certain lots, such action could not be ratified at a subsequent legally constituted meeting; the proceedings at the first meeting being not merely defective, but absolutely void.

**3. MUNICIPAL CORPORATIONS ⚡85—ACTION
OF BOARD OF TRUSTEES—SUFFICIENCY OF RESOLUTION.**

Proceedings before a municipal board of trustees purporting to ratify its action at a prior illegal meeting in authorizing the purchase of land and directing a warrant to be drawn in payment, held insufficient in itself to authorize the purchase of the property, or to constitute the adoption of an original order for the payment of the specified amount.

Mandamus by the City of Orange, a municipal corporation, against W. E. Clement, as treasurer of the City of Orange. Petition for peremptory writ denied, and alternative writ discharged.

W. R. Garrett, City Atty., of Orange, and Scarborough & Forgy, of Santa Ana, for petitioner.

F. C. Drumm, of Orange, and Head & Rutan, of Santa Ana, for respondent.

CONREY, P. J. Mandamus. Assuming the facts to be those stated in the petition filed by plaintiff herein, an alternative writ of mandate was issued requiring that the defendant, as treasurer of the city of Orange, a city of the sixth class, pay out of the city hall fund of the city of Orange a certain warrant for the sum of \$3,150 in payment for certain lands alleged to have been purchased by the city to be used as a city hall site, or show cause why he did not pay the same.

The complaint alleged that on March 3, 1919, at a special meeting of the plaintiff's board of trustees, duly called to consider certain offers and proposals to sell to the plaintiff suitable lots for the stated purpose, a resolution was duly adopted by the vote of four

members of said board, the fifth member being absent, which resolution determined that the city should purchase certain described lots at a stated price, and which resolution was duly approved and published; that on April 14, 1919, at a regular monthly meeting of the board of trustees, a resolution was adopted which, after reciting the adoption and publication of the former resolution and that no objection had been made thereto and that no request for a referendum thereon had been presented or filed, ordered that the warrant be drawn; that said warrant was drawn and presented to the defendant, who refused to pay the same; that at an adjourned regular meeting of the board of trustees duly held on April 30, 1919, said refusal of the treasurer to pay said warrant was reported to the board, and thereupon a resolution was duly adopted by unanimous vote of the four members then present, ratifying and confirming all proceedings of the board for the purchase of said lots, and directing that proceedings be taken to compel defendant to pay the warrant; that at a special meeting of said board duly called and held on May 15, 1919, at which all members of the board were present and voting, a resolution was unanimously adopted demanding the payment of said warrant and instructing that the city attorney present the warrant to the defendant and demand payment of the same; that such demand was made, but defendant refused to make the demanded payment.

[1] In his answer to the petition, defendant denied that any special meeting of the board of trustees was held on March 3, 1919, to consider said offers or proposals, or for any purpose, and denied that at any meeting of said board of trustees any resolution was adopted as alleged in the paragraph of the petition referring to said meeting of March 3, 1919. Evidence was heard by this court upon the issue so raised. From such evidence it appears, and this court finds, that no written notice of said alleged special meeting of March 3, 1919, was delivered to any member of the board of trustees, and that one member of the board was absent from the alleged meeting. This being so, it follows that said meeting and all proceedings thereof were void. Municipal Corporations Act, § 858; Stats. 1883, p. 268; Deering's Gen. Laws, 1915 Ed. p. 1121.

[2] Counsel for petitioner contend that, even if the meeting and resolution of March 3, 1919, are void, the warrant nevertheless is valid by reason of the resolution of April 14, 1919, adopted at a regular meeting of the board; that the board of trustees had power at such regular meeting to ratify the former proceedings, and, at all events, had power at that time to purchase the property and order that a warrant issue to pay the

purchase price. This contention cannot be sustained on the ground that it was a ratification of former proceedings. Those proceedings were not merely defective action occurring at a legally constituted meeting; they were absolutely void, and were no action at all on the part of the city or any authorized agency thereof.

[3] In order to constitute authority for the issuance of the warrant in question, the resolution of April 14, 1919, must first be held to be sufficient in itself as an original proceeding for the purchase of the property and as an original order for the payment of the amount specified. But this resolution did not contain any language purporting to constitute a present determination that the city acquire land for city hall purposes or at all. It is wholly without those elements of legislative action which must precede the acquisition of property for purposes like those here proposed. There being, therefore, no legal ground for the issuance of the warrant, the defendant was justified in his refusal to make the demanded payment.

The petition for a peremptory writ is denied, and the alternative writ is discharged.

We concur: SHAW, J.; JAMES, J.

PATTERSON GLASS CO. v. THOMAS et al.
(Civ. 1971.)

(District Court of Appeal, Third District, California. June 12, 1919.)

1. INJUNCTION §118(3) — INDUCING EMPLOYEES TO BREACH CONTRACT—NOTICE OF CONTRACT—PLEADING.

In an action by an employer to enjoin third persons from inducing employees to breach their contract of employment, complaint *held*, as against a general demurrer, to sufficiently allege that defendants had knowledge that a contract of employment existed.

2. INJUNCTION §118(3) — INDUCING EMPLOYEES TO BREACH CONTRACT—CONSPIRACY—PLEADING.

In an action to enjoin members of a labor union from inducing plaintiff's employees from breaching their contracts, complaint *held* to sufficiently allege that defendants conspired together for the purpose of inducing the employees to break their contract, and were engaged in an effort to induce them to abandon their employment.

3. INJUNCTION §63—INDUCING EMPLOYEÉ TO BREACH CONTRACT—REMEDIES.

An employer may enjoin third persons from inducing employees, by threats or otherwise, from breaching their contracts of employment.

4. INJUNCTION §57 — INTERFERENCE WITH CONTRACTS OF EMPLOYMENT.

The employment of workmen under a contract by a glass manufacturer for the season

of 1917 and 1918, *held* subject to protection by injunction against interference by third persons, and not an employment at will of such persons, although no number of months of the season were specified, and it was agreed that the workmen could be discharged or could quit on seven days' notice, so that the contract was terminable under Civ. Code, § 1999, at the will of either party.

5. MASTER AND SERVANT §339—INTERFERENCE WITH CONTRACTS OF EMPLOYMENT.

Although workmen have the right to organize a union of their craft for the purpose of improving the working conditions of the members of such organization, and to maintain such improved conditions by peaceable means, they do not have the right to induce employees, by threats or otherwise, to break their contracts of employment.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Suit by the Patterson Glass Company against Herbert Thomas and William Pickering, individually and as members of the National Window Glass Workers' Association. Judgment for defendants, and plaintiff appeals. Reversed.

Gordon A. Stewart and R. C. Minor, both of Stockton, for appellant.

Ben Berry and Lawrence Edwards, both of Stockton, for respondents.

CHIPMAN, P. J. A general demurrer to the amended complaint of plaintiff was sustained, plaintiff was given leave to file a second amended complaint, and, upon its failure so to do, judgment of dismissal was entered, from which judgment plaintiff prosecutes this appeal upon the judgment roll.

The sole question presented for decision is: Does the amended complaint state facts sufficient to constitute a cause of action?

The complaint alleges:

That plaintiff is a California corporation doing business at the city of Stockton, in San Joaquin county, being engaged in the business of manufacturing and selling window glass and operating a glass plant for that purpose. That in the operation of its plant it is necessary that plaintiff should have in its employ skilled artisans. That "to that end and purpose the plaintiff entered into a contract during the month of September, 1917, at which time it commenced the operation of its plant, with approximately 75 artisans to work for the plaintiff during the season of 1917-1918, under the terms of which contract of employment the plaintiff agreed that the said artisans could work for the plaintiff during said period of time, and that so long as said artisans faithfully discharged their duties in the employ of plaintiff, the plaintiff would not discharge any of said artisans without giving to said discharged artisans seven days' notice prior to the date when said discharge became effective, and, in like manner, each of said artisans agreed with the plaintiff that he would not quit

the employ of the plaintiff during said season, unless prior to quitting such employ he gave to the plaintiff seven days' notice of his intention to leave the services of the plaintiff. That the foregoing mentioned artisans being insufficient in number to meet the requirements of the plaintiff, it was compelled to and did during the month of September, 1917, enter into a contract with approximately 30 artisans in different cities of the United States "to leave their homes and come to Stockton, Cal., to work for the plaintiff in its plant." That plaintiff agreed to pay their traveling expenses and said artisans agreed to work for so long a period as would be necessary to repay to plaintiff, in weekly installments, the moneys so advanced as traveling expenses, and that a similar agreement as above mentioned, regarding seven days' notice, was entered into between said artisans and the plaintiff.

It is then alleged:

That the defendant National Window Glass Association "is a voluntary unincorporated association of individuals" composed of workers in the window glass business, and that defendants Thomas and Pickering are members thereof. That its office and principal place of business is in Cleveland, Ohio. "That the business of said association is the collection of dues and fines from said members, the fixing of hours of labor and the compensation of said members. * * * That the compensation of said members is based upon the value of the product produced by their labor. That the said association, for the purpose of increasing the sale cost of glass, limits the production of said glass by prohibiting its members from engaging as journeymen in the manufacture of window glass except for such duration of time in each year as may be designated by the association. That it has been the custom of said association to limit the annual output of glass by refusing to permit its members to work for a certain number of months in a year. That the association, in the fall of each year, fixes its scale of wages to be paid to its members by employers. That until said wage scale goes into effect its members are not to perform any services as journeymen to any employers. That said association gave notice to the plaintiff that it would not permit its members to work for plaintiff prior to the 1st day of December, 1917. That the plaintiff opened its plant for the manufacture of glass upon the 15th day of September, 1917, and thereupon received in its employ a large number of journeymen window glass artisans who were members of said association. That no dispute exists between the plaintiff and its employes as to the hours of labor or compensation, and said employes are satisfied and content with their employment."

It is next alleged:

That during the month of September, 1917, "the defendants entered into a combination, federation, and conspiracy for the purpose of coercing the plaintiff to shut down its plant and not to operate the same until such time as the said defendants would consent thereto; the object and purpose of said combination, confederation, and conspiracy being to limit the output of glass, restricting its manufacture, and thereby

increasing the cost of production to the consuming public, and out of the increased cost so manipulated to increase the wages of said members employed in the manufacture of window glass." That defendants, for said purposes, "are seeking to induce, procure, and entice the said artisans to quit their employment with the plaintiff, without giving any notice to said plaintiff. * * * and to that end and purpose are promising divers employes of the plaintiff that in the event that such employes abandon their contract of employment with the plaintiff, said defendants will pay money to said employes in the way of living expenses of said employes to the 1st day of December, 1917, and at said last-mentioned time will transport, at the expense of the defendants, the said employes so abandoning their contracts" to Eastern points where they might find employment. That the acts of the defendants are for the purpose of rendering the operation of plaintiff's plant unprofitable, and that skilled workmen are not available in California to take the places of any employes who may be induced to leave plaintiff's employment.

It is further alleged:

"That it would be extremely difficult in a suit of law for the plaintiff to ascertain the amount of compensation which would equalize the damages sustained by it in the enticement of its employes from its service. That said damages would result from the loss of material and overhead expenses resulting from the decreased output of the plant, depreciation in the value of the glass products by its not being handled seasonably at the proper time, the fluctuating market in the sale of glass, and the expenses of procuring or endeavoring to procure other employes to fill the places of those who are enticed from its employment, and the cost of transporting said employes from Eastern points to Stockton, Cal. That these and other damages which will result to the plaintiff if the defendants are permitted to entice from its employment its skilled artisans are extremely difficult to ascertain, and an action at law against said defendants would not afford adequate relief."

Also:

"That the plaintiff is informed and believes that all of the defendants, save and except the National Window Glass Workers' Association, are insolvent and judgment proof. That the assets of the National Window Glass Workers' Association, if any, are without the state of California, and beyond the process of this court. That by reason of these facts, the plaintiff alleges that it has no plain, speedy, or adequate remedy at law. That said defendants threaten to and will, unless restrained by this court, continue to solicit and to entice plaintiff's employes from its employment, to the great and irreparable injury of said plaintiff."

The prayer is that—

Defendants and each of them be "enjoined and restrained from knowingly and intentionally causing or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by any like inducement or persuasion, any employé of the plaintiff under contract of hire to break such contract to render

service to the plaintiff by quitting the plaintiff's employment, or from knowingly and intentionally causing, or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by like inducement or persuasion, any employé of the plaintiff to quit his employment, or preventing or deterring them or any of them from rendering services to the plaintiff by any like means, scheme, or plan; and for such other and further relief as to the court seems meet and equitable."

In support of the order sustaining the demurrer the respondents advance certain propositions: (1) Attention is called to the averments of the complaint in which it was stated that an agreement existed between plaintiff and its employés that so long as the latter faithfully discharged their duties plaintiff would not discharge any of them without giving seven days' notice, and that the employés agreed to give like notice before quitting the employ of plaintiff. It is hence claimed that the only definite time specified was for a period of seven days. Cyc. is quoted as follows:

"When the complaint alleges a contract of employment for a period of time, no recovery can be had where there is no evidence of a contract for a definite term of service." 28 Cyc. 1585.

Section 1999 of the Civil Code is then quoted, which reads:

"An employment having no specified term, may be terminated at the will of either party, on notice to the other. Employment for a specified term shall mean an employment for a period greater than one month."

It is contended that if the period of time is less than a month the employment may be terminated at will, for the statute provides first what shall and what shall not be considered a "specified term." It is further claimed that the complaint nowhere alleges that defendants knew or were informed that any contract of employment existed between plaintiff and its employés, and hence defendants "had a right to assume that the employment of the members of defendant association was upon a contract of employment at will."

It is alleged in the complaint that certain of plaintiff's employés were contentedly working under wages and conditions satisfactory to them; that, requiring more artisans and not being able to obtain them in California, plaintiff sent to Eastern states and entered into contracts with 30 artisans, by which it was agreed that they would go to work for plaintiff on the same terms as the others were working under, and they further agreed to work until they had by their wages paid to plaintiff the money plaintiff had advanced to bring them to California. And it is alleged:

That these men will shortly arrive at Stockton, "and that said defendants, conspiring one

with the other, threaten to and will, unless they are restrained by the order of this court, induce, persuade, and entice said persons, by the use of money and by threats and intimidation, to violate the terms of their contract, and will induce, persuade, and entice said persons to leave the plaintiff's employ and depart from the state of California."

The men who were there at work had voluntarily entered into these contracts, and were engaged in the performance of their duties when defendants appeared upon the scene and commenced their propaganda and persuasions, as alleged in the complaint, to induce these men to quit work, the result of which, if successful, would necessarily cause plaintiff to shut down its establishment and cease its productive activities. That such an injury may not be adequately compensated in damages, but may only be thwarted by injunctive relief, is manifest.

In closing their brief, defendants, after a somewhat extended examination of the cases and text-books, including the California cases, state the following as the result:

"(1) Where a third person has knowledge of a lawful contract existing between employer and employé, to induce such employé to break his contract is actionable, whether done in good faith or not.

"(2) Where the employment is at will, to maliciously induce an employé to quit is actionable, but not otherwise."

The complaint does not specifically and in terms charge knowledge by defendants of the contract of employment. Referring to the employés then at work, the complaint (paragraph V) states that—

Defendants "are seeking to induce, procure, and entice the said artisans to quit their employment with the plaintiff, without giving any notice to said plaintiff, and are seeking to induce them to leave the employ of the plaintiff, and to that end and purpose are promising divers employés of the plaintiff that, in the event that such employés abandon their contract of employment with the plaintiff, said defendants will pay money to said employés in the way of living expenses of said employés to the 1st of December, 1917, and at said last-mentioned time will transport, at the expense of the defendants, the said employés so abandoning their contract of employment with the plaintiff from Stockton, Cal., to Eastern points where they might find employment in their respective trades."

We think that by fair implication it sufficiently appears that defendants knew that the employés of plaintiff were working under a contract with plaintiff. An inference that they were ignorant of the fact that a contract existed is inconsistent with the averments of the complaint. One of the points contended for by defendants was that the men should not work until December 1st, whereas some were then at work and others expected to commence work. By seeking to induce them not to go to work until

December 1st and to cease work until that time, defendants lend aid to the inference that they knew they were endeavoring to cause the employes to break the existing contract of employment under which they were working.

The acts which it was charged defendants were committing seem to have been directed to bringing about a breach of their contracts by the employes in respect to the express terms of their contracts, and this gives rise to the implication that defendants must have known, not only that the employes were working under contract engagements, but that they knew the terms of the contracts. We do not think, however, that it was necessary to allege specifically what the terms were. The defendants are charged with seeking to induce plaintiff's employes to quit work without giving any notice; they are promising to furnish the employes with money to cover their living expenses if they would break their contract; that they would furnish them money to pay their expenses in returning to the states from whence they came. These and like averments, admitted by the general demurrer, would seem to show that defendants had knowledge that plaintiff's employes were working under existing contracts.

We confess some difficulty in determining just what was intended by the Legislature in the enactment of section 1999 of the Civil Code. But, whatever the intention was and whatever its meaning, it cannot be held to dispute the facts, admitted by the demurrer, that plaintiff's employes were working under contract engagements, and, among other things, had agreed not to quit work without giving seven days' notice. In addition, the employes soon to arrive from the East were under contract to work until they had repaid to plaintiff the advances of money made by plaintiff in transporting them to California. We do not believe that the section of the Civil Code relied upon should be given a construction which would justify a court of equity in holding that these employes were working "at will," i. e., that they could quit work without notice and without paying plaintiff its money advances. What the section may mean as to the mutual relation of employer and employe, it was not intended that third persons could with impunity induce the employes to violate their contract and thus evade the lawful right of the employer to their services. If the section may be construed, as between employer and employe, that the engagement was "at will," it cannot mean that the employe was working at the will of a third person.

The questions here involved have had the attention of the courts in many cases and under great variety of circumstances. Certain principles have been settled with but little disagreement—defendants' proposition

that it is actionable for a third person, having knowledge that an employe is working under contract, to induce such employe to break his contract, may be set down as one of these settled principles. Indeed, some of the courts have held that such acts are actionable where no contract for a specified period exists.

In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 251, 38 Sup. Ct. 65, 72 (62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461), the court said:

"Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employes, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment 'was at will,' and terminated by either party at any time, is of no consequence."

The writer of the opinion quotes as follows from *Truax v. Raich*, 239 U. S. 33, 38, 36 Sup. Ct. 7, 9 (60 L. Ed. 131, L. R. A. 1918D, 545, Ann. Cas. 1917B, 233):

"It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason; the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employe has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable, although the employment is at will" (citing many cases).

Pursuing the subject the court said:

"In short, plaintiff was and is entitled to the good will of its employes, precisely as a merchant is entitled to the good will of his customers, although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employes, and paying them fair wages, and avoiding reasonable grounds for complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of cases" (citing cases).

In the *Hitchman Case* the defense was advanced that all measures may be resorted to if they are "peaceable," that is, if they stop short of physical violence, or coercion through fear of it. The court said:

"In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purposes of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employes constitutes such a violation" (citing cases).

Eagle Glass & Mfg. Co. v. Rome, 245 U. S. 275, 38 Sup. Ct. 89, 62 L. Ed. 286, is similar to the *Hitchman Case*, and was decided upon the authority of that case. Upon the question of employment "at will" the case of *George Jonas Glass Co. v. Glass Blowers' Ass'n*, 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. (N. S.) 445; *Folsom v. Lewis*, 208 Mass. 336, 94 N. E. 316, 35 E. R. A. (N. S.) 787, are instructive.

We do not think it necessary in the present case to follow these cases in their view as to engagement "at will," for here, we think, were contracts which defendants had no right, by peaceable or other means, to cause the employes to break. Our Supreme Court seems to have held that an employé may, with or without reason, stop work, if by so doing he does not violate his contract, and where there are no contractual relations employes may strike without notice. *Parkinson & Co. v. Building Trades Council*, 154 Cal. 594, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324. Holding, as the learned trial judge did, that no contract was pleaded, he probably regarded the object of defendants to be lawful. If so, we think his decision was without a sustaining premise.

We quote from the text-books as follows:

"The doctrine that it is not lawful to induce to quit employment applies even in the absence of any contract to serve for a fixed period; a fortiori does not apply to inducing to quit employment in violation of a contract to serve for a fixed period." *Cooke on Combination, Monopolies, and Labor Unions*, § 67.

"Where a union (by statute made liable to be sued) or its officers or members, intentionally and without just cause or excuse, induces another's employes to quit his service in breach of their contracts of employment, he is entitled to recover the damages resulting from such tortious acts, from such union, or from such combination of officers or members, and this has been held true whether the means used is peaceable persuasion, or intimidation, or threats, or abusive language, or a system of espionage. Procuring a breach of such contracts is not justifiable as legitimate trade competition, and it is immaterial that those inducing the breach of contract acted in good faith and without ill will toward the employer." *Martin on Modern Laws of Labor Unions*, § 207.

The right to injunctive relief is no longer questioned, and it is no justification that defendants acted without ill will but in good faith, in pursuance of the provisions of the constitution of the union prohibiting its members from working with nonunion men; the employer not being aware of or a party to such provisions.

"The rule applies where the means to procure the breach of contract are mere molestation or annoyance, payment of money or of transportation advances, abusive language, or violence or threats of violence, and where no justification is shown the rule is applicable, where the meth-

od employed to procure the breach of contract is persuasion." *Id.* § 209.

In *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885, it was held that—

"Persons who conspire to induce others to break a valid contract between other persons are liable to actions therefor."

In *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152, the court said:

"Now, the relation of master and servant being shown to exist, the law is quite clear that no person has a right to entice away another's servant. * * * The right of a master to have his servant continue in his employ without molestation * * * is a recognized property right."

This doctrine finds support in many cases, among which are the following: *Brown Hardware Co. v. Indiana Stove Works*, 96 Tex. 453, 73 S. W. 800; *Butterfield v. Ashley*, 6 Cush. (Mass.) 249; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Blocker*, 43 Ga. 331.

Some objection is made to the complaint in failing to state the particular acts or facts relating to the things which it is alleged have been done or that defendants threatened to do. The foregoing, however, disposes of the grounds on which, counsel seem to agree, the trial court sustained the demurrer, and is, we think, decisive.

The judgment is reversed.

BURNETT, J. [1-3] I concur in the judgment and generally in the opinion of the Presiding Justice. It is admitted by respondents that—

"Where a third person has knowledge of a lawful contract existing between employer and employé, to induce such employé to break his contract is actionable, whether done in good faith or not."

Assuming that to be the law, we must hold that the complaint, while admittedly imperfect, is sufficient as against a general demurrer. It does appear, as pointed out in the main opinion, that defendants had knowledge of the contract, although it is to be regretted that such fact was not explicitly alleged. That the contract between plaintiff and its employes was and is lawful, of course, does not admit of doubt. And that it sufficiently appears that defendants have not only conspired together for the purpose of inducing the employes to break such contract, but are actually engaged in the effort to induce them to discontinue and abandon their employment, I think cannot be successfully controverted. In my opinion, there is much of surplage in the complaint, and I feel satisfied that it is open to attack on the ground of uncertainty in certain particulars. But we are called upon to deal with the

single question whether it states facts sufficient to constitute a cause of action. Accepting the law applicable to the case as stated by respondents themselves, it seems to me we must hold the complaint sufficient. In considering the case, it is not improper to notice that the conduct of respondents relates not only to those artisans in the East who have contracted to work but have not yet entered upon their employment, but it has reference also to the employes who were actually engaged in carrying out the terms of their employment. While it might be doubted whether the allegations of the complaint are sufficient as to those who have not entered upon their employment, there is no such doubt of the sufficiency of the complaint as to the other class.

[4] I may add that, in my opinion, the situation does not call for a discussion of the rule applicable to instances of employment at will. It appears that the workmen herein were employed for the season of 1917 and 1918. While the number of months of the season is not specified, I think we have a right to assume that it was for a longer period than one month, and that its exact duration was capable of ascertainment and proof. It is true that there was another agreement that the employes would not abandon their work until certain advancements had been restored to plaintiff, and that they would give seven days' notice of their intention to quit, but this was not inconsistent with the terms of the contract requiring them to work during the season of 1917 and 1918.

[5] Of course, there is no intention herein to question "the right of workmen to organize a union of their craft for the purpose of improving the working conditions of the members of such organization, and to maintain such improved conditions by peaceful means," but we have to take the complaint as we find it, and it appears therein that defendants are violating the law, which is enacted for the protection of all classes; and whether the allegations can be proved or not, we must hold them sufficient to require an answer.

I concur: HART, J.

FLICKINGER v. McKESSON. (Civ. 2901.)

(District Court of Appeal, Second District, Division 2, California. June 13, 1919.)

1. EVIDENCE \S 348(2)—FOREIGN JUDGMENTS—CLERK'S CERTIFICATE.

In an action on a foreign judgment, a certificate of the clerk of the foreign court that papers offered in evidence "are true and cor-

rect copies" of certain enumerated records, "as full and complete as the same remains on file and of record in my office," will be held sufficient as against an objection that it fails to certify "that the papers are copies of the originals on file in this office."

2. EVIDENCE \S 348(2)—FOREIGN JUDGMENT—AUTHENTICATION.

In an action on a foreign judgment, the certificate of authentication of the clerk of the foreign court will not be held insufficient in that the words "county clerk of County of P. and ex officio" were erased from before the words "clerk of the district court of said P. County," where the judge certified that he was the clerk, and that his signature was genuine, although the clerk in his certificate to the official character of the judge did not erase such descriptive words, and although such erasures were unexplained.

3. APPEAL AND ERROR \S 757(1)—ALTERNATIVE METHOD OF APPEAL—RECORD.

Where an appeal is taken under the alternative method, it is incumbent upon appellant to point out in the record the matter he relies upon to support his points.

4. EVIDENCE \S 178(9)—SECONDARY EVIDENCE—ASSIGNMENT OF JUDGMENT.

In an action by an assignee of a foreign judgment, a certified copy of an assignment of the judgment as recorded in the court where the judgment was rendered was properly admitted in evidence, where the evidence was undisputed that the original assignment which had been made and delivered to plaintiff was lost, and that the lost assignment was in the same form as the one shown in the record.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Laura Flickinger, administratrix of the estate of I. N. Flickinger, deceased, against O. P. McKesson. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucius M. Fall, of Los Angeles, for appellant.

P. S. McNutt, of Los Angeles, for respondent.

SLOANE, J. This is an action by the assignee on a foreign judgment. Defendant appeals from the judgment here under the alternative method. The only errors assigned are as to the sufficiency of the identification and authentication of the record from the district court of the state of Iowa, where the judgment sued on was obtained, and of the assignment thereof to plaintiff. We find no merit in the appeal.

In the first place, our attention is called to an exhibit in the record, being marked Defendant's Exhibit 3, exemplified abstract of judgment in the original suit, with certificate of the clerk of the court in which the matter was pending of the subsequent assignment of the judgment to the plaintiff here. The facts therein set forth, if binding on the

defendant—as they appear to be, he having introduced them in evidence—are sufficient to support the judgment here appealed from. But, aside from this, the exhibits, to the introduction of which defendant takes exception, were sufficiently proved and authenticated to admit them as evidence.

[1] The first exception is to Plaintiff's Exhibit 1, being a certificate of the clerk of the Iowa court to the record supporting the original judgment, on the ground that it fails to certify "that the papers are copies of the originals on file in this office." What the clerk does certify is that the papers therein enumerated "are true and correct copies" of certain enumerated records, "as full and complete as the same remains on file and of record in my office." As the copies enumerated include all that is necessary to prove the judgment, and are of the records on file, we see no reason to question the sufficiency of the certificate, so far as the specified ground of the objection goes.

[2] The second specification is alleged error in admitting in evidence Plaintiff's Exhibit 2, being the certificate of authentication, because of certain unexplained erasures. The typewritten certificate of the clerk to the judgment record, and the certificate of the judge to the clerk's attestation, contain the following descriptive words in each reference to the clerk:

"I, J. N. Tollinger, county clerk of the county of Pottawattamie, state of Iowa, and ex officio clerk of the district court of said Pottawattamie county, state of Iowa."

In these recitals the words "county clerk of the county of Pottawattamie, and ex officio," have been erased. This leaves these certificates as relating alone to the official in question as the "clerk of the district court of said Pottawattamie county." The judge of the district court certifies that the signature is the genuine signature of said J. N. Tollinger; that the seal annexed thereto is the seal of said district court; that said Tollinger, as such clerk, is the proper official to execute the said certificate and attestation; and that such attestation is in due form, etc.

Section 1905 of the Code of Civil Procedure provides that a judicial record of a sister state "may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a

certificate of the chief judge or presiding magistrate that the attestation is in due form." The certificates, therefore, as they stand, contain all that is necessary to the authentication of the record. If the certifying officer is, as described, the clerk of the court, that is sufficient. The matter erased is mere surplusage. The certification would be good under either state of the facts. The final certificate to the official character of the judge in this exemplification contains the full recital without erasures, and is signed, "J. N. Tollinger, County Clerk of the County of Pottawattamie, State of Iowa, and ex officio Clerk of the District Court of Iowa, in and for Pottawattamie County." As the certificate is in due form either way, the erasures are immaterial.

[3, 4] The third assignment of error is upon the admission in evidence of Plaintiff's Exhibit 3, which is in terms an assignment by the judgment creditor of the Iowa judgment to the plaintiff here, before the present action was commenced. The exhibit is certified to by the clerk of the Iowa court as being a true copy of an assignment of said judgment, "as the same remains of record and on file" in his office. Appellant's counsel states in his brief that this exhibit was admitted in evidence over defendant's objection that it was incompetent and not the best evidence; but we find no record of such, or any, objection, either in the appendix to appellant's brief or in the reference given to the reporter's transcript. This appeal being taken under the alternative method, it is incumbent on the appellant to point out in the record the matter he relies upon to support his points. In any event, the undisputed evidence outside of this record is ample to show that an assignment in writing, which was lost, had been made and delivered to the plaintiff here before suit on the judgment was commenced, and the document introduced as Plaintiff's Exhibit 3 was properly used in evidence as the basis of plaintiff's parol testimony as to the contents of the lost assignment; it being testified by one of plaintiff's witnesses that the lost assignment was in the same form as the one shown in the exhibit.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

CRIST et al. v. FIFE et al. (Civ. 2816.)

(District Court of Appeal, First District, Division 1, California. June 10, 1919.)

1. APPEAL AND ERROR §1011(1)—FINDINGS OF FACT—CONFLICTING EVIDENCE.

A finding of the trial court based upon conflicting evidence is conclusive on appeal.

2. COVENANTS §42(1)—AGAINST INCUMBRANCES—"SUFFERED."

"Suffered," as used in Civ. Code. § 1113, relating to implied covenant against incumbrances "suffered by the grantor," implies reasonable control, and does not apply to an incumbrance not caused by the act of the party nor within his power to prevent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suffer.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by Wiley F. Crist and others against Nettie Fife and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Edward R. Eliassen, of Oakland, for appellants.

Roscoe D. Jones, of Oakland, for respondents.

KERRIGAN, J. This suit is one for the rescission of a contract for the purchase of certain residence property, the cancellation of a note and mortgage given as part payment therefor, and the recovery of money paid thereon.

The complaint charged that respondents had falsely and knowingly, and with intent to deceive appellants, represented that the title to the property was free and clear of all incumbrances of every kind, and that appellants relied upon these representations, whereas there were in fact certain building restrictions against the property. The trial court found that the claimed representations were not made, and judgment went in favor of defendants.

[1] It is first claimed as ground for reversal that this finding on the alleged representations is not supported by the evidence. There was a conflict upon this subject, and the finding is conclusive here.

As a further ground for reversal it is urged that, notwithstanding this question, the facts found by the trial court necessitate a reversal of the judgment. These facts, in substance, are as follows:

On the 28th day of August, 1911, the respondents sold to appellants the residence property for the sum of \$6,850, receiving \$1,000 on account thereof, with a mortgage for \$5,850, upon which appellants subsequently paid \$4,400. On May 28, 1917, appellants discovered that the property was burdened with certain building restrictions. The restric-

tions provided: (1) That the building should be used only as a residence; (2) that no building should be erected on the premises to cost less than \$3,000, nor nearer than 20 feet to the street frontage; (3) that no saloon or mercantile business should be maintained or conducted thereon.

These restrictions were to remain in force until the 29th day of November, 1917, and in the case of any violation thereof the property was to revert to the original grantor. There was also a sewer right of way across the property. Appellants first learned of the existence of the restrictions and conditions above set forth on May 28, 1917. None of them were contained in the deed from respondent to appellants. The former had purchased the property at a foreclosure sale, and they too knew nothing concerning their existence at the time of the conveyance to appellants. The form of deed adopted by the respondents in making the conveyance of the property to appellants was one of grant, bargain, and sale.

These facts appellants claim show that the property was burdened with incumbrances that the form of deed adopted by the parties insured against, for which reason they claim the right of rescission.

We are of the opinion that there is no merit in the contention. By section 1113 of the Civil Code the word "grant," in any conveyance by which an estate is to be passed, insures to the purchaser an implied covenant, unless restrained, of (1) that previous to the time of the execution of such conveyance the grantor has not conveyed the same; (2) that such estate is at such time free from incumbrances done, made, or suffered by the grantor.

[2] Assuming that the building restrictions here involved constitute incumbrances under the implied covenants contained in the statute, and that they are enforceable against appellants, such incumbrances were upon the property at the time the grantor acquired the title to it, and they are therefore not within the covenant against incumbrances "done, made, or suffered" by the grantor, for the reason that he has not created or caused them to exist. "Suffered," as used in the statute, implies reasonable control, and it cannot be held to apply to an incumbrance not caused by the act of the party nor within his power to prevent. *Smith v. Elgerman*, 5 Ind. App. 269, 31 N. E. 862, 51 Am. St. Rep. 281; *Polak v. Mattson*, 22 Idaho, 727, 128 Pac. 89.

Conceding therefore, that this question is properly before us, it can avail appellants nothing.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

MAUPIN v. SOLOMON et al.
(Civ. 2860; S. F. 8741.)

(District Court of Appeal, First District, Division 1, California. May 29, 1919. On Rehearing in Supreme Court, in Bank, July 29, 1919.)

On Rehearing in Supreme Court.

1. MASTER AND SERVANT §330(1)—INJURIES TO THIRD PERSONS—AUTOMOBILE COLLISION—EVIDENCE.

The prima facie case made by one damaged by negligent driving of an automobile, when he proves that the automobile belonged to defendant and that the driver was the employé of defendant, is based on an "inference," and not on any "presumption" declared by law, that the employé was acting within the scope of his employment.

2. EVIDENCE §53—"INFERENCE."

When we say that a certain "inference" is warranted by certain facts proved, we mean no more than that jury is reasonably warranted in making that deduction from those facts, under Code Civ. Proc. § 1958.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inference.]

3. MASTER AND SERVANT §330(3)—INJURIES TO THIRD PERSONS—EVIDENCE—INFERENCES.

Where plaintiff shows that he was damaged by defendant's automobile through the negligence of defendant's employé in driving, an inference arises that the employé was acting within the scope of his employment, but such inference disappears upon the introduction of uncontradicted evidence that the employé was not acting within the scope of his employment, and a verdict for plaintiff, under such circumstances, would be contrary to the evidence.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by J. L. Maupin against B. Solomon and M. A. Gunst & Company, Incorporated. Judgment for plaintiff, and the last-named defendant appealed. Judgment reversed in appellate court, and petition for rehearing denied in Supreme Court.

Short & Sutherland, of Fresno, for appellant.

M. M. Dearing, of Fresno, for respondent.

KERRIGAN, J. This is an appeal by the corporation defendant from a judgment in favor of plaintiff in an action for damages arising through the destruction of an automobile belonging to plaintiff as a result of a collision alleged to have been due to the negligence of the defendants.

At the time of the collision the defendant Solomon was in the employ of his codefendant, M. A. Gunst & Co., as a traveling sales-

man, with headquarters in the city of Fresno, and whose duties embraced the solicitation of customers for the purpose of selling the merchandise of his employer. To facilitate the discharge of that duty he was furnished by his employer with an automobile, which he was instructed to use only in the course of his employment. In the forenoon of February 22, 1917, being a public holiday, Solomon called on several customers, but in the afternoon he transacted no business, spending most of that time at the Elks' Club. In the early part of the evening, in pursuance of his personal recreation, he took two of his friends for a ride in the aforesaid automobile, intending thereafter to dine in a public café in Fresno. During this ride, and while the automobile was being driven by Solomon at a high rate of speed in said city, it collided with plaintiff's car, which was standing near or alongside of a street sidewalk, with its tail light burning. Plaintiff's car was practically demolished by the force of the collision.

It is not denied, as testified to by the witnesses introduced by appellant, and corroborated by the surrounding circumstances, that at the time of the accident Solomon was engaged in a pursuit wholly his own, and that such use of the automobile was without the consent of and against the instructions of the appellant. Nor is it disputed that the accident was the result of the negligence of Solomon. But plaintiff's contention in support of the judgment is that when he proved that the automobile belonged to the appellant and was being operated by its employé at the time of the collision, a presumption arose that the employé was acting within the scope of his employment, and that such presumption remained in the case in spite of the clear, positive, and uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, with the result that the action of the court in denying a motion for a new trial must be sustained upon appeal.

With this position we cannot agree. The inference relied upon by respondent cannot be indulged under the circumstances of this case. It must yield to the direct and unequivocal evidence rebutting such inference. "Presumptions," such as the one relied on here, "are allowed to stand, not against the facts they represent, but in lieu of proof of them," and when "the fact is proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled." Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922. The authorities in this state abundantly support this view. Freese v. Hibernia, etc., Soc., 139 Cal. 392, 73 Pac. 172; King v. Hercules Powder Co., decided by this court December 20, 1918, 178 Pac. 531; Mullia v. Ye Planry Building Co., 32 Cal.

App. 6, 161 Pac. 1008; *Mauchle v. Panama Int. Exp. Co.*, 174 Pac. 400.

The very recent case of *Brown v. Chevrolet Motor Co. of Cal.*, 179 Pac. 697, in an essential respect is like this case. There a traveling salesman employed by the defendant borrowed its automobile for a pleasure excursion, and while so using it injured the plaintiff. There, as here, the plaintiff contended that he had made out a prima facie case when he had shown that the automobile belonged to the defendant, and that it was the province of the jury to weigh any evidence in conflict therewith; but the court held that a nonsuit had been properly granted, and, quoting from the case of *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, said:

"The presumption growing out of a prima facie case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely upon it."

In the last analysis respondent's position is in effect that, granting the evidence introduced by appellant rebutting the presumption relied upon is convincing and uncontradicted, it merely creates a conflict in the evidence, and that a finding of the jury in accordance with the presumption is under those circumstances supported thereby. This, we think, is not the law.

The judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. [1-3] In denying the petition for hearing in this court after decision by the District Court of Appeal of the First appellate district, division 1, we desire to point out that respondent's prima facie case was based solely on an "inference," and not on any "presumption" declared by law. When we say that "a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts. Section 1958, Code Civ. Proc. In this case the direct uncontradicted evidence introduced in response to the prima facie case as to the circumstances under which the employé of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference, based solely on the fact of appellant's ownership of the automobile, and the further fact that the person driving was an employé of appellant, that the driver was acting within the scope of his employment at the time of the accident. The verdict therefore was contrary to the evidence, and this is all we understand the opin-

ion of the District Court of Appeal to decide.

The application for a hearing in this court is denied.

All concur.

DOUGHTY v. MOORS. (Civ. 2793.)

(District Court of Appeal, First District, Division 2, California. June 19, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

BANKRUPTCY — 186(1) — CORPORATE ASSETS — RECOVERY.

A purchaser of corporate property within four months prior to adjudication in bankruptcy who complied with a request of the seller's president and general manager by applying a portion of the purchase price toward discharging personal debts incurred for the corporation's benefit cannot be required to make such payments a second time to the corporation's trustee in bankruptcy.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by E. W. Doughty, as trustee in bankruptcy of the Electric & Garage Company, against Frank Moors. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 175 Pac. 278, 275.

Wallace Rutherford, E. L. Webber, U'Ren & Beard, and U'Ren, Beard & Linn, all of Napa, for appellant.

G. Clark, of San Francisco, for respondent.

HAVEN, J. Plaintiff is the trustee in bankruptcy of the Electric & Garage Company, a corporation. As such trustee he brought this suit to recover from the defendant an alleged balance of the purchase price of certain real property, improvements thereon, and equipment of a garage business, agreed to be purchased by the defendant from said corporation within four months prior to its adjudication in bankruptcy. The judgment was for the defendant, from which plaintiff appeals. It is alleged in the complaint that the defendant agreed to buy the real and personal property above referred to for the sum of \$9,192.93, of which the sum of \$5,500 had not been paid, and for which latter sum plaintiff prayed judgment. The court found that, with the exception of the formal denials of the corporate character and bankruptcy of the corporation, and the appointment of plaintiff as trustee, all the allegations of defendant's answer were true, and all denials therein contained were true denials. Among these are allegations that the consideration for the agreement of purchase, referred to in plaintiff's complaint, was not the payment of \$9,192.93 in cash, as alleged by plaintiff, but was an assumption by

the defendant of an indebtedness against the real property purchased in the sum of \$3,600, an agreement by the defendant to pay \$2,000 in cash, a further agreement by defendant to release one Armstrong from an obligation to said defendant in the sum of \$2,000, and a still further agreement by the defendant whereby he guaranteed payment of a promissory note in the sum of \$1,500, which had theretofore been executed by C. W. Crouch and J. R. Clark. The said C. W. Crouch was the president and general manager of the corporation whose property was purchased by the defendant, and was also the owner of all its capital stock, with the exception of one share. The dealings of the defendant were all had with said Crouch as such president and general manager. The answer further alleges that the defendant paid to the corporation all sums of money agreed by him to be paid and fully performed all of the undertakings which he agreed to perform in consideration of the transfer by said corporation to him. The finding of the trial court that these allegations are true is supported by sufficient evidence.

Appellant concedes that there is no material dispute as to the facts of the case, but insists that, inasmuch as the defendant testified that he was purchasing the property from the corporation, it was his duty to make payment to that corporation, and that payments made by him on personal obligations of the officers of the corporation cannot be credited on account of the purchase price. It is not alleged that the defendant knew at the time of his purchase, that the corporation was insolvent. Waiving the question as to the right of a purchaser from a corporation, without knowledge of its insolvency, to apply the agreed purchase price in accordance with the terms of a contract made with its president and general manager, it appears from the testimony that both of the payments to which objection is made by appellant were made in discharge of debts of the president and manager, Crouch, and covered moneys borrowed by him for the use of the corporation. Under such circumstances, it would indeed be a harsh rule which would compel the purchaser of corporate property to make a second payment to the trustee of a bankrupt corporation, for the reason that in making his first payment he had complied with the request of the president and general manager, and applied a portion of the purchase price to the discharge of personal debts incurred for the benefit of the corporation. The fact that one of the amounts of the indebtedness so discharged was a note payable to the defendant himself does not make him liable a second time to the plaintiff in this action.

The complaint contains no charge of fraud, and does not attempt to rescind the contract

of sale. On the contrary, the demand of plaintiff for the payment of an alleged balance of the purchase price is an express affirmation of the contract. The finding of the trial court is specific to the effect that defendant has fully performed all obligations resting upon him under the contract as made. This finding is not assailed, and cannot be under the evidence. Having once performed, defendant cannot be held liable a second time to a trustee in bankruptcy who does not seek to set aside the contract.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITAIN, J.

CHARLES BOLDT CO. v. JULIUS LEVIN CO., Inc. (Civ. 2685.)

(District Court of Appeal, First District, Division 2, California. June 19, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. SALES ⇐81(5) — CONTRACT — IMPLICATION AS TO TIME.

Where a contract of sale merely provided that deliveries were to be taken before September 1st, in the absence of statement as to when the orders for and specifications of the goods should be given, the law will presume they were intended to be given within a reasonable time before the date fixed for delivery, especially under Civ. Code, §§ 1655, 1657, providing stipulations necessary to make a contract reasonable or conformable to usage are implied, and that if no time is specified for performance of an act required, reasonable time is allowed.

2. SALES ⇐88 — ACTION FOR PRICE — QUESTION FOR COURT.

In action to recover for goods sold and delivered to defendant, it was the duty of the trial court to find what was a reasonable time for defendant to give orders for and specifications of the goods before the date fixed by the contract for delivery; the contract having been silent as to when the orders should be given.

3. SALES ⇐87(2) — ACTION FOR PRICE — EVIDENCE.

In an action for goods sold and delivered, evidence of the usual time required and allowed for the filling of orders given plaintiff by defendant, and of the previous dealings of the parties with respect to the time allowed for the filling of orders, and of similar matters, held relevant on the issue of what was a reasonable time for the giving of orders and specifications before the time for delivery fixed by the contract.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by the Charles Boldt Company against the Julius Levin Company, Incorporated. From judgment for plaintiff, defendant appeals. Affirmed.

L. H. Brownstone, of San Francisco, for appellant.

Gavin McNab and Nat Schmulowitz, both of San Francisco, for respondent.

LANGDON, P. J. This is an action to recover \$778.76 for goods sold and delivered to the defendant. The defendant answered, admitting this amount due, and set up a counterclaim and cross-complaint against plaintiff, alleging damages for breach of contract. The trial court held that the defendant was not entitled to damages against the plaintiff upon its cross-complaint, and gave judgment for plaintiff for the full amount of its claim. Defendant appeals from this judgment and the question presented to this court is in regard to the cause of action set up in the cross-complaint. This arose out of a contract for the sale and delivery to the cross-complainant of certain "skeletons" for bottling whisky, consisting of boxes, bottles, cartons, etc. The contract is evidenced by certain letters and telegrams introduced in evidence. It calls for 15,000 cases at specified prices, delivery of the entire number to be taken by September 1, 1917. The cases were to be marked in a certain way as per directions from the cross-complainant, who was also to have the privilege of specifying sizes, the contract providing different prices for different sizes. Up to August 27, 1917, about 7,000 "skeletons" had been delivered. On that date, defendant telegraphed plaintiff, asking for an extension of 90 days within which to take delivery. This was refused by telegram, and on August 28th, defendant telegraphed for the balance of the cases called for by the contract, specifying sizes, etc., and saying that it would specify distillery markings in a day or so. On August 29th, the cross-defendant telegraphed, refusing to deliver because the order came too late to allow of delivery before September 1st. On August 31st, the cross-complainant telegraphed the cross-defendant, giving the balance of the directions necessary to fill the order and demanding delivery. This was a night letter, and arrived September 1st.

[1-3] The contract between the parties, as evidenced by the letters and telegrams, is silent as to when the orders for the "skeletons" were to be sent to the cross-defendant. The contract merely provides that deliveries are to be taken before September 1st. In the absence of any statement in the contract as to when the orders should be given, we think the law will presume that they were intended to be given within a reasonable time before the date fixed for delivery. Especially is this true, under Civil Code,

§§ 1655, 1657. Section 1655 provides that stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention. Section 1657 provides that if no time is specified for the performance of an act required to be performed, a reasonable time is allowed. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. It was the duty of the trial court to find what was a reasonable time under all the circumstances. Evidence of the usual time required and allowed for the filling of such orders, of the previous dealings of the parties with respect to the time allowed, and similar matters, to which the cross-complainant objects, seems to us relevant upon this issue of what was a reasonable time; and such evidence is sufficient to justify the finding made by the court that "no additional skeleton cases were requested for delivery of and from plaintiff and cross-defendant by the defendant and cross-complainant reasonably in advance of and prior to the 1st day of September, 1917."

We think the evidence objected to was properly admitted. The judgment is affirmed.

We concur: BRITAIN, J.; HAVEN, J.

HARMON v. KEOGH et al. (Civ. 2697.)

(District Court of Appeal, First District, Division 1, California. June 27, 1919.)

1. APPEAL AND ERROR §768—ADMISSIONS IN BRIEF—EFFECT.

Where appellants' brief conceded the complaint in a claim and delivery case, sustained the judgment if there was sufficient evidence of plaintiff's right of possession, any error the trial court made, in a finding without evidence to sustain it, that defendants had taken the property from plaintiff's possession without his consent, is cured.

2. REPLEVIN §72—RIGHT TO POSSESSION—SUFFICIENCY OF EVIDENCE.

In a claim and delivery case, evidence that plaintiff paid defendant for certain number of mules, but that defendant delivered three less than stipulated number, *held* to sustain trial court's finding that plaintiff was entitled to possession of the three animals in question.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. D. Harmon against John Keogh and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. S. Van Meter and O. K. Bonestell, both of Fresno, for appellants.

Harris & Hayhurst, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action brought in claim and delivery to recover three mules. The complaint alleged that on or about November 22, 1917, the defendants, without the consent of plaintiff, took said mules from his possession, and have ever since retained possession of them. It also alleged that the plaintiff at the time of the commencement of said action was the owner and entitled to the possession of the mules in question, and that he had demanded their delivery prior to the institution of the action. The court found these allegations of the complaint to be true, and gave judgment accordingly in plaintiff's favor for the possession of the animals.

[1, 2] The only contention of the defendants upon appeal is that the evidence does not sustain the findings and judgment of the trial court.

There is no merit in this contention. The facts of the case, as testified to by the plaintiff and his witnesses, and which the court believed and based its findings upon, were these: On November 20, 1917, the plaintiff, who was engaged in purchasing mules for the purpose of selling them to the United States government, went with one Veach, who was a salaried employé of the government, to the defendant's ranch, located about 20 miles from Fresno, and there arranged to buy 24 head of mules, 19 of which were at the time being used in plowing the fields of the defendants, the rest of them being elsewhere about their premises. Plaintiff and Veach inspected all of these mules but one, which was described to them, and offered to buy the lot at \$150 per head, which offer being accepted, the plaintiff paid a deposit of \$1,000 upon the purchase price, and it was agreed that the mules should be delivered to him at the Southern Pacific stockyards in Fresno a few days later. Upon the date of delivery, the plaintiff went with Veach to the stockyards, and, according to their testimony, they there found 20 of the mules they had theretofore seen, together with 4 other mules which had been substituted for 4 of the best of those inspected and purchased. The evidence shows that this substitution was deliberately made by the defendants, and that their conduct in that behalf was reprehensible. The plaintiff rejected the four substituted animals, and with reference to them had a separate transaction with the defendants, by which he agreed to buy two of the latter mules for \$75 each, and one of them for \$2. He gave the defendants the \$2 in cash and a check for \$2,300, and then received 18 of the mules he had originally bought, returning the rejected animals.

It would thus appear that he paid the defendants upon the original transaction \$3,150, which would have entitled him to 21

mules at the price of \$150 each. Having received but 18 of these, he thus became entitled to the other three, which, the evidence showed, were at the time upon the defendants' ranch, where, prior to the institution of this action, the plaintiff made his demand for said three mules, which are the subject of this action.

From this statement of the facts of the case it would seem that the averments of the plaintiff's complaint to the effect that the defendants had, without the consent of the plaintiff, taken said mules from his possession, and also the finding based upon said averment, do not find support in the evidence in the case. The defendants, however, expressly concede in their brief that "the complaint contains sufficient, in addition to these useless allegations, to sustain a judgment if there was sufficient evidence of right of possession at the time the case was commenced." By this admission whatever error the court may have made in the finding above referred to is cured; and the evidence otherwise is amply sufficient to sustain the averment of the complaint and the finding of the court that at the time of the institution of this action plaintiff was entitled to the possession of the animals in question.

The judgment is affirmed.

We concur: WASTE, P. J.; NOURSE, Judge pro tem.

ARENDRT v. McCONNELL. (Civ. 2740.)

(District Court of Appeal, First District, Division 2, California. June 10, 1919. Rehearing Denied by Supreme Court Aug. 7, 1919.)

1. EXCHANGE OF PROPERTY §3(1)—FALSE REPRESENTATIONS.

One cannot have a contract for exchange of land for corporate stock annulled on the ground that the other party made false representations, where such representations were not relied on.

2. VENDOR AND PURCHASER §15 — CONSIDERATION.

One who exchanged land for corporate stock cannot maintain that there was no consideration in that the stock was worthless, where the defendant paid \$1,500 in cash and assumed a certain indebtedness on the land conveyed, although the cash was paid to the former's agent and was retained by him as his commission in negotiating the exchange.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by M. Arendt against Emmett W. McConnell. Judgment for defendant, and plaintiff appeals. Affirmed.

Hugo D. Newhouse, of San Francisco, and Milton Shephardson, of Oakland, for appellant.

Wise & O'Connor, of San Francisco, for respondent.

HAVEN, J. This action was brought for the purpose of obtaining a decree annulling an agreement of exchange between plaintiff and defendant. Plaintiff and one Edward A. Lesser were the owners in common of a certain tract of land in the county of Tulare. They jointly agreed with the defendant, McConnell, to exchange the above referred to tract of land for 3,250 shares each of the preferred and common capital stock of the Consolidated Concessions Company, and certain other considerations hereinafter referred to. The agreement was consummated by the execution and delivery to McConnell of a deed of the real property and the delivery by McConnell to the plaintiff and Lesser of certificates for the required number of shares of the capital stock of the corporation referred to. Plaintiff alleged in his complaint that the defendant made certain false representations to him with regard to the value of said stock and the assets and indebtedness of the corporation which had issued such stock; that plaintiff believed said statements were true, and relied upon them, and by reason thereof was induced to enter into the agreement of exchange; that he later discovered that the assets and affairs of the corporation were not as represented by the defendant; that defendant knew the said representations were false, and that if plaintiff had known the same, he would not have entered into the agreement of exchange; that upon the discovery of the falsity of said statements plaintiff rescinded the agreement, and so notified the defendant, and then and there tendered and offered to return to the defendant the 1,625 shares of the corporate stock which he had received as his portion of the consideration exchanged for the deed of the land; that the said shares of stock constituted everything of value which he had received in the exchange; that the defendant had refused to comply with plaintiff's demand for rescission; and that the title of the real property still stood in the name of defendant. The prayer was for a decree canceling, annulling, and setting aside the agreement of exchange, requiring defendant to account for the rents, issues, and profits of the real property, and further requiring him to execute and deliver to plaintiff a deed for his undivided interest in the real property, and for the recovery of damages. The findings of the trial court were all in favor of the defendant, and expressly negated the making of any false or fraudulent representations by him, or the reliance by plaintiff on any such representations.

[1] Appellant concedes that these findings

cannot be disturbed, in so far as they are based upon conflicting evidence, but claims that there is no evidence to support at least one of the findings. As a part of a long recital of representations which were found not to have been made by defendant, it is found that the defendant did not state or represent:

"That said corporation owned shares of the capital stock of other corporations which owned or had or would conduct concessions at the Panama Pacific International Exposition to be held in the city and county of San Francisco, state of California, in the year 1915."

The contention of appellant that the above portion of the finding is contrary to the evidence is well founded, as it was proved without conflict that such representation was made by the defendant. It was necessary, however, for the plaintiff to show, not only that said representation was made, but that the same was false, and that plaintiff relied thereon. With regard to the latter matter, the court found:

"That plaintiff did not rely on any representations made to him by defendant nor was he induced thereby to enter into the exchange of property above referred to."

This finding was supported by the evidence, and is not attacked by appellant. As reliance by plaintiff upon the representations alleged to have been made by defendant was a necessary part of his cause of action, proof that certain admitted representations were made, and that the same were false or fraudulent, would not have entitled plaintiff to a judgment, in view of the above finding that he did not rely upon such representations.

Appellant contends that the evidence in the record shows that the Consolidated Concessions Company did not own the shares of capital stock of the other corporations referred to in the findings, for the reason that the transaction under which said shares were purported to have been acquired by that corporation was fraudulent and void. It is also urged that the illegality and fraudulent character of this transaction would have been more clearly established if certain additional evidence offered by the plaintiff and erroneously excluded by the trial court had been admitted. Discussion of these contentions is unnecessary, for the reason that, if all that is contended for by appellant with regard thereto be conceded, his cause of action still falls on account of the above referred to finding as to lack of reliance by him upon any of the representations made.

[2] It is further contended that it is shown without conflict that the stock of the Consolidated Concessions Company never had any value, and that therefore there was no consideration for the agreement of exchange, for which reason it may be canceled without regard to a rescission on the part of plaintiff.

The evidence disclosed that, in addition to the corporate stock delivered by defendant to plaintiff and his co-owner, the sum of \$1,500 was paid by defendant to Mr. Lesser, the co-owner of plaintiff, who acted as plaintiff's agent throughout the transaction. This sum was retained by Lesser and claimed by him as a commission for negotiating the exchange, but it was, nevertheless, paid by the defendant as a part of the consideration moving from him for the single agreement here sought to be set aside. It also appeared that as further consideration the defendant assumed certain indebtedness upon the real property conveyed to him by plaintiff and his co-owner, and agreed to hold them harmless from such indebtedness. Under these circumstances, it cannot be said that there was a failure of consideration for the contract of exchange.

The judgment is affirmed.

We concur: LANGDON, P. J.; KERRIGAN, J.

ROOS v. LOESER. (Civ. 2633.)

(District Court of Appeal, First District, Division 1, California. June 27, 1919. Rehearing Denied July 26, 1919; Denied by Supreme Court Aug. 25, 1919.)

1. ANIMALS ⇐2—DOGS—PROPERTY RIGHTS.

Dogs constitute property of their owners, and are recognized as having pecuniary value, depending on their market value, or some special or pecuniary value to their owners, to be ascertained by reference to their usefulness or other qualities.

2. ANIMALS ⇐81—VICIOUS DOGS—LIABILITY OF OWNER.

The owner of a dog is liable for injuries caused by it only if it is vicious and he has notice thereof.

3. ANIMALS ⇐82—VICIOUS DOG—SERVANT'S KNOWLEDGE.

Knowledge by servant in charge of master's dog of its vicious character will be imputed to the master.

4. ANIMALS ⇐81—KILLING OF UNLICENSED DOG.

That a dog on the street killed by another vicious dog is not licensed, as required by ordinance, does not prevent recovery for its death; absence of the license not contributing to the attack.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by E. L. Roos against Robert L. Loeser. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Affirmed.

Andrew Thorne, of San Francisco, for appellant.

Wise & O'Connor, of San Francisco, for respondent.

KERRIGAN, J. This is an action for damages alleged to have been sustained by plaintiff by reason of the killing of her dog, of the variety known as Pomeranian, by an Airedale belonging to the defendant. A jury trial was had, and judgment went for the plaintiff in the sum of \$500. Defendant made a motion for a new trial, which was denied, and he now appeals from the judgment.

The complaint alleges that on the 16th day of May, 1907, the plaintiff was the owner of a Pomeranian dog of the value of \$1,000; that the defendant was the owner of an Airedale, of vicious disposition and dangerous character, which on said date and for a long time prior thereto was evilly disposed towards other dogs, and was accustomed to attack them without provocation, all of which matters were well known to the defendant; that nevertheless, the defendant carelessly and negligently permitted said Airedale to go upon the public streets of San Francisco unleashed and free from restraint, and that on the day mentioned, without provocation, and while the plaintiff's dog was proceeding peaceably along the public street, said Airedale attacked it from behind, the attack resulting in breaking the neck of the Pomeranian, from which its death immediately ensued.

From the evidence it appears that on said day the Pomeranian, attended by two maids, was pursuing the even tenor of its way upon the street, "tarrying" now and then and occupied with matters entirely his own, when the Airedale, an arrogant bully, domineering and dogmatic, being beyond the reach of the sound of his master's voice and having evaded the vigilance of his keeper (for the maids and the man were vigilant), dashed upon the scene, and with destruction in his heart and mayhem in his teeth pounced upon the Pomeranian with the result already regretfully recorded; the plaintiff's dog had had its day. It crossed to that shore from which none, not even a good dog, ever returns.

[1] Leaving this painful subject and turning to the considerations elaborately discussed in the briefs of able counsel, we remark that there was a time in the history of the law when, as is said in one of the early cases, "dog law" was as hard to define as "dog Latin." As Blackstone puts it, dogs were the subject of property to a very limited and qualified degree; they had no intrinsic value, and were regarded as being kept only through the whim or caprice of their owner. They were not the subject of larceny. 2 Blackstone's Comm. 393. But that day has passed, and dogs now have a well-established

status before the law. Considerable sums of money are invested in dogs, and they are the subject of extensive trade. Aside from their pecuniary value their worth is recognized by writers and jurists. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society, and that a little reflection will convince one that barbarous nations owe much of their subsequently acquired civilization to the dog. From the building of the pyramids to the present day, from the frozen poles to the torrid zone, wherever man has wandered there has been his dog. In the case of *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423, he is eulogized in the following language:

"He is the friend and companion of his master, accompanying him on his walks; his servant, aiding him in his hunting; the playmate of his children, an inmate of his home, protecting it against all assailants."

In his well-known tribute to the dog United States Senator Vest characterizes him as "the one absolutely unselfish friend a man may have in this selfish world, the one that never deserts him, never fails him, the one that never proves ungrateful or treacherous." See, also, *Sabin v. Smith*, 26 Cal. App. 676, 679, 147 Pac. 1180.

The Pomeranian was small, weighing about 4½ pounds, but history discloses that the small dog, perhaps oftener than his bigger brother, has rendered modest but heroic service, and by his fidelity has influenced the course of history.

As already indicated, the law now recognizes that dogs have pecuniary value, and constitute property of their owners, as much so as horses and cattle or other domestic animals. *Ten Hopen v. Walker*, 96 Mich. 236, 55 N. W. 657, 35 Am. St. Rep. 598. It may be the market value, or some special or peculiar value to its owner to be ascertained by reference to its usefulness or other qualities. *Heilgmann v. Rose*, 81 Tex. 222, 16 S. W. 931, 13 L. R. A. 272, 26 Am. St. Rep. 804. Its amount is a question for the jury, after hearing evidence directed to those points. *Parker v. Mise*, 27 Ala. 480; 62 Am. Dec. 776. The plaintiff's dog was the proud possessor of the kennel name *Encliffe-Masterpiece*; his pedigree and reputation entitled him to be regarded in dog circles as possessing the bluest of blood; in short, in canine society he belonged to the inner circle of the 400. In West and East he had won the first prize in every bench show at which he had been exhibited. He was middle-aged and in good health. Experts testifying placed his monetary value at \$1,000.

[2, 3] The owner of a dog is not liable for the injuries caused by it unless it is vicious and the owner has notice of that fact. 3 Corp. Juris, p. 89, § 330. But we think the

evidence in this case shows, by inference at least, that while the defendant's dog was an estimable animal in many respects, he was, nevertheless, prone to attack without provocation other dogs irrespective of size, and that such an assault upon a dog of the weight and physical characteristics of that owned by the plaintiff was likely to prove harmful, if not fatal, to the object of the attack. As to the defendant's prior knowledge of the vicious propensities of his *Airedale*, while the evidence may not clearly show that he was personally aware of them, it sufficiently demonstrates that his employé, in charge of it at the time of the attack, and whose custom it was to exercise it on the public streets, knew of its dangerous character, which knowledge the law charges to the employer. The knowledge of a servant or agent of an animal's vicious propensity will be imputed to the master when such agent or servant has charge of or control over the animal. 3 Corp. Juris, p. 96, § 328.

[4] It is urged by the appellant that the court erred in refusing to instruct the jury, as requested, that the plaintiff was guilty of contributory negligence arising from the fact that her dog was upon the public streets without being licensed—unlike the defendant's *Airedale*, whose master had ornamented his favorite with a tag entitling him to roam the city's streets secure from interference by the poundkeeper or his myrmidons. The appellant's contention in this respect would be well grounded if the plaintiff's omission to comply with the ordinance requiring dogs to be licensed had contributed to the incident resulting in the Pomeranian's untimely end. But for aught that appears the absence of a tag from the collar of plaintiff's dog was unnoticed by the *Airedale*, and was not the matter that aroused his ire or induced him to make the attack. His was the canine point of view, and not that of the license collector. When the violation of an ordinance has no causal connection with the injury, as contributing thereto, the rule contended for by appellant has no application. This was held in the case of *Shimoda v. Bundy*, 24 Cal. App. 675, 142 Pac. 109, where, in its discussion of the subject, the court says:

"One who violates an ordinance wherein a penalty is fixed for noncompliance with its provisions, may be subjected to the penalties therein prescribed, but he cannot, in addition thereto, be deprived of his civil rights to recover damages, perhaps in many thousands of dollars, sustained by reason of the negligence or wrong of another, when such violation bore no relation to the injury, and did not contribute in the remotest degree thereto."

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

**FROST v. SUPERIOR COURT IN AND FOR
MODOC COUNTY et al. (Civ. 2019.)**

(District Court of Appeal, Third District, California. June 13, 1919.)

**1. CERTIORARI §16 — QUESTIONS REVIEW-
ABLE—FINAL DETERMINATION.**

Certiorari will not issue to review a proceeding by an inferior tribunal prior to court's final adjudication.

2. CONTEMPT §67—REVIEW—CERTIORARI.

Statutory contempt proceedings by superior court, under Code Civ. Proc. § 714 or 715, will not be reviewed by certiorari until a final order has been made, although the court may have made jurisdictional mistakes during the proceedings.

Application for writ of review by Herman Frost against the Superior Court in and for the County of Modoc and Clarence A. Raker, Judge of said court. Writ dismissed.

Milton S. Hamilton, of San Francisco, and Driver & Driver and Frank Tade, all of Sacramento, for petitioner.

J. E. White, of San Francisco, for respondents.

HART, J. In an action previously instituted by Sallie C. Turner against the petitioner and one Patrick L. Flanigan, a judgment for the sum of \$8,166.60 was entered by the clerk of the above-named respondent court against petitioner and said Flanigan on the 13th day of March, 1919. On the same day a writ of execution was issued in said action by the clerk of said court (respondent herein), directed to the sheriff of the city and county of San Francisco. Said writ was returned to said clerk partially satisfied, and on the 10th day of April, 1919, was filed by said clerk with the papers in said action. The petition here alleges that—

"On the 10th day of April, 1919, an oral application was made by said plaintiff (Sallie C. Turner) to said Hon. Clarence A. Raker, in his chambers and not while he was holding court, for an order directing said petitioner to appear before John McCallan, a notary public in and for the said city and county of San Francisco, as a referee, to answer on oath concerning his property; that said judge thereupon, in compliance with such application, made in said action the following order"

—and then follows the order made by the judge, commanding the petitioner to appear before the said John McCallan, notary public, a referee, etc., in room 1012, Mills building, San Francisco, on the 23d day of April, 1919, at 10 o'clock in the forenoon, to answer on oath concerning his property, etc.

It is made to appear that the said McCallan, as referee, made and signed a return to

the respondent superior court, setting forth the fact:

That the order above mentioned was served in due time on the petitioner by the sheriff of the city and county of San Francisco; that petitioner "did not appear before me at room 1012, Mills building, * * * on the 23d day of April, 1919, at the hour of 10 o'clock a. m., or at all; and I hereby recommend that the said Herman Frost be punished for contempt in failing to obey the said order, and that the court take such steps as may seem meet and proper in the premises to punish the said Herman Frost for his contempt of this referee and the order of the court."

Upon receiving and the filing of the said return or report of the said referee, the respondents, it is alleged, ordered the issuance of and the clerk of said court issued—

"a writ of attachment for contempt against your petitioner and directed to the sheriff of said county of Modoc; that the time for the return of said writ of attachment has by order of said superior court been continued to the 18th day of May, 1919, at the hour of 10 o'clock a. m."

The petition further alleges, and thus are stated two of the grounds upon which a writ of certiorari is herein prayed for to annul the proceedings thus far in the contempt matter inaugurated against the petitioner:

"That no affidavit or other verified application was presented to said judge or filed in said action as the basis for said order so issued by said judge in his chambers. That it was not made to appear to the said judge at the time of said application and at the time of the issuance of said order, or at all, that the petitioner was at that time a resident of the said city and county of San Francisco, or of any other county, * * * or had a place of business therein. That there is no paper or document filed in said action or with said court or in the office of the clerk thereof showing or tending to show the residence of your petitioner at the time said order was made, and that the only paper referring to said matter is the order set forth hereinabove."

It is further contended that it nowhere appears that the court ever made an order appointing the said McCallan a referee to take the testimony of the petitioner concerning his property; the only reference to a referee in said proceeding being in the order of the court requiring petitioner to appear before the said McCallan, "a referee by me appointed," etc. It is also maintained that the statute requires that the order compelling a judgment debtor to appear before a referee to answer on oath concerning his property shall be made in court as a court order and not in chambers by the judge, as was the fact in this case.

There was some discussion in the oral argument before the court of the question

whether the order requiring the petitioner to appear before the referee was the one authorized by section 715 or that authorized by section 714 of the Code of Civil Procedure; the respondent contending that the order was based on the last-named section and the petitioner contending that upon the provisions of the section first named the order was made. But a consideration of this as well as the other points made by the petitioner is, as we view the matter as it stands before us now, foreign to any requirement imposed upon us in the determination of what we conceive to be the controlling question submitted by this petition.

[1] Counsel for petitioner, in his brief, states that—

"Section 1068, Code Civ. Proc. subd. 4, provides that a petition for writ of review must show that there is a final determination or judgment the subject of the attack."

We have found no such provision in section 1068, nor, after some investigation, have we found such a provision in any other part of said Code, nor of any other of our Codes. But we think the rule as thus stated is the correct one, and that no review of a proceeding had by an inferior tribunal through the writ here asked for should be allowed unless in such a proceeding there has been a final adjudication or determination of the subject-matter thereof.

[2] The petitioner declares that the order requiring him to appear before the referee to answer on oath concerning his property is a final order, and that therefore the same is subject to review and annulment, if illegal, through the writ of certiorari. It is undoubtedly true that said order was in a sense, if not entirely, final. Its purpose merely was to direct the petitioner to appear before the referee for the purpose therein stated. It was final as to that matter because there was nothing further to be done in that particular. But the question which we are asked to review herein is whether or not the proceedings instituted against petitioner for contempt are legal, or within the jurisdiction of the respondent court to hear and determine, although therein there has been no final determination or adjudication. It is true that the order directing the petitioner to appear before the referee is the basis of said proceedings, but it does not constitute a final order in said proceedings. Of course, counsel will not attempt to dispute the proposition that, whether the proceedings in contempt were inaugurated under the provisions of section 714 or those of section 715 of the Code of Civil Procedure, the superior court nevertheless has jurisdiction to hear and determine such proceedings. Both sections expressly invest superior courts with such jurisdiction. It follows that those courts, on all proper occasions, are to be

permitted without interruption to exercise such jurisdiction until their judgments, following from the employment of the power given them by the statute in that respect, have become final. In other words, error may be committed in the steps essential to the starting in operation of the jurisdiction vested by law in superior courts of certain proceedings, yet, notwithstanding that error, such court must be permitted to proceed to a final determination of the matter, and then, if it should appear that the court has not correctly followed the course marked out by the statute to put in motion its jurisdiction, and it appears that there is no adequate remedy at law, the party suffering from the final adjudication may have the proceeding reviewed through a writ of certiorari. It certainly cannot be held to be the law that the proceeding before a court may be arrested at any particular time in the progress thereof to determine whether the court has committed error either in the matter of putting its jurisdiction in motion or in ruling upon some proposition arising during the course of the hearing of the proceeding.

Counsel for the petitioner, however, maintains that the proceeding authorized by either section 714 or 715 of the Code of Civil Procedure is special, and that therefore every step necessary to its consummation is jurisdictional. He argues from this premise that if the court omits to observe any of the essential facts necessary to start its jurisdiction in motion the proceeding may be stopped and the error reviewed through the writ prayed for here. Of course, the statute must be followed with substantial strictness, but the same is true of statutes authorizing other proceedings in the superior court. Indeed, the same argument may be advanced as to a proceeding in eminent domain. That is a special proceeding, and the action authorized for the purpose of the exercise of the right of eminent domain is distinctly different in many respects from that of the ordinary action at law or in equity. Would counsel contend that, notwithstanding that the statute specially invests superior courts with jurisdiction to hear and determine eminent domain proceedings, a writ of review would be available to determine whether the complaint in such an action stated a good cause of action or was sufficient in the statement of facts to put the court's jurisdiction of such a proceeding in motion? We think that no such contention would be made. The contention of counsel for the petitioner in this case, however, in substantial effect, involves the same proposition.

We think that the petition here is premature; that if the objections to the proceedings thus far had in the contempt matter against the petitioner are in any sense legally valid the same may be urged before the superior court having jurisdiction of the pro-

ceeding; and that the writ here should therefore be dismissed. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

**CRENSHAW BROS. & SAFFOLD v.
SOUTHERN PAC. CO. (Civ. 1950.)***

(District Court of Appeal, Third District, California. July 1, 1919.)

1. APPEAL AND ERROR ⇨1221, 1222—AMENDMENT OF REMITTITUR.

After regular issuance of remittitur by the appellate court which has modified a judgment for plaintiffs and reduced their recovery, such remittitur having gone down, the appellate court cannot amend it and correct the judgment, having lost jurisdiction of the cause except in case of mistake, fraud, or imposition.

2. APPEAL AND ERROR ⇨1218—AMENDMENT OF REMITTITUR — MISAPPREHENSION OF COUNSEL.

A misapprehension of counsel as to the effect of the judgment of the appellate court modifying the judgment of the trial court for plaintiffs by reducing the recovery furnishes no ground for recalling the remittitur after it has gone down and for setting aside the judgment and amending it in any particular.

3. APPEAL AND ERROR ⇨1221—RELIEF FROM JUDGMENT—LOSS OF JURISDICTION.

The wide discretion of the appellate court, under Code Civ. Proc. § 473, to relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or inexcusable neglect, cannot be exercised where the court has lost jurisdiction, as by the going down of its remittitur.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Crenshaw Bros. & Saffold, a partnership consisting of John A. Crenshaw and others, against the Southern Pacific Company. From judgment for plaintiffs, defendant appealed; the appellate court modifying judgment by reducing the amount of recovery (181 Pac. 252). On application for order recalling remittitur and to correct the judgment. Application denied.

Arthur L. Levinsky, of Stockton, for appellant.

L. T. Hatfield, of Sacramento, for respondents.

CHIPMAN, P. J. This is an application for an order recalling the remittitur, and also to correct the judgment of this court in the action made on the 8th day of April, 1919. The judgment of the lower court from

which the appeal was taken was for the principal sum of \$3,163.50, with interest thereon at the rate of 7 per cent. per annum, as follows: —. In reviewing the case, this court reached the conclusion that the amount of recovery should be the sum of \$1,528.06, with interest thereon at the rate of 7 per cent. per annum, as follows: —, thus modifying the judgment and reducing the principal in the sum of \$1,635.44. The plaintiff in the action petitioned the Supreme Court for a hearing in that court, which was on June 5, 1919, denied. No petition for rehearing in this court was filed, and no motion made to correct the judgment of this court, either as to the amount found to be due plaintiff from defendant or as to the matter of costs on the appeal. The matter stood thus until June 18, 1919, when the present application was filed.

It appears from the application that after the remittitur was received and filed by the clerk of the lower court appellant served its cost bill upon respondents' attorney, who thereupon came to this court for the relief asked.

Section 1027, Code of Civil Procedure, provides as follows:

"The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. * * *

Rule 23 provides (176 Pac. xl) that:

"In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal. In all cases in which the judgment or order appealed from is affirmed, the clerk will enter upon the record, and insert in the remittitur, a judgment that the respondent recover the costs of appeal."

The clerk of this court acted in obedience to this rule in issuing the remittitur, and the rule itself is authorized by the statute. The Supreme Court, in *Granger v. Sheriff*, 140 Cal. 190, 195, 73 Pac. 816, 818, said:

"Under the Constitution, by the lapse of time and the issuance of the remittitur, the judgment has become a finality beyond the power of the court to modify or amend' (*Martin v. Wagner*, 124 Cal. 204 [56 Pac. 1023]), and the jurisdiction of the Supreme Court ends (*Herrlich v. McDonald*, 83 Cal. 505 [23 Pac. 710]. In *re Levinson*, 108 Cal. 450 [41 Pac. 483, 42 Pac. 479]). When the remittitur is filed with the clerk 'with whom the judgment roll is filed,' the jurisdiction of the superior court attaches."

In the case *In re Levinson*, supra, a motion was made to recall the remittitur for the purpose of securing a modification of the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
*Certiorari denied 250 U. S. —, 40 Sup. Ct. 14, 64 L. Ed. —.

direction made therein for the payment of the costs of the appeal. The court said (108 Cal. 459, 42 Pac. 479):

"Without reference to the merits of the motion, it comes too late. The remittitur was regularly issued on September 6, 1895, and this motion was not noticed until October 18th following. If respondent desires a modification of the judgment in any respect, the proper application should have been made before the going down of the remittitur. *Gray v. Palmer*, 11 Cal. 341. When the remittitur has been duly and regularly issued, without inadvertence, we have no power to recall it. This court thereupon loses jurisdiction of the cause, except in a case of mistake, or fraud, or imposition practiced upon the court, neither of which elements appear in this case. *People v. Sprague*, 57 Cal. 147; *Rowland v. Kreyenhagen*, 24 Cal. 52."

See *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008.

In *Martin v. Wagner*, 124 Cal. 204, 56 Pac. 1023, cited in *Granger v. Sheriff*, *supra*, the court said:

"Where fraud or imposition has been practiced upon this court in procuring its judgment, the remittitur will be recalled, and jurisdiction will be reasserted upon the ground that the judgment so procured is a nullity. But in this case no charge of fraud is made. In its legal aspect it stands in no different position from that of any other case in which an erroneous decision may chance to have been made by this court. Under the Constitution, by the lapse of time and the issuance of the remittitur, the judgment has become a finality, beyond the power of this court to modify or amend."

[1, 2] Obviously we cannot amend the remittitur should we recall it without first amending the judgment, and, as we have seen, this we cannot do. It is not claimed that there was fraud, or that the court was imposed upon, or that, by its judgment, it inadvertently failed to state which party should pay the costs of the appeal. The mistake alleged was on the part of counsel for respondent, as counsel stated, in assuming that the judgment reading, "and, as thus modified, the judgment is affirmed," meant that the judgment of the superior court was "affirmed in every particular, except the amount recovered thereunder." The misapprehension of counsel as to the effect of the judgment furnishes no ground for recalling the remittitur and setting aside the judgment and amending it in any particular. As we understand the decisions in the cases cited, we must hold that this court, under the circumstances shown, is without jurisdiction to afford the relief prayed for.

[3] Section 473 of the Code of Civil Procedure gives the court wide discretion to "relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." But

this discretion cannot be exercised in a case where the court has lost its jurisdiction.

The application is denied.

We concur: BURNETT, J.; HART, J.

PEOPLE v. PATTERSON. (Cr. 475.)

(District Court of Appeal, Third District, California. June 30, 1919.)

1. CRIMINAL LAW §1036(1)—APPEAL—OBJECTION TO EVIDENCE.

The introduction of evidence received without objection in a criminal case cannot be urged as error upon appeal.

2. FALSE PRETENSES §49(1) — DRAWING CHECK WITHOUT FUNDS — CORPORATE EXISTENCE OF BANK.

In a prosecution for drawing a check upon a banking corporation in which accused had insufficient funds, it is sufficient to prove the de facto existence of the banking corporation.

3. CRIMINAL LAW §400(6) — PAROL EVIDENCE—CORPORATE CHARACTER.

In a prosecution for drawing a check upon a banking corporation in which accused had insufficient funds, the bank's corporate character may be proved by parol.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

B. O. Patterson was convicted of drawing a check upon a bank in which he had insufficient funds, and he appeals. Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was charged by information with the crime of uttering and delivering a certain bank check for \$15 to one George Carlton; it being alleged that the check was drawn November 11, 1918, upon the California National Bank of Sacramento, a banking corporation existing under the laws of the United States, and that at the time of the uttering of said check defendant had neither funds nor credit in said bank.

[1-3] No attack is made upon the information, the instructions, or any of the rulings of the court. The only contention is that the evidence is insufficient to support the verdict in two particulars; that is, as to the bank being a corporation, and that defendant had insufficient funds in the bank at or about the time the check was uttered and presented for payment. Appellant is, however, totally in error in this contention, as will be seen from the following quotation from the testimony of Charles S. King, the assistant cashier of the California National Bank of Sacramento:

"Q. The California National Bank of Sacramento is a corporation organized and existing under the laws of the United States? A. Yes, sir. Q. And it has its principal place of business in the City of Sacramento, state of California? A. Yes, sir."

After stating how long he had been assistant cashier of said institution and that an account was opened with B. C. Patterson on October 16, 1918, with a deposit of \$20 to his credit, and that the largest balance he had to his credit during November and December, 1918, was \$3, he further testified that at no time during the said month of November did the defendant have any arrangements with the bank for credit.

But appellant contends that said evidence was incompetent, especially as to the incorporation of the bank; the claim being that the articles of incorporation should have been introduced. As to this, it may be said in the first place that no objection was made to the introduction of the evidence, and it is now too late to urge the point. Again, in such cases it is sufficient to prove the de facto existence of the corporation, and its corporate character may also be proved by parol.

In *People v. Barric*, 49 Cal. 342, the defendant was convicted of stealing certain property of a corporation, and the Supreme Court said:

"The prosecution proved by the witness Rondel that the company known by the name given in the indictment was a corporation de facto, doing business as such. This was sufficient. *People v. Frank*, 28 Cal. 507; *People v. Hughes*, 29 Cal. 257; *People v. Ah Sam*, 41 Cal. 645."

In the *Ah Sam* Case it was held that proof of the bank being a corporation may be made by "general reputation" and by showing that the bank was known and acted as an incorporated company, and as such issued bank bills. There are many cases to the same effect, but we need cite no further. Indeed, there seems to be no merit in the appeal. The evidence is abundantly sufficient to support the verdict and the defendant had a fair and impartial trial.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

STOUFFER v. EYMANN et al. (Civ. 2028.)
(District Court of Appeal, Second District, Division 1, California. June 12, 1919.)

1. BROKERS \Leftrightarrow 38(3) — LAND EXCHANGE TRANSACTION — MISREPRESENTATION — OWNERS' RIGHT TO DAMAGES.

Owners cannot recover from their broker who effected real estate exchange transaction,

damages for misrepresentation of value of property received by them in exchange, without alleging and proving that such property was of a less market value than their own land.

2. BROKERS \Leftrightarrow 82(2) — LAND EXCHANGE TRANSACTION — MISREPRESENTATION BY BROKER — PLEADING.

In land broker's action on commission notes, in which owners seek to avoid liability and counterclaim for damages upon ground of broker's misrepresentation as to value of property received in exchange, *held*, that answer failed to plead that property received in exchange was not worth as much as property transferred in return therefor.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by H. A. Stouffer against Dorothea H. Eymann and another. From judgment for plaintiff and an order denying motion for new trial, defendants appeal. Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Minor Moore, of Los Angeles, for respondent.

JAMES, J. Appeal by defendants from a judgment in favor of plaintiff and from an order denying defendants' motion for a new trial.

[1] The complaint stated in the ordinary form causes of action upon two promissory notes admitted to have been executed by the defendants and made in favor of the plaintiff. The notes were given as the result of an agreement made between plaintiff and defendants; the amount represented thereby being for commissions to be paid to the plaintiff by defendants in consideration of services rendered. Plaintiff was a real estate broker and was instrumental in effecting an exchange of certain property of the defendants in the county of Riverside, Cal., for real property in the state of Colorado. Defendants in their answer sought to avoid liability on the notes by setting up the defense that their agent had been guilty of fraud in that he had misrepresented the value of the Colorado property which was received by them in exchange for the California real estate. It should be remembered, then, that this is not an action against the other party to the exchange for falsely representing the value of his property, but is an action based solely upon an alleged breach of confidence committed by an agent toward his principals. In such a case it was incumbent upon the complaining principals to allege and prove that the property received by them in exchange for their own land was of a less market value than was the latter property; in other words, if the

Colorado property was worth as much in the market at the time of the alleged transaction as the Riverside property, no damage would be shown, regardless of the fact that the Colorado property might have been represented to be of a value greatly in excess of its actual market worth. The trial judge, after permitting an amended answer to be filed, announced that he did not consider that this amended answer stated any defense to the causes of action pleaded by the plaintiff on the notes, but allowed the defendants to introduce evidence as to what representations were actually made by the plaintiff. This evidence having been introduced, the court denied the defendants the right to introduce other offered evidence not going to the point mentioned, and ordered judgment for the plaintiff. The evident conclusion of the trial judge was that the facts shown in evidence did not establish a case where the defendants either relied upon, or were warranted in relying upon, statements made by their agent, that the latter were, as to the question of the value of the Colorado property, mere opinions, and that the defendants, having pursued an inquiry independent of that in which the plaintiff took a part, showed that they did not rely upon his statements, and hence the injury, if any, could not be attributed to the plaintiff. Upon an examination of the evidence we are inclined to agree with the trial judge upon this proposition. However, whether that question was correctly resolved or not, we find exhibited in the record an insurmountable obstacle to the defense claimed on the part of the defendants.

[2] Nowhere in the answer is there any allegation showing what the market value of the Riverside property owned by the defendants was; hence it is not made to appear by that pleading but that the Colorado property was worth as much, if not more, than the equity owned by the defendants in the Riverside property; the latter property having been exchanged subject to a large incumbrance by way of trust deed. We find in paragraph 1 of the answer, this clause:

"That on said last-mentioned date said real property was of the reasonable exchange value of \$60,000, subject to a lien of deed of trust thereon for the principal sum of \$20,000.
* * *"

This allegation referred to the Riverside property. It contains no statement at all of what the market value of that property or the equity was. In an alleged counterclaim set up in the answer the defendants seek to recoup damages in the sum of \$35,663, which they allege as being "the difference between the value of said Colorado property as represented and the actual value of said property on or about the said 24th day of

January, 1914." In the preliminary paragraphs of the alleged counterclaim the allegations of the answer, including that which we have quoted, are made a part thereof by reference. It will be at once discerned that there is nothing in the counterclaim, added to the allegations of the main answer, which shows what the value of the Riverside equity was; and the allegation as to the amount of damages does not help the case of defendants any, for, as we have stated hereinabove, if the value of the Colorado property equaled the value of the Riverside property, no damage would be shown for which recovery could be had against the agent. In point generally on this proposition are the cases of *Baker v. Brown*, 82 Cal. 64, 22 Pac. 879; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; and *London, etc., Fire Ins. Co. v. Liebes*, 105 Cal. 203, 38 Pac. 691.

For the reasons given, we conclude that the appeal is without merit. At the time the order denying a new trial was made the law did not authorize an appeal to be taken therefrom. *Hirsch v. All Persons*, 173 Cal. 268, 159 Pac. 712. The questions sought to be raised thereby are all presented on the appeal from the judgment.

The appeal from the order denying defendants' motion for a new trial is dismissed. The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

DOI v. McMURRY. (Civ. 1880.)

(District Court of Appeal, Third District, California. June 10, 1919. Rehearing Denied by Supreme Court Aug. 7, 1919.)

LANDLORD AND TENANT §49(1) — CARE OF PREMISES—ELECTION OF REMEDIES.

A lease provision, authorizing lessor to employ men to properly care for the premises, etc., is for lessor's benefit, and does not prevent a damage recovery against lessee for failure to maintain premises, nor does the lessor's employment of men constitute an election of remedies precluding recovery of damages from lessee.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by M. Doi against J. B. McMurry. Judgment for defendant and plaintiff appeals. Affirmed.

Fred J. Harris, of Sacramento, for appellant.

Ben P. Tabor, of Auburn, for respondent.

CHIPMAN, P. J. Plaintiff leased from defendant a fruit orchard of about 20 acres for the term of three years from October 16, 1916, agreeing to pay as rental the an-

nual sum of \$1,000. The lease provided that "all of the fruit produced upon the premises hereby leased must be delivered to the Auburn Fruit Exchange in the name of the party of the first part (J. B. McMurry), all transactions, accounts, statements, account sales, and checks to be issued in the name of the party of the first part." The complaint alleged that the fruit crop of 1917 was so delivered, and the defendant received therefor the sum of \$4,493.36, that a portion of this was paid to plaintiff, but that the defendant withheld the sum of \$639.92, which, together with an unknown amount for rebate, is due the plaintiff. The prayer was for an accounting and a judgment for whatever amount was found due. The answer claimed that no amount was due plaintiff in consequence of certain services performed for him by defendant and his wife and by reason of damage done to the orchard through the want of proper care and attention on the part of plaintiff. Affirmative relief was, indeed, therein demanded, and the same matters were set up by way of cross-complaint, and therein it was sought to have the lease rescinded and defendant restored to the possession of the land, together with damages for said injury. However, it appeared at the trial that an agreement had been reached by the parties for the restoration of the premises, and that feature was consequently eliminated from the case. The court found that the value of the services performed for plaintiff as aforesaid and the amount of the damages suffered by defendant equaled the amount due plaintiff under said lease, and rendered judgment for defendant for costs. After an examination of the record, we may say that there is substantial support for the finding that said services were rendered as claimed and were of the value charged against the plaintiff. The doubtful proposition relates to the sum of \$481.59, which was allowed as an offset for injuries done to the premises. While the answer refers to several particulars in which plaintiff failed to comply with his agreement as to the care of the place, it is quite apparent that said award was made principally for his failure to thin the growing fruit, and thereby allowing many limbs to be broken and the trees greatly injured.

When the case was first before us we gained the impression, and so decided, that because the lease provided that the lessor had the right to employ one or more men properly to care for the premises (which we assumed included the right to thin the fruit) and charge the expense to the lessee, the lessor was "thereby charged with the ultimate responsibility for the proper thinning of the fruit." This view was somewhat contributed to by the fact that the lessor had caused some thinning to be done, and had done some other work in the orchard, and that he seemed to be aware of the necessity

for better thinning being done than the lessee was doing. Upon further reflection we think we were in error. This right of supervision to some extent and the right himself to assist in harvesting the crop or thinning the fruit was, we think, for the lessor's benefit, and was not intended to nor did it have the effect of relieving the lessee from the duty of performing his covenants, nor acquit him of liability for damages caused by his breach of the contract. While by an abandonment of the work by the lessee or by his doing the work in such a way as to cause great damage the lessor might for his protection have elected to do all the work, he was under no obligation to do so, and his failure to do it would not relieve the lessee from the performance of his contract obligations. Any other view would make it to the lessee's possible advantage to neglect his work, sit idly by while the lessor is performing the duties of the lessee, and at the same time claim the fruits of the lease, thus casting upon the lessor the entire burden of the lease.

Appellant thus states his position:

"We do not mean to contend that there is not available an election of remedies to the injured party in proper cases, but we do say that an election, once made, binds the person making it to the exclusion of all others. Particularly is this the case when the election is made in conformity to the written terms of the lease to which he is a party. And where a party has an election of two remedies, each being inconsistent with the other, the plaintiff may elect which he will pursue, but he cannot have both."

As we understand, appellant's application of this statement is this: That in assuming to do some of the work in the orchard which he deemed necessary for its protection against damage respondent made an election of remedies open to him, and thereby released appellant from all claims for damages caused by appellant's breach of his contract.

That we may have a clear view of appellant's position we quote further from his brief:

"By solemn agreement he (respondent) stipulated therein what the remedy for a breach of its terms would be. This remedy is exclusive of all others. If the premises were not being conducted according to the stipulations in the lease he was bound under it to take charge of the orchard, and if any damage resulted while he was in charge, the loss would be the result of his own negligence. If he elected not to take charge of the place, knowing that waste was being suffered or injury done thereto, then he waived his right and remedy under the lease, and cannot complain if he chose not to protect his interest."

The court found upon sufficient evidence, though not free from conflicting evidence, that the work done by respondent was at ap-

pellant's request and in the accounting respondent was given credit for it. The court also found, upon sufficient evidence, that, through the negligence of appellant to do certain work, which the contract provided he was to do, certain damages resulted to the trees. These damages arose partly from improper pruning, but chiefly from failure properly to thin the fruit, thus causing the limbs to break and to injure the trees and to diminish materially their productiveness. We do not think that because respondent, as he had the right to do, hired one or more boys for a short time to assist in thinning the fruit, he thereby elected to take the full responsibility of this branch of the work. He was all the time urging appellant to do this work, and at no time did he give appellant cause for assuming that he was relieved from his obligations in this regard.

In considering the evidence, conflicting as it was, as to the various matters the subject of the accounting, appellant's argument harks back to his construction of the lease, which we think is not warranted. We can discover no place for the application of the doctrine of election as was applied in *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435, and similar cases cited by appellant. In the *Holt Case* plaintiff made a conditional sale of a machine. The purchaser died, leaving the last payment unpaid. Plaintiff filed a claim against the estate for the amount, and it was allowed by the administrator and the court, and thereby became in effect a judgment. Plaintiff subsequently brought an action to recover the machine for breach of the contract of sale. Said the court:

"The so-called lease was in fact a conditional sale, under the terms of which the seller had either one of two remedies for the violation of the contract by the purchaser. It might, upon the default of the purchaser in meeting the stipulated payments, or any of them, have retaken the property or recovered its possession in an action of claim and delivery, or, on the other hand, treated the sale as an absolute one, and brought its action upon the notes to recover the contract price of the property sold. These remedies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both. *Parke v. White River Lumber Co.*, 101 Cal. 37 [35 Pac. 442] and cases there cited."

Obviously plaintiff could not have a judgment against the property of the deceased for

the amount due him and also have the machine. No such inconsistency of remedies as was present in that case exists here. Indeed, according to appellant's view, as we understand it, respondent had no choice in the matter. If he took charge of the orchard he thereby relieved appellant of responsibility, and if he failed to do so he thereby waived all right to damages. In point of fact he made no election.

The case is by no means complicated. The fruit grown by appellant was marketed as the lease provided, and certain of the proceeds paid over to appellant, respondent withholding his rentals, also the amount due for services rendered, and also an amount claimed as damages to the premises. The court, upon the evidence submitted at the trial, found the balance due appellant in the accounting, and also found that the amount due respondent for services and the damages caused by appellant's failure to care for the orchard equaled the amount due to appellant and rendered judgment for respondent for costs.

We can discover no just ground for arriving at a different decision. The judgment is affirmed.

I concur: HART, J.

BURNETT, J. I concur. After more deliberate consideration, I am satisfied that the controlling principle is as stated by the presiding justice.

If the parties had intended to relieve the lessee from liability for any default in case the lessor with knowledge thereof failed to avail himself of the privilege of doing the work himself, it is fair to assume that they would have expressed such intention. We must gather their intention from the language of the instrument itself, and, so viewing the situation, it seems reasonable to hold that the lessor did not, by his inaction, waive his right to claim damages from the lessee. As a matter of equity it is to be remembered that the proposition involves the willful violation of his covenant on the part of the lessee and no more than the failure to exercise a privilege on the part of the lessor. It is therefore morally as well as legally right that the latter, on the showing made, should be permitted to recover the amount of the damage actually suffered by him.

NORTON v. NORTON'S ESTATE.
(Civ. 2746.)

(District Court of Appeal, First District, Division 2, California. June 18, 1919. Rehearing Denied by Supreme Court, Aug. 14, 1919.)

1. EXECUTORS AND ADMINISTRATORS §453(4)
— ADMINISTRATRIX'S CLAIM AGAINST ESTATE—EFFECT OF JUDGMENT.

Where an administratrix's claim against the estate is reduced to judgment pursuant to Code Civ. Proc. § 1510, the judgment is not personal, but merely establishes a claim against the estate.

2. EXECUTORS AND ADMINISTRATORS §202
(2)—CLAIMS AGAINST ESTATE—WHEN PROVABLE.

Under Code Civ. Proc. §§ 1493, 1494, making claims not due or contingent provable against a deceased's estate, a debt contingent upon the claimant living with decedent as his wife until his death became due upon decedent's death and provable against his estate.

3. EXECUTORS AND ADMINISTRATORS §202
(1)—CLAIMS—CONTRACT.

A claim against an estate based upon an instrument executed with the formalities required of contracts may be enforced, although the instrument has been admitted to probate as a will; since a writing may be both a will and a contract.

4. WILLS §792(4)—ELECTION OR ESTOPPEL BY PROBATE OF WILL.

The fact that an administratrix offered an alleged will for probate, as she was required to do by Code Civ. Proc. § 1298, did not constitute an estoppel or election precluding her from claiming the instrument gave her contractual rights against deceased's estate.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Frances E. Norton against the Estate of G. N. Norton, deceased. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Pelrce Coombes, of San Francisco, for appellant.

W. W. Allen, of San Francisco, and J. W. Henderson, of Eureka, for respondent.

BRITAIN, J. Frances E. Norton, the surviving widow of G. N. Norton, appeals from a judgment entered upon an order sustaining a demurrer to her complaint in a suit against the estate of G. N. Norton, upon a claim rejected by the judge sitting in probate.

The essential allegations of the complaint are summarized as follows:

On July 4, 1915, leaving an estate in excess of \$10,000, G. N. Norton died testate and indebted to the plaintiff in the sum of \$1,000 per year, in monthly installments of \$83.33, commencing July 4, 1915, under a

contract set forth as an exhibit to the claim, which by proper reference is made part of the complaint. July 21, 1915, the plaintiff was appointed and qualified as special administratrix of the estate, and served as such until September 17, 1915, when she was appointed, and since which time she was, and continued to be at the time of filing suit, the administratrix of the estate with the will annexed. On March 16, 1916, within the time required by, and in accordance with, sections 1493, 1494, and 1510 of the Code of Civil Procedure, the plaintiff filed her verified claim with the clerk of the court in which the probate proceedings on the estate were pending. No payments were made on the claim, allowance of which was opposed by the children of the decedent, and the claim was rejected. In the claim appended to the complaint it was averred that the contract on which the claim is based was written and signed by Norton in December, 1911, and thereupon delivered to the claimant; that it was executed because the claimant had obtained, after the appearance of her husband and trial, an interlocutory decree of divorce against him for cruelty, and he desired a reconciliation, and to induce her thereafter to live with him as his wife until his death, and in reliance upon the writing she did live with him as his wife until his death, and had her interlocutory decree of divorce set aside; that the writing was in her possession until December 30, 1912, when at Norton's request she gave it to him for the purpose of rewriting it; that he did rewrite it, after which he destroyed the original; that the rewritten document was continuously thereafter in her possession until it was filed by her as the will of the decedent; and that it has been admitted to probate as a will, and as such is on file in the office of the clerk of the court in which probate proceedings on the estate are pending. The document is in the words and figures following:

"This instrument made and dated at San Francisco, California, on the thirtieth day of December in the year of our Lord one thousand nine hundred and twelve by me the undersigned is intended to be not only a contract but also an irrevocable olographic will (the same being an instrument that is entirely written, dated and signed by the hand of myself) to the extent of the provisions thereof, it being my purpose by virtue of the provisions of this instrument to secure to my wife, Frances E. Norton, the payments hereinafter specified out of my estate for and during her natural life if she shall continue to be my wife and be living with me as such at the time of my death. Making reference to the foregoing I hereby promise, agree, undertake and guarantee that after my decease my personal representatives shall and will pay out of my estate to my wife, Frances E. Norton, for and during her natural life the sum of one thousand dollars (\$1,000.00) per

year in monthly installments of eighty-three dollars and thirty-three cents (\$83.33) each if she shall continue to be my wife and be living with me as such at the time of my death, but not otherwise. I hereby expressly provide that upon my death all of my estate of every name, nature, character and description and wheresoever situated shall stand charged for the payments aforesaid if my said wife shall then be entitled to such payments according to the provisions aforesaid.

"In witness whereof I have written, dated and signed the foregoing by my own hand as above stated. G. N. Norton."

Since the demurrer was sustained without leave to amend, the grounds of ambiguity and uncertainty may be disregarded. The other three grounds of demurrer were that the court had no jurisdiction of the subject-matter of the action, that there was a defect of the party defendant, and that facts sufficient to constitute a cause of action were not stated.

In the brief on behalf of the respondent the demurrer is sought to be sustained. No consideration can be given to statements of fact not shown by the complaint, but made in the brief. They may be pertinent, if proved, on a trial of the case, but upon the demurrer ruling the court is confined to the facts stated in the complaint.

[1] In regard to the claimed defect of parties, it is said: "There is no entity or being in the defendant, and respondent submits that the court could not render a judgment against respondent." The statute provides that if the administrator is a creditor of the decedent, his authenticated claim shall be filed with the clerk, who is required to present it to the judge, and if it is rejected, "action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action." Code Civ. Proc. § 1510. A judgment rendered for the plaintiff in such a case is not personal, but merely establishes the claim against the estate. Estate of More, 121 Cal. 635, 54 Pac. 148.

[2] The question of jurisdiction of the subject-matter and the sufficiency of the statement of facts appear to be merged in the respondent's brief. Reliance is placed on the application of sections of the old practice act to a claim upon a mortgage lien, in a case where it was held that the word "claims," as used in the act, referred only to such debts as might have been enforced against the decedent in his lifetime by a personal action for the recovery of money. Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140. The present statute provides for claims not due or contingent. Code Civ. Proc. §§ 1493 and 1494; Verdier v. Roach, 96 Cal. 471, 81 Pac. 554; Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 Pac. 951. The debt

was contingent upon the performance of the condition to live with the decedent as his wife until his death. Civ. Code, § 1439. Upon the death, if the condition was performed by the plaintiff, the debt became due, and was provable as a claim.

[3, 4] The only other matter relied on by respondent is that the instrument on which the claim is based is a will and not a contract. Cases are cited in support of the rule "that where an instrument does not operate inter vivos, but is made to depend for its whole operation upon the event of the death of the maker to consummate it, then it can only take effect as testamentary." Carey v. Dennis, 13 Md. 1. The instrument under consideration here did operate inter vivos. In reliance upon it the plaintiff caused her interlocutory decree of divorce to be set aside and resumed marital relations with her husband, faithfully performing on her part all the obligations of the contract, and she seeks in this action to establish her right to receive the consideration for her performance. Such a contract is one favored by the law. Bowden v. Bowden, 175 Cal. 711, 167 Pac. 154, L. R. A. 1918A, 380. The instrument was admitted to probate as a will. The decedent in the writing declared it was "intended to be not only a contract but also an irrevocable olographic will * * * to the extent of the provisions thereof." A writing may be both a will and a contract. For the purpose of the present appeal it is immaterial whether it is operative for testamentary purposes or not. It is executed with all the formalities required in the execution of a contract, and suit may be maintained upon it without regard to its testamentary character. Adams v. Lansing, 17 Cal. 640. No question of election is presented by the demurrer, nor could it be determined on this appeal. As the custodian of the instrument, it was the duty of the plaintiff to present it for probate. Code Civ. Proc. § 1298. She could not attack the validity of the instrument on which she relied. Under such circumstances there is neither election nor estoppel thereafter to make her election to rest on her contractual rights. In re Gwin, 77 Cal. 313, 19 Pac. 527. In reaching the conclusion that the demurrer should have been overruled, the facts stated in the complaint are necessarily taken as true, and the law is declared upon that assumption. Nothing in this opinion is intended to determine any matter of fact upon which evidence may be adduced upon proper issues being framed in the trial court. The judgment is reversed, with directions to the trial court to enter an order overruling the demurrer to the complaint, and for such further proceedings as are not inconsistent herewith.

We concur: LANGDON, P. J.; HAVEN, J.

LA CHANCE v. BROWN et al. (Civ. 2828.)

(District Court of Appeal, Second District, Division 1, California. June 9, 1919.)

1. VENDOR AND PURCHASER ⇐187—TIME OF PAYMENT—WAIVER.

Vendors' acceptance of payments while purchaser was in arrears held to constitute waiver of time as an essential condition for the payment of installments due under the contract.

2. VENDOR AND PURCHASER ⇐95(2), 101—FORFEITURE—ACCEPTANCE OF OVERDUE PAYMENTS—SUSPENSION OF RIGHT OF FORFEITURE.

Where contract provided for forfeiture of purchaser's rights thereunder upon failure to make payments when due, vendors' acceptance of payments while purchaser was in arrears created a temporary suspension of right of forfeiture, which could be restored only by a definite and specific notice of an intention to enforce it.

3. VENDOR AND PURCHASER ⇐109, 203—DESTRUCTION OF IMPROVEMENTS — RIGHTS OF PURCHASER—RESCISSION OF CONTRACT.

Where there exists an executory contract for the sale and conveyance of real property, and improvements which constitute a material part of the consideration have been destroyed, the loss falls upon the vendor, and purchaser has the right to rescind the contract.

4. VENDOR AND PURCHASER ⇐101—FORFEITURE FOR NONPAYMENT—WAIVER—NOTICE TO PURCHASER.

Vendors, after waiving right of forfeiture for purchaser's failure to make payments when due, could revive right only by giving purchaser reasonable time within which to make payments in compliance with contract.

5. VENDOR AND PURCHASER ⇐101—FORFEITURE — WAIVER — DEMAND FOR PAYMENT — MAKING OF REPAIRS.

Where contract provided for forfeiture of payments upon purchaser's failure to pay installments when due, and required vendor to make repairs in case of fire, vendor, after having waived right of forfeiture by acceptance of overdue payments, and after having undertaken to repair building after partial destruction by fire, could not revive right of forfeiture by notice demanding payment before completion of repairs.

6. VENDOR AND PURCHASER ⇐102—SALE BY VENDOR—RESCISSION.

Sale of premises by vendor to persons other than purchaser without purchaser's knowledge or consent does not constitute an attempt to rescind contract, since vendor may sell property subject to purchaser's rights under the contract.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by O. J. La Chance against C. D. Brown and another. Judgment for plaintiff, and defendants appeal. Reversed.

W. W. Kaye and Alfred Siemon, both of Bakersfield, for appellants.

N. E. Conklin, of Bakersfield, for respondent.

CONREY, P. J. Action to recover the sum of \$1,071 paid by the plaintiff to the defendants on account of a contract for the purchase of real property, which contract it is alleged was abandoned by the defendants, and rescinded. From a judgment awarding to the plaintiff the sum of \$411, the defendants appeal.

The complaint alleged that immediately after the signing of the contract the plaintiff and defendants entered into a supplemental agreement to the effect that a certain policy of insurance upon the improvements on the land was for the benefit of the plaintiff, and that in case of loss of the premises by fire any sum paid upon the insurance would be paid to the defendants, in case of total loss, and that the plaintiff was to be credited upon the purchase price of the property for whatever amount was recovered on the policy, and in case of a partial loss whatever money was paid by the insurance company so much of it as necessary was to be used to repair the damage by fire, and whatever remained over and above such expenditure would be credited to the plaintiff on the purchase price of the property; that after the fire by which the house was partially destroyed and after the repairs were completed there remained the sum of \$850 paid by the insurance company, which sum the defendants retained to their own use and refused to pay over or credit to the plaintiff. No evidence was introduced in support of the foregoing allegations (all of which were denied), and no finding of fact was made thereon.

The contract price was \$3,500, of which \$400 was paid at the execution of the contract. The contract provided that the remainder of the purchase price should be paid as follows: \$1,500 by assuming a mortgage indebtedness held by the Producers' Savings Bank against the property, which sum of \$1,500, together with the interest thereon, it was agreed should be paid by the plaintiff. The remaining \$1,600 was to be paid in certain monthly installments. The interest on the mortgage was payable quarterly. It was agreed that, if the plaintiff failed to make any of the payments provided within the time or according to the terms of the contract, the vendors should be released from all obligations in law or equity to convey the premises, and the purchaser should forfeit the same and his rights under the contract, and the vendors should be entitled to possession of the premises and to remove the vendee therefrom.

The court found that the fire occurred on

the 15th day of February, 1912, and that the monthly average of payments theretofore made were up to and in accordance with the terms of the contract. These two findings are not sustained by the evidence. The fire occurred on the 15th day of January, 1912, and the payments theretofore made were several hundred dollars less in their aggregate amount and in their monthly average than the requirements of the contract.

[1,2] The court found that the repairs, which the defendants made upon the property after the fire and without cost to the plaintiff, were completed on the 7th day of March, 1912; that the deviation in times and amounts of payments as made by the plaintiff were made with and by the consent of the defendants; that the defendants had waived time as an essential condition for the payment of the amounts provided by the terms of the contract; and that such failure to pay the amounts required by the contract at the times specified therein was with the consent of the defendants. Appellants claim that the evidence is insufficient to support these findings, but we do not agree with this contention. The evidence shows that the defendants accepted payments on account while the plaintiff was in arrears with respect to payments due, and also that at the same time defendants knew that the plaintiff had not paid any interest on the mortgage. This was sufficient to constitute waiver. It created "such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it." *Stevinson v. Joy*, 164 Cal. 279, 285, 128 Pac. 751, 753.

Appellants claim further that the evidence is insufficient to support the court's finding that the date of completion of the repairs after the fire was the 7th day of March, 1912. They claim that the repairs were completed on the 15th day of February, 1912. However, we find in the record testimony tending to show that some of the repair work was still going on after the 7th day of March. Immediately after the fire occurred it was orally agreed between the plaintiff and the defendants that the defendants should proceed to make repairs of the premises, and pursuant to that agreement the plaintiff removed therefrom. At that time neither party claimed that the contract was not in force, and by mutual consent they proceeded upon the theory that the removal of plaintiff was temporary, and that defendants would proceed and complete the repairs on the understanding that the contract remained in force. The court made the following finding of fact, the truth of which is not challenged:

"That on the 16th day of February, 1912, the defendants demanded of plaintiff that he meet and perform every condition specified in

said contract by the 25th day of February, 1912, at 12 o'clock noon, or defendants would immediately have all of plaintiff's interest forfeited to defendants without further notice, that on the 15th day of February, 1912, defendants demanded of plaintiff that he perform all of the conditions of said contract required of him to such date, and offered in writing to give the plaintiff ten days' time within which to comply with such demand, which were served on plaintiff on February 16, 1912, at 4:30 p. m., and promised and agreed in writing that, if said plaintiff should within ten days perform all of the terms of said contract by him to be performed to such date, they would reinstate the plaintiff under said contract, and allow him to enter in and upon the possession of the said property, but that the said plaintiff failed, refused, and neglected to pay any further or other sum to the defendants under said contract, or on account thereof."

Evidently this notice was intended to put an end to the temporary suspension of the right of forfeiture by giving "a definite and specific notice of an intention to enforce" such right of forfeiture. *Stevinson v. Joy*, supra. This the vendors were entitled to do, and the vendee's failure to comply with the demand would place him in default, unless such failure was excused by the fact that, when the time limit fixed by the notice expired, the repairs by which the house was being restored to a condition fit for occupancy had not been completed.

[3-5] When there exists an executory contract for the sale and conveyance of real property, and improvements which constituted a material part of the consideration have been destroyed, the loss falls upon the vendor, and the vendee has a right to rescind the contract. *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755. Let it be assumed that the damage by fire to the house on the land covered by the contract was of such consequence that the vendee might have established his right to rescind. In fact, he elected that the contract remain in force, and concurrently the vendors agreed to restore the premises, and proceeded to the performance of their agreement. That they were proceeding in good faith is not denied. This being so, the obligation of the vendee to pay the installments named in the contract remained an obligation in force. Certain installments were due. The right of the vendors, by reason of their non-payment, to insist upon forfeiture of the plaintiff's rights, was in suspension because of their acts of waiver. But this right they could revive at any time by giving notice and demanding payment. Under such circumstances, however, they could not demand instant payment, but must allow a reasonable time. They allowed nine days—a time which expired before the repairs of damage caused

by the fire had been completed. The court found that this was not a reasonable time. We are of the opinion that the court was justified in this finding or conclusion from the evidence. In view of the vendee's waiver of his right to rescind, which waiver was concurrent with the promise of the vendors to make the necessary repairs, it was not reasonable that the vendors should attempt to revive their right of forfeiture until first they completed those repairs. We conclude, therefore, that the contract remained in force until a time subsequent to the 25th day of February, and that the vendee never was in default.

{6} Early in March the defendants rented the premises to tenants selected by them, and thereafter sold the property to persons other than the plaintiff, all without plaintiff's knowledge or consent. Thereupon the plaintiff elected to treat these acts as an abandonment and repudiation by defendants of the contract of sale, and accepted the same as constituting a rescission. The fact that the defendants made such sale of the property was not alleged in the complaint. Assuming, however, that this fact had been alleged, or that evidence thereof was received without objection, and that the court was justified in finding as it did that after the 1st day of March, 1912, the defendants "sold said premises to persons other than plaintiff and without plaintiff's knowledge or consent," this fact alone did not constitute an attempt to rescind. The vendor may part with his title "subject to the rights of the vendees under the executory contract of sale, and thus not put it beyond his reasonable power to make title to his vendees under the executory contract of sale when in due time it may be demanded of him. * * * A pleading merely that during the life of such an executory contract of sale the vendor has parted with the title is not sufficient to put the vendor in default or to show an abandonment by him of the contract. It must further be pleaded that the vendor did this without reserving and protecting his vendee's rights under the executory contract." *Brimmer v. Salisbury*, 167 Cal. 522, 527, 140 Pac. 30, 32.

Applying the law, as thus declared, to the facts found in the present case, it appears that neither party was in default, and that the contract has not been abandoned or otherwise rescinded. Under such circumstances no cause of action exists entitling the vendee to recover the moneys which have been paid by him on account of said contract. *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

CORMOND v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 2426.)

(District Court of Appeal, First District, Division 1, California. June 20, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. APPEAL AND ERROR ⇐502(4) — **RECORD — NOTICE OF MOTION.**

A copy of notice of intention to move for new trial incorporated in the transcript, but not made a part of the judgment roll or a part of the bill of exceptions, cannot be considered as a part of the record on appeal from order granting the motion.

2. APPEAL AND ERROR ⇐714(6) — **BILL OF EXCEPTIONS—SUBSTITUTE.**

Neither a stipulation as to the correctness of the transcript nor the certificate of the trial clerk that the papers in the transcript are true copies of the originals can supply what the law requires should be made to appear in the bill of exceptions.

3. NEW TRIAL ⇐128(5) — **INSUFFICIENCY OF EVIDENCE—SPECIFICATION.**

Plaintiff's specification of particulars in which the evidence was claimed to be insufficient to support verdict for defendant that there was no evidence to sustain the verdict was an insufficient specification under Code Civ. Proc. § 659, before its amendment in 1915.

4. NEW TRIAL ⇐139 — **DEFECT IN NOTICE OF INTENTION—WAIVER.**

Where the bill of exceptions was made up and agreed to by the parties, and contained all the proceedings and material evidence and testimony, and stipulated that all the evidence was used and referred to at the hearing of plaintiff's motion for new trial, defendant waived the defect in the notice of intention to move for new trial that it insufficiently specified the particulars in which the evidence was claimed to be insufficient to sustain the verdict for defendant.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Francis Cormond against the United Railroads of San Francisco. From an order granting plaintiff's motion for new trial, defendant appeals. Affirmed.

Wm. M. Cannon and Wm. Abbott, both of San Francisco, for appellant.

Perry Evans, of San Francisco, for respondent.

WASTE, P. J. This is an appeal by defendant from an order granting plaintiff's motion for a new trial in an action for damages for personal injuries.

On the 10th of December, 1913, at about the hour of 2 o'clock in the afternoon of that day, an east-bound Sutter street car, operated by the defendant, collided with a wagon then being driven by plaintiff in a southerly direction across the intersection of Sutter and Franklin streets in the city of San Fran-

cisco. As a result of the collision plaintiff was thrown from the wagon and injured. He thereupon instituted this suit for damages, claiming that: (1) The car was operated by defendant at a negligently excessive rate of speed; and (2) that defendant failed to avail itself of a last clear chance to avoid the accident. The defendant, by its answer, set up the defenses of contributory negligence and the failure on plaintiff's own part to avail himself of a last clear chance.

Upon the issues thus framed the case was tried before a jury, which on July 3, 1915, returned its verdict in favor of defendant. Judgment being entered upon the verdict, plaintiff moved for and was granted a new trial upon one or other of the grounds set forth in his notice of intention.

Section 659 of the Code of Civil Procedure, prescribing the manner of making an application for a new trial, was amended in the year 1915, the amendment taking effect on August 8th of that year, as was also section 660, which provides, among other things, that unless a notice of intention to move for a new trial be determined within three months from the date of the verdict, it is deemed denied. In this case it is admitted that the notice of intention was served two days before the effective date of said amendment to section 659, but defendant claims that it was not filed until two days after such change in the law. The motion was not decided until five months after the verdict. Defendant for the first time in his reply brief contends that in order to initiate a proceeding for a new trial both the service and filing of the notice are essential, and accordingly that, the notice having been filed after the amendment referred to went into effect, the proceeding was governed by the law as amended, and, the motion not having been decided within three months from the rendition of the verdict, the order granting the new trial was void.

[1, 2] While an interesting question is thus presented as to whether or not the law as it existed before or after its amendment governs the present case, the condition of the record upon this point precludes us, we think, from considering it. Incorporated in the transcript is a copy of the notice, which purports to show, as claimed by defendant, that it was filed after said amendment went into effect; but this paper is not a part of the judgment roll, nor in the present case is it made a part of the bill of exceptions. It cannot, therefore, be considered as a part of the record on appeal from the order granting the motion. *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 761, 765, 118 Pac. 92; *Leonard v. Shaw*, 114 Cal. 69, 45 Pac. 1012. The stipulation as to the correctness of the transcript is not signed by the parties; but, even if it were, neither it nor the

certificate of the clerk that the papers in the transcript are true copies of the originals can supply what the law requires should be made to appear in the bill of exceptions. *Carver v. San Joaquin Cigar Co.*, supra; *Sprigg v. Barber*, 122 Cal. 573, 55 Pac. 419. From the bill of exceptions then, it not appearing when the notice of intention was filed, we will assume in support of the order of the trial court that it was filed prior to said amendment. This conclusion brings us to a consideration of the question argued at length in the briefs.

[3, 4] The motion for a new trial was made upon the minutes of the court and was based upon the insufficiency of the evidence to justify the verdict and upon errors of law occurring at the trial. The order granting the motion was in general terms. An examination of the record discloses that the court committed no error in the admission or rejection of evidence, nor in its instructions to the jury. Its order, therefore, must be sustained, if at all, upon the first ground stated. As to that ground, it appears from the record that plaintiff's only specification of particulars in which the evidence is claimed to be insufficient is the bald statement that "there is no evidence to sustain the verdict in favor of the defendant and against plaintiff"—admittedly an insufficient specification under section 659, Code of Civil Procedure, before its amendment. *S. F. O. Terminal Rys. v. Superior Court*, 172 Cal. 541, 157 Pac. 604; *Strange v. Strange*, 23 Cal. App. 231, 137 Pac. 1104; *Western Pac. Land Co. v. Wilson*, 19 Cal. App. 338, 125 Pac. 1076. It is therefore argued by appellant that the order granting the new trial could not have been predicated upon the insufficiency of the evidence to support the verdict. But it is claimed by plaintiff—and we think with reason—that the defendant waived this defect. It appears that the bill of exceptions was made up and agreed to by the parties, and contains all the proceedings and material evidence and testimony in the case; and it further appears that such proceedings and evidence were used and referred to upon the hearing of the motion. The record clearly discloses that an examination of all the evidence in the case was unnecessary to a consideration of the claimed errors of law, and as all the evidence was incorporated in the bill of exceptions with defendant's consent, and with a stipulation by the parties that all the evidence was used and referred to at the hearing of the motion, and the bill fails to show any objection by appellant to the consideration of the claimed insufficiency of the evidence because of lack of specification of particulars, it would seem to necessarily follow that this point was presented to and passed upon by the trial court. The condition of the record and the manner in which it was

prepared sufficiently show that the appellant tacitly consented to the hearing of the motion on each of the grounds designated in the notice. Under these circumstances it must be held that the defect in the notice was waived by the appellant. In *Christy v. S. V. Water Co.*, 68 Cal. 73, 8 Pac. 849, no objection that the notice of intention to move for a new trial was not in time was made at the settlement of the statement or at the hearing of the motion, referring to which situation the court said:

"The motion was contested and submitted for decision without objecting or reserving any right to object that the notice of the motion was not made or given according to law. Such being the case, the attorney of the corporation defendant waived any supposable irregularity in the notice of the motion of which he now in this court for the first time seeks to avail himself."

See, also, *Harrigan v. Lynch*, 21 Mont. 36, 42, 52 Pac. 642; 1 Hayne N. T. & App. § 14.

The trial court then, being in a position where it could rightfully consider the question of whether the evidence was sufficient to support the verdict, granted the plaintiff's motion, and we cannot say that in so doing it abused the discretion vested in it.

The order is therefore affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

WEBSTER v. MOTOR PARCEL DELIVERY CO. (Civ. 2865.)

(District Court of Appeal, First District, Division 1, California. June 19, 1919.)

1. MUNICIPAL CORPORATIONS ⇨705(1)—USE OF STREETS—DUTY OF AUTOMOBILE DRIVER—PARKING OF MACHINES.

Driver of automobile between sidewalk and center of street in which automobiles are parked has duty of proceeding with such reasonable speed, with such warnings, and in such reasonable distance from the rear ends of the parked machines as not to endanger the safety of persons exercising their right to pass from the place of parking to the sidewalk.

2. MUNICIPAL CORPORATIONS ⇨706(5)—USE OF STREETS—NEGLIGENT DRIVING OF AUTOMOBILE.

Where automobile driver had 18 feet within which to drive machine between sidewalk and parked automobiles in center of street, the driving of automobile within 2½ to 3 feet from rear ends of parked automobiles was sufficient from which to raise inference of negligence.

3. MUNICIPAL CORPORATIONS ⇨706(5)—USE OF STREETS—AUTOMOBILE ACCIDENT—NEGLIGENCE OF DRIVER—SUFFICIENCY OF EVIDENCE.

In action for injuries by plaintiff struck by automobile in street after having parked her

automobile in center thereof, evidence held sufficient to sustain finding that defendant automobile driver was negligent.

4. APPEAL AND ERROR ⇨1010(1)—REVIEW—FINDINGS.

Court's finding as to negligence of automobile driver in personal injury action, where there is evidence to sustain it, will not be disturbed on appeal.

5. MUNICIPAL CORPORATIONS ⇨706(9)—USE OF STREETS—FINDINGS—NEGLIGENCE.

In an action for injuries sustained in being struck by automobile, court's finding held a sufficient finding of negligence on part of defendant automobile driver to sustain judgment for plaintiff.

6. MUNICIPAL CORPORATIONS ⇨705(10)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE.

Automobile driver who, having parked machine in center of street, stepped to the back of her machine with the intention of looking northerly past the rear end of next automobile to see if street was sufficiently clear to be crossed in a northwesterly direction, and was struck by automobile driven within 3 feet from rear ends of parked machines in southerly direction, was not contributorily negligent.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Patricia K. Webster against the Motor Parcel Delivery Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Charles H. Keller, of San Francisco, and Donahue & Hynes, of Oakland, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor for the sum is \$1,530.74 damages for injuries alleged to have been received by the plaintiff through being struck by the defendant's automobile upon one of the streets of the city of Oakland while the said automobile was being operated by a servant of the defendant in a negligent manner.

A brief statement of the material facts in the case will serve to elucidate the several points urged by the appellant upon this appeal.

Clay street, in the city of Oakland, at the time of the plaintiff's injuries was one of the streets of said city wherein automobiles were to be parked in the center of the street in accordance with the traffic regulations adopted by the governing body of said city. On December 1, 1917, at about 8 o'clock in the evening, the plaintiff parked her automobile in the center of Clay street, between 14th and 15th streets, and having done so walked out from the rear of her machine westerly with the intention of crossing to the

westerly side of Clay street, and was immediately, and when about 3 feet from the said westerly end of her machine, struck by an automobile of the defendant driven by one of its agents, who was proceeding southerly along said street on the westerly side thereof, from which impact the plaintiff sustained certain injuries from which she suffered severely, and by which she was prevented from engaging in her work of selling automobiles upon commission for several weeks. In her action for damages she sought to recover not only for her personal injuries, but also special damages for her loss of earnings during the period of her inability to pursue her vocation.

The appellant's first contention is that the evidence is insufficient to justify the finding of the trial court of negligence on the part of the defendant. We are unable to sustain this contention. The evidence showed that Clay street, in the vicinity of the place of the plaintiff's injuries, is a busy thoroughfare and is a business street, though not formally so declared to be or marked by signs as such by the civic authorities. The resolution of the city council providing for the parking of automobiles in the center of said street, while it does not so declare in terms, implies that persons so parking their machines in its center shall be entitled to cross to its sidewalks from the place of parking at any point along said street. The distance between the rear ends of machines parked in the center of Clay street in conformity with said regulation and the outer edge of the sidewalk is approximately 17 feet. Automobiles which are being driven along said street are required to proceed northerly on the easterly side of its center parking lines, and southerly on the westerly side thereof.

[1-4] The defendant's driver was proceeding southerly on the westerly side of said street, and was therefore, generally speaking, where he had a right to be and go, but that right was to be exercised by him with due regard to the facts that it was a busy street and that persons parking automobiles in its center were privileged to cross it at any point from the place of parking their machines to the sidewalk, and were likely to be exercising that privilege at any moment. He had approximately 18 feet within which to operate his machine, but his duty was to propel it within said space at such reasonable speed, with such warnings, and at such reasonable distance from the rear ends of parked machines as not to endanger the safety of persons exercising their right to pass from the place of parking to the sidewalk. There is evidence in the record that the defendant's agent was, prior to and at the moment of the accident, going over 25 miles an hour. There is also evidence that no warning of his approach was sounded. Upon both these

points the evidence is conflicting, but that conflict the court had a right to resolve in favor of the plaintiff's side of the case. There is no conflict in the evidence as to the fact that the driver of the defendant's machine was proceeding within $2\frac{1}{2}$ to 3 feet from the rear ends of the automobiles which were parked in the center of the street. With a space of almost 18 feet within which to operate his machine, it would seem that to do so within that short distance from the row of parked machines, from among which pedestrians were liable to emerge at any moment and any place along his route, would be a fact from which of itself the court might fairly infer negligence on the part of the defendant's driver, which, taken with the court's conclusion as to the rate at which he was traveling, without warning, would be amply sufficient to sustain its finding of negligence to be imputed to the defendant. Such finding, if made, we are not at liberty to disturb.

[5] The appellant, however, contends that the court has made no sufficient finding of negligence on the defendant's part. The court found that the plaintiff's injuries to her person and property were "caused solely by the negligence of the defendant"; and, dealing more specifically with the subject, also found that the plaintiff "was walking in a westerly direction from her automobile, and had proceeded approximately 3 feet from the westerly end of her automobile when an automobile operated by the defendant, by its servant Ray Estudillo, did carelessly and negligently collide with plaintiff with great force and violence," etc. We think the foregoing to be a sufficient finding of negligence on the part of the defendant to sustain the judgment of the court.

[6] The next contention of the appellant is that the evidence established conclusively that the plaintiff was herself guilty of contributory negligence, and hence was not entitled to recover. In support of this contention the appellant insists that the evidence shows that the plaintiff stepped out suddenly from behind her automobile directly in the path of the approaching machine without looking and when it was too near to be stopped in time to avoid a collision. The plaintiff's testimony, however, in that regard, is that after having parked her own machine she stepped to the back of her car with the intention of looking northerly past the rear end of another car parked next to her own to see what, if anything, was coming before essaying to cross the street in a northwesterly direction to the store to which she was going; that as she was taking the step or two out which she had to take in order to see around the adjoining car she was struck down by the defendant's automobile, which approached rapidly and without warning. If the trial court accepted

this statement of the plaintiff as true, we think its finding that the plaintiff was not guilty of contributory negligence would be sufficiently supported thereby.

The appellant's final contention is that the damages awarded to the plaintiff were excessive; but, without attempting to review the evidence upon this point, we are of the opinion that this contention is without merit.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

BANK OF COMMERCE & TRUST CO. v. HUMPHREY et al. (Civ. 2909.)

(District Court of Appeal, Second District, Division 2, California. June 12, 1919.)

1. PARTIES ¶76(5)—OBJECTIONS—CAPACITY OF ADMINISTRATOR TO SUE—DEMURRER.

That the complaint, in action by an administrator, fails to show capacity to sue, is not ground for demurrer, but such defect can be taken advantage of only by answer.

2. EXECUTORS AND ADMINISTRATORS ¶29(4)—APPOINTMENT—COLLATERAL ATTACK—SUFFICIENCY OF OATH.

Where letters of administration in due form have been issued by order of a court having jurisdiction, the administrator's right to sue as such cannot be collaterally attacked on ground that his oath was not sufficient in form.

3. EXECUTORS AND ADMINISTRATORS ¶29(2)—REGULARITY OF APPOINTMENT—CONCLUSIVENESS.

The issuance of letters of administration by a court having jurisdiction to make the order of appointment is conclusive of the regularity of the appointment when attacked collaterally.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Bank of Commerce & Trust Company, as administrator of the estate of Silas E. Gaskill, also known as S. E. Gaskill, deceased, against William Humphrey and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Wm. Humphrey, of San Diego, in pro. per. Ward, Ward & Ward, of San Diego, for respondent.

THOMAS, J. This is an appeal by the defendant Humphrey alone from a judgment of foreclosure entered in favor of plaintiff, a corporation, as administrator of the estate of

Silas E. Gaskill, deceased, against all of the defendants, on March 1, 1916.

To affirm the judgment without further comment would, we believe, be highly proper. We shall, however, consider the appellant's contentions to such an extent that he will be deprived of the opportunity—unless he departs from the virtue we call truth—to say that this court has decided against him without reading the briefs.

The statement of the case is not borne out by the record. It has the earmarks of a willful attempt to mislead the court. We can hardly believe that the erroneous statements found therein are unintentional.

The first point made by appellant is that the court erred in overruling his demurrer to plaintiff's complaint, which, omitting the formal parts, is as follows:

"(1) That the plaintiff has not stated facts sufficient to constitute a cause of action against said defendants; (2) that the plaintiff has not stated facts sufficient to constitute a right to bring said action as administrator; (3) that the complaint does not show the capacity of plaintiff to sue as administrator of the estate of Silas E. Gaskill, or as administrator at all; (4) that the complaint is ambiguous and uncertain in that it cannot be ascertained therefrom whether Silas E. Gaskill is dead or alive; (a) that it cannot be ascertained therefrom whether letters of administration have ever been issued to plaintiff, by any competent court, or at all."

In support of his contention on the demurrer appellant urges that "there is no evidence of qualification of appellant as administrator." (We assume that he means "respondent," rather than "appellant," in the sentence just quoted.) He then urges that an oath subscribed and sworn to by the assistant trust officer of the bank is the only evidence offered as to qualification of the plaintiff as such administrator. This is not a correct statement. Neither is it true, as clearly disclosed by the record. As a clincher to this alleged argument of appellant, it is urged that the plaintiff corporation, in case of Carter's (the assistant trust officer) failure to perform his duty, would not be liable. He then argues:

"Whether construed to mean pecuniarily or criminally liable, that provision is unconstitutional. It has no possible relation to banking business as defined by the law, but relates wholly to the shifting of liabilities of trustees, etc., to employees. The subject is not included in the title of the Banking Act [St. 1909, p. 87], and if it was it is wholly foreign to the object of the act."

[1] The complaint is sufficient. *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278; *Munro v. Dredging, etc., Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. No good purpose could be served by quoting the complaint, or any part thereof. It is sufficient to say that the court properly overruled the demurrer. *Halleck v.*

Mixer, 16 Cal. 574. The other alleged grounds are without merit. Such defect, if it exists, can be taken advantage of only by answer. *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Locke v. Klunker*, 128 Cal. 231, 55 Pac. 993.

[2] Letters of administration, in due form, were issued by the clerk to respondent, and the court had jurisdiction to make the order directing the clerk to issue them. Assuming that the oath, a copy of which is indorsed on the letters, is not sufficient in form, nevertheless respondent's right to act as administrator cannot be thus collaterally attacked in this action. Respondent did not refuse to act. Nor did it decline to give any bond or make any oath. On the contrary, seeking to act as administrator of the estate, it caused to be made what its officers and the clerk of the court doubtless thought a sufficient qualifying oath in an attempted compliance with the statute. Thereupon the court, acting through its clerk, issued the letters of administration. It is this that differentiates the case from the *Estate of Hamilton*, 34 Cal. 464, and other cases cited by appellant.

An objection to the sufficiency of the administrator's oath does not raise a jurisdictional question. The authority of the court to appoint does not rest upon the oath or bond. That is a matter going only to the manner of qualifying after an appointment already made, and not to the validity of the appointment. If the clerk of court issues the letters in violation of the statute, without requiring the proper oath, any person interested may appear in the probate proceeding and ask to have the letters revoked. But to allow every person who may be sued to go behind the letters of administration and object to the oath as given, or to plead any other defect which does not go to the jurisdiction of the court making the appointment, would be to involve litigation in a hopeless confusion of collateral issues. Letters issued by the clerk upon the order of a court having jurisdiction should furnish ample protection to all parties dealing with an administrator as such; and no irregularity in the clerk's issuance of the letters, occurring after the order of the court directing their issue—the court having jurisdiction to make the order—should be taken advantage of in a collateral proceeding. Were the rule otherwise, no business depending on letters testamentary or of administration could be safely transacted. Payments made to executors or administrators, even

after judgment, would be no protection. Even if the debtor litigated the precise point, and compelled the administrator to establish it by proof, the adjudication would avail him nothing should a subsequent administrator spring up and demand payment a second time. To allow the sufficiency of the executor's or administrator's oath to be thus collaterally questioned, on any and every occasion, and during all time would be destructive of all confidence. A large number of titles depend for their validity on decrees of foreclosure. Such decrees are often made in suits instituted by executors or administrators. Should these be subject to review at any period, however remote, on the nice question of the sufficiency of the qualifying oath of the executor or administrator—a question often difficult to decide where the facts are clear, and much more so where the facts are obscured by lapse of time and loss of documents—chaos, appalling in its possibilities, would confront the business community, and shake all confidence in titles based upon foreclosure decrees in actions brought by executors or administrators.

[3] The danger of the doctrine contended for by appellant impels us to the conclusion that, if the court has acquired jurisdiction to make the order appointing the executor or administrator, the issuance of letters testamentary or of administration should be deemed conclusive of the regularity of the appointment. Says the court in *Dennis v. Bint*, 122 Cal. 42, 54 Pac. 379, 68 Am. St. Rep. 17:

"It is clear that the court had jurisdiction of the estate of the deceased, and to appoint the administratrix. Therefore, if the letters issued had been duly attested, it is unquestionable that, as against any collateral attack, they would have been *conclusive* evidence of her due qualification, and of her authority to act as administratrix." (The italics are ours.)

See, also, *Abrook v. Ellis*, 6 Cal. App. 451, 92 Pac. 396; *Garthwaite v. Bank of Tulare*, 134 Cal. 242, 66 Pac. 326; *Plemmons v. Southern Ry. Co.*, 140 N. C. 236, 52 S. E. 953; *Beresford v. American Coal Co.*, 124 Iowa, 34, 98 N. W. 902, 70 L. R. A. 256; *Gallagher v. Holland*, 20 Nev. 164, 18 Pac. 834.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

FATTA et al. v. CATALANO. (Civ. 2130.)

(District Court of Appeal, Second District, Division 1, California. June 16, 1919.)

1. APPEAL AND ERROR ⇨1002 — **REVIEW—VERDICT—CONFLICTING EVIDENCE.**

Verdict is conclusive on appeal as to disputed facts, where evidence is conflicting.

2. APPEAL AND ERROR ⇨1005(3)—**REVIEW—ORDER DENYING MOTION FOR NEW TRIAL.**

Order denying motion for new trial is conclusive on appeal as to disputed facts, where evidence is conflicting.

3. TRIAL ⇨404(1) — **FINDINGS — CONSTRUCTION.**

Where contractors, suing owner for balance due, denied allegation of an account stated, but admitted one of the plaintiffs was indebted to owner upon note, finding that such plaintiff was indebted on note in amount alleged due from all contractors cannot be construed as a finding that there was an account stated growing out of construction of the building.

4. WORK AND LABOR ⇨14(1)—**REPUDIATION OF BUILDING CONTRACT BY OWNER—REASONABLE VALUE OF SERVICES.**

Where owner repudiated building contract, the contractors were entitled to sue for the reasonable value of their services.

5. APPEAL AND ERROR ⇨1039(13)—**HARMLESS ERROR—VARIANCE.**

Where owner repudiated building contract, contractors' failure to declare on the contract and repudiation thereof, in suit for reasonable value of services performed, was harmless, where evidence relating to contract and its repudiation was introduced without objection on the theory that existence of contract and its repudiation was an issue to be tried.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Santo Fatta and others against Joseph O. Catalano. From a judgment for plaintiffs and an order denying motion for a new trial, defendant appeals. Affirmed.

Edward R. Milliken, of Pasadena, N. P. Moordyke, of Los Angeles, and Robert W. McDonald, of Pasadena, for appellant.

Bennett, Turnbull & Thompson, of Los Angeles, for respondents.

SHAW, J. In this action plaintiffs sued in quantum meruit to recover from defendant a balance for work and labor performed in constructing a house for him at his special instance and request. Defendant answered, denying the allegations of the complaint, and, by cross-complaint, alleged that after the house was completed there had been an account stated between himself and plaintiffs, wherein it was agreed that plaintiffs were in-

debted to him in the sum of \$400, all of which allegations were denied by plaintiffs, who however, admitted that Angelo Fatta, one of the plaintiffs, was indebted to defendant in the sum of \$400, for which defendant held the note of Angelo and a pledge of certain personal property deposited as security for the payment thereof.

The issues were tried by jury, which rendered a verdict in favor of plaintiffs for \$350, and in favor of defendant and against Angelo Fatta for \$400, from the whole of which judgment, and an order denying his motion for a new trial, defendant appeals.

[1, 2] As one ground for reversal the insufficiency of the evidence to justify the verdict is urged. The evidence is sharply conflicting, and while appellant concedes that plaintiffs' testimony clearly tended to establish the issues found in their favor by the jury, his counsel insist that their testimony is unworthy of credence because of the inconsistencies therein, and, moreover they were contradicted "by at least six unbiased witnesses." At most, the record discloses a substantial conflict of evidence touching the facts in dispute, as to which the verdict of the jury and order of the court denying defendant's motion for a new trial must be deemed conclusive.

[3] Appellant next contends that where there is an account stated, it is a bar to an action upon the original items thereof. The jury, however, by its verdict found against defendant upon this issue. The fact that it found in favor of defendant upon the note made to him by Angelo Fatta cannot be construed as a finding that there was an account stated between defendant and plaintiffs growing out of the transaction under which the house was constructed.

In the course of the trial, though the question was not an issue, it was made to appear from plaintiffs' testimony, in respect to which our attention is called to no objection interposed thereto, that it was agreed defendant should pay plaintiffs \$450 in cash for constructing the house, which he was to sell, and, after deducting the cost thereof, the profits were to be equally divided between plaintiffs and defendant; that defendant repudiated this contract, the making of which on the trial he denied, and testified that plaintiffs were, for their work and labor, to receive \$450, which sum he had paid to them. The court instructed the jury that if they believed that such contract was entered into between the parties, nevertheless if they found from the evidence that defendant had repudiated the contract and refused to carry out the same, plaintiffs were entitled to recover the reasonable value of the services rendered. If the jury believed plaintiffs' testimony the effect of the verdict was an implied finding that the contract so made between the par-

ties had been repudiated by defendant, who refused to abide thereby.

[4, 5] Under these circumstances plaintiffs were entitled to sue for the reasonable value of the services performed; and conceding that they should have declared upon the original agreement, alleging the repudiation thereof by defendant (*Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127), nevertheless evidence touching the same appears to have been introduced without objection, upon the theory that it, as well as the value of the services and the agreement as to a stated account, alleged by defendant to have been had, was an issue to be tried. In no event was defendant prejudiced by reason of the court's action.

The record shows the case to have been tried as presented by the parties to the action; that in constructing the house plaintiffs performed work and labor thereon of the reasonable value of \$800, upon which they were paid \$450, leaving a balance due plaintiffs of \$350, for which they were given judgment and to which they were entitled, since there was, as found by the jury upon sufficient evidence, no account stated as alleged by defendant. Angelo Fatta individually was indebted to defendant, as evidenced by his note, in the sum of \$400, for which cross-complainant was given judgment against the maker of the note. Upon the facts, we are unable to perceive that any miscarriage of justice resulted from any alleged technical error complained of. The record presented discloses no error in the ruling of the court in taxing and distributing the cost of the trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

MARX & RAWOLLE v. STANDARD SOAP CO. (Civ. 2813.)

(District Court of Appeal, First District, Division 1, California. June 30, 1919.)

SALES 32 — CONTRACT — CORRESPONDENCE.

Letters and telegrams transmitted through brokers regarding proposed sale of glycerine held not to establish a completed contract between the parties, in view of the fact that their minds did not meet on terms of payment, and that both parties expected to reduce the understanding to a more formal writing.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Marx & Rawolle against the Standard Soap Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Adams & Adams, of San Francisco, and John D. Murphey, of Berkeley, for appellant. Winfield Dorn and J. R. Fringle, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action instituted by the plaintiff to recover damages from the defendant for the alleged repudiation of a contract for the sale by the defendant to the plaintiff of 12 carloads of crude glycerine. The contract upon which plaintiff relies for a recovery was claimed by it to have been created through an interchange of telegrams and letters passing between the defendant and certain middlemen acting as brokers for the purpose of purchasing the product in question for the use and benefit of the plaintiff. These middlemen were the Zimmerman, Alderson, Carr Commission Company, having offices in Chicago and New York, the plaintiff being a business concern located in the latter city. The defense relied upon by the respondent on the trial and upon this appeal is that the letters and telegrams referred to did not amount to a completed written agreement for the sale of said product, and that the defendant withdrew from the negotiation before the parties had arrived at and consummated a final and binding contract in the premises. The trial court, upon the conclusion of all of the evidence presented on both sides of the case, granted the defendant's motion for a nonsuit, which had the effect of withdrawing the case from the jury, and which was followed by the judgment in the defendant's favor from which this appeal has been taken.

The evidence is in the main undisputed. The negotiations out of which the action arose were initiated by a letter sent on September 2, 1915, from the Chicago office of the above-named brokers to the defendant at its place of business in Berkeley, Cal., explaining the state of the glycerine market, and suggesting that the firm of brokers could sell some of the defendant's glycerine product at an indicated price. The defendant responded on September 17, 1915, with a telegram to the brokers to the effect that it would sell about 12 cars of crude glycerine for a price slightly above that indicated in the brokers' letter. Upon receipt of this message the brokers' Chicago office communicated its import by telegram to their New York office, which submitted the substance of the defendant's message to the plaintiff, who on the same day authorized the latter to instruct the Chicago office that the plaintiff would take 12 cars of glycerine at the indicated price shipside San Francisco. Certain details as to the disposition of the drums which were to contain the glycerine during shipment were included in this message, and upon its receipt the Chicago office at once sent to the

defendant a telegram embodying the terms, to which the defendant responded on September 18th, by telegram in the following words:

"Telegram received. O. K. If our usual terms 90 per cent. against documents satisfactory. Our option as to drums returnable or seven dollars to keep 12 drums one year or over."

The Chicago office immediately advised the New York office of the terms of this telegram, which replied in a brief dispatch, reading:

"Calder confirms Standard crude terms specified excepting sellers must declare their intention regarding drums at once and not retain the option through delivery."

This message was amplified by the manager of the Chicago office into a longer telegram to the defendant, which embraced both the latter's offer and the buyer's qualified acceptance, and requesting a speedy reply. This message was sent on September 18th, and was followed by another brief dispatch on the following day, urging a quick reply, to which two messages the defendant, on September 20th, responded with a dispatch in the following words:

"Will accept contract as outlined and sell drums at seven dollars. Give immediate shipping instructions as we will have a car to ship in a few days."

Upon receipt of this message by the brokers' Chicago office it at once telegraphed to the New York office:

"Standard Soap confirms sale. Marx to pay seven dollars for drums also giving shipping instructions first car."

It is the contention of the appellant that the letters and telegrams above quoted or referred to constituted a completed contract in writing between the parties, upon the respondent's subsequent repudiation of which the present right of action arose.

There would be a certain degree of plausibility in this contention were it not for the fact, as disclosed by other evidence in the case, that the minds of the parties had not yet fully met upon one of the essential elements of the agreement to be consummated between them, and were it not also for the fact, as shown by the subsequent conduct of the parties, that a more formal writing was to be executed embracing their contract. One of the essential conditions of the defendant's entering into a contract for the sale of its product was that embraced in the dispatch of September 18th and contained in the clause "O K if our usual terms 90 per cent. against documents satisfactory." By this phrase the defendant wished to be understood as reserving the right to draw upon the buyer at sight for 90 per cent. of the purchase price as soon as the documents which evidenced shipment were forwarded. But it appears that this was not the buyer's under-

standing of the meaning of this clause in the seller's telegram, since it was understood to mean that the seller might draw upon the buyer at ten days' sight for 90 per cent. of the invoice price of each shipment, the difference between these two constructions of this clause in the defendant's telegram being equivalent to a discount of 1 per cent. in the plaintiff's favor. Aside, however, from what the evidence discloses as to this divergent interpretation of the meaning of the phrase in question, there was another particular in respect to which apparently the minds of the parties had not met upon September 20, 1915, the date which the appellant fixes as that of the ripened agreement between the parties. This has reference to the quality of the drums which were to contain the glycerine, and for which the buyer of the product was to pay \$7 each. On September 22, 1915, the plaintiff informed the brokers' New York office that—

"In agreeing to accept drums at seven dollars apiece Marx & Rawolle are to receive A 1 stock."

This information, not embraced in any former correspondence, was conveyed by the New York office to the Chicago office of the brokers, and was by the latter forwarded by letter to the defendant on the date of its receipt by them. In this letter it was for the first time disclosed to the defendant the name of the prospective buyer of its product, although it was perfectly evident from the earlier messages which had passed between the brokers and this defendant that the former were merely acting in the capacity of middlemen. Two days after sending the letter above referred to in which the quality of the drums was for the first time mentioned, the brokers, through their Chicago office, prepared and forwarded to the defendant a formal contract covering the transaction. This document was drawn apparently upon a form customarily used in similar transactions, setting forth with considerable circumstance and detail the precise terms of the agreement to be entered into between the principals to it. Among other details it embraced a specific statement of the two matters above referred to respecting which the minds of the parties had not yet fully met. As to the first of these it expressed with unmistakable exactitude the understanding of the plaintiff herein as to the terms of payment of defendant's product, and understanding which was communicated by the plaintiff to the brokers before the formal contract was drawn and which, by reference to that document, will be seen to differ materially from the defendant's idea as to the meaning of the brief verbiage of its earlier telegram. As to the quality of the drums it is also quite precise in its specification that the glycerine was "to be shipped in No. 1-a grade drums." As to this latter detail the defendant does not seem to have regarded it as material, but as to the former

it expressed its dissatisfaction with the terms of the formal contract in a letter sent to the brokers immediately upon receipt of the proposed contract.

It thus appears that neither of the parties to the transaction understood at the time that the communications which had passed through their intermediary up to and including September 20, 1915, constituted the final and binding contract between them. This being so, and the final form of contract sent to the defendant being found to vary materially from the terms apparently arrived at in their previous informal negotiations, the defendant was entirely within its rights, both in refusing to execute the same and in withdrawing from the transaction on October 8, 1915.

This being the conclusion of the trial court, it was within its rights in granting a nonsuit at the close of all of the evidence in the case.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

HIEATT v. GASSEN. (Civ. 2851.)

(District Court of Appeal, Second District, Division 1, California. June 16, 1919.)

1. VENDOR AND PURCHASER — §334(3) — RESCISSION—PARTIAL PAYMENTS.

Where the mutual abandonment or rescission of a real estate sale contract is unconnected with a new agreement, the purchaser may recover installments paid on the contract.

2. VENDOR AND PURCHASER — §334(3) — 'NOVATION'—PARTIAL PAYMENTS.

Where the parties agreed to cancel a real estate sales contract, and plaintiff purchaser was given an option to purchase part of the premises covered by the old contract, there was in effect a "novation" as defined by Civ. Code, §§ 1530 and 1531, and plaintiff cannot recover partial payments made under the old contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by F. L. Hieatt against A. G. Gassen. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Chatterson, L. E. Dadmun, and Hoff & Chatterson, all of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondent.

CONREY, P. J. Plaintiff brought this action to recover from defendant money which had been paid by plaintiff to defendant on account of a contract for the sale of real prop-

erty, which contract the plaintiff alleged had been rescinded and abandoned by mutual consent. The plaintiff appeals from the judgment entered in favor of the defendant.

The contract was dated April 30, 1913. It provided for the payment of \$7,500 on the execution of the contract, \$2,500 on October 1, 1913, and \$2,500 on the 1st day of each and every April and October thereafter until the full sum of \$33,582.75 had been paid, interest at 6 per cent. per annum, payable quarterly, commencing on the 1st day of July, 1913. The findings show:

That the plaintiff paid the sum of \$7,500 and the \$2,500 due October 1, 1913, together with the interest then due. "That prior to the 1st day of April, 1914, the said plaintiff and said defendant did orally agree that they would by mutual consent cancel, rescind, and abandon the said written contract, and that the said plaintiff would in pursuance of said abandonment, cancellation, or rescission of said contract, and upon request of said defendant, sign, execute, and deliver unto said defendant his quitclaim deed to and for the property described in said written contract and agreement, upon the execution to plaintiff by defendant of an option for the purchase by plaintiff of a portion of said land. That after the 1st day of April, 1914, and on or about the 9th day of April, 1914, said original contract was by mutual consent abandoned, canceled, or rescinded, and said defendant released the said plaintiff from all his obligations under the said contract hereinbefore referred to, and from his said agreement to purchase the land in said contract described and pay the balance due on the purchase price thereof, and that in substitution for and in lieu of said contract defendant gave to said plaintiff an option in writing to purchase a part of the said lands described in said contract upon the terms and conditions set out in the said option, and that in consideration of the release of said plaintiff from his said obligations and covenants under said contract and of the giving of said option to him by the defendant, the plaintiff did execute and deliver to defendant a quitclaim deed of all his interest in said land, and released and discharged said defendant from all liabilities and obligations under or by virtue of said contract, which said release was indorsed upon the original of said contract and delivered therewith to defendant, and which said release was and is in the words and figures as follows, to wit: 'I, F. L. Hieatt, do hereby remise, release, and quitclaim to A. G. Gassen, all the land and property described in the foregoing contract and transfer to him all my rights under said contract and all my interest in said property, and this contract is hereby canceled. Dated April 9, 1914, F. L. Hieatt.' That prior to the filing of the complaint in said action, to wit, on the 19th day of February, 1915, the said plaintiff did demand of and from said defendant the return and repayment of the said sum of \$11,136.22 paid to said defendant by said plaintiff under the terms of said written contract and agreement, but that he never made any other demand on defendant for the payment of said sum or any part of it, and that said defendant refused and still refuses to pay the said sum or

any part thereof, and holds and retains the said money and the whole thereof. That it is not true that the said defendant holds and retains said money and the whole thereof to the plaintiff's damage in the sum of \$11,136.22 or to his damage in any other sum or sums at all. That no other agreement or negotiations were had between plaintiff and defendant with reference to the rights of the parties in said sum of \$11,136.22 than are contained or implied in said release indorsed upon said original contract."

As conclusions of law from the facts found, the court found that the option was given in substitution for and in lieu of the contract, and that the release indorsed upon the contract effected a complete settlement between the parties in regard to the contract and discharged and released defendant from any obligation to repay the plaintiff said sum of \$11,136.22, or any part thereof, and that defendant was entitled to judgment that plaintiff take nothing by the action. Judgment was entered accordingly.

Appellant contends that the conclusions of law and the judgment are not consistent with or supported by the findings of fact, and that upon those findings the plaintiff is entitled to judgment in his favor.

[1, 2] Where a contract for the sale of real property has been mutually abandoned or rescinded by the parties thereto, and such abandonment or rescission is unconnected with any new contract or other agreement affecting the purchaser's rights in the premises, the purchaser is entitled to maintain an action in implied assumpsit as for money had and received, to recover the money which he has paid on account of such contract. To that extent we agree with the contentions of appellant with relation to this matter. But the case presented here is one wherein the release of the parties from the original contract was a part of and resulted from a new contract arising out of and connected with the abandonment of the original transaction. In lieu of defendant's obligation to convey the property upon the payment of the full contract price, the parties by agreement substituted therefor an obligation of the defendant to convey to the plaintiff a part of the property included in the original sale, and the plaintiff accepted

this new agreement with the additional advantage that on his part the new agreement was only an option on which he would not be bound unless he elected to take the property under the option and upon the terms and conditions set out therein. What the terms and conditions of that option were we do not learn from the record, but it may reasonably be inferred that in agreeing upon those terms and conditions the parties took into consideration the fact that the plaintiff had made payments on account of the original contract. The new contract was in reality a novation whereby new obligations were substituted for those theretofore existing between the parties. Civ. Code, §§ 1530, 1531. When a novation has taken place the courts "have found no difficulty in declaring that the rights of parties to the agreement are to be governed by the new contract alone, and that a failure to perform does not, under any theory of rescission or revivor, operate to breathe new life into the dead and extinguished obligation." *Beckwith v. Sheldon*, 165 Cal. 319, 324, 131 Pac. 1049, 1051.

Equally well may it be said that when a novation has taken place the rights of the parties to the agreement are to be governed by the new contract alone, and that a party who has made payments under the original contract may not recover those moneys on the basis of a bare assumption that the terms of the new contract were not in any way affected by the situation existing under the original contract at the time when the new contract was made. The natural inference from such series of transactions runs the other way. When in this case the original contract "was by mutual consent abandoned, canceled, or rescinded," and in substitution therefor a new contract was made, it is evident that the new contract "was intended to effect a complete settlement in regard to the subject." In this respect the case is very similar to *Winton v. Spring*, 18 Cal. 451, where it was held that the vendee was not entitled to recover a partial payment which he had made on account of an agreement to purchase land.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

McMANAMAN v. VICKERY. (Civ. 2655.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919. Rehearing Denied by Supreme Court Aug. 28, 1919.)

1. APPEAL AND ERROR ⇨782—ORDERS APPEALABLE—DISMISSAL.

An appeal from an order denying a motion for new trial will be dismissed, when at the time the order was made there was no right of appeal from such order.

2. CORPORATIONS ⇨116 — TRANSFER OF STOCK—OPTIONS—DEMAND.

Testimony that plaintiff said to defendant, "I guess I will let you have that," was insufficient to show a demand by the plaintiff that defendant purchase corporate stock under a contract wherein defendant agreed to purchase it at a certain price at a certain time, if plaintiff so desired.

3. CORPORATIONS ⇨116 — STOCK — OPTION TO SELL—REASONABLE TIME.

Under an agreement to purchase corporate stock at the end of one year from date at a certain price, if owner then elected to sell, an election to sell and notification thereof made ten months after the expiration of the year was not made within a reasonable time.

4. CORPORATIONS ⇨121(5) — STOCK — OPTION TO SELL—EVIDENCE.

In an action to enforce an option to sell corporate stock, plaintiff having the right to require defendant one year from date of an agreement to purchase the stock at a certain price, evidence held insufficient to show that defendant did anything to interfere with plaintiff's exercise of his option so as to justify a delay of ten months after the expiration of the year in giving notice of election to sell.

5. CORPORATIONS ⇨116 — STOCK — OPTIONS—TIME FOR EXERCISING.

A purchaser of corporate stock who has the option of requiring another person to buy it at the end of a year for a certain price must exercise the option within a reasonable time after the termination of the year.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by I. W. McManaman against B. L. Vickery, administrator with the will annexed of the estate of C. K. Ingersoll, deceased, substituted for C. K. Ingersoll. From a judgment for plaintiff and an order denying his motion for new trial, the defendant appeals. Appeal from the order dismissed, and judgment reversed.

Valentine & Newby, of Los Angeles, for appellant.

Henry P. Goodwin and Irving M. Walker, both of Los Angeles, for respondent.

CONREY, P. J. [1] The defendant appeals from the judgment and from an order denying his motion for a new trial. At the time

when the last-named order was made there was no right of appeal from such an order. *Hockerston v. Hockerston*, 182 Pac. 325; *Hirsch v. All Persons*, 173 Cal. 268, 150 Pac. 712.

Prior to the 1st day of April, 1911, one Bonnard, as agent for the Colorado & Wyoming Coal Company, a corporation, solicited the plaintiff to buy certain stock of that corporation. Appellant's testator, C. K. Ingersoll, the original defendant in this action, had purchased stock of the corporation and recommended the stock to the plaintiff. As an inducement to aid in persuading plaintiff to buy such stock, Ingersoll gave Bonnard, for delivery to the plaintiff, an agreement in writing which was delivered to the plaintiff. This agreement, so far as necessary to the discussion here, reads as follows:

"This is to certify that in the event that I. W. McManaman purchases \$5,000 worth of preferred stock in the Colorado & Wyoming Coal Company, I will, after one year from date hereof, purchase the same from him at par value, plus 7 per cent. interest on all payments made to the Colorado & Wyoming Coal Company or its agent"—signed by C. K. Ingersoll, and dated Monrovia, Cal., April 1, 1911.

Without considering the debate of counsel concerning the extent to which the plaintiff relied upon this contract, as compared with his reliance upon the representations made by the agent of the corporation and upon other sources of information, we will assume that, as found by the court, the plaintiff, in agreeing to purchase and in purchasing the stock, did so in reliance upon the said agreement of Ingersoll. The plaintiff did purchase stock to the extent of \$5,000, paying part in cash and giving his notes for the remainder. Afterwards the plaintiff was sued on said notes by an assignee thereof, and judgment was rendered against him; whereupon he did, on the 21th day of May, 1912, pay the amount of that judgment, and thereby paid in full for the stock purchased by him. A stock certificate therefor was delivered to him on or about the 27th day of September, 1912. The plaintiff claims that within due time he elected to sell the stock to defendant under the option given in that agreement, and demanded that defendant perform the contract according to its terms. Appellant claims that the attempted exercise of said right of option came too late.

[2] The court found that prior to April 1, 1912, plaintiff notified defendant that plaintiff required defendant to purchase from him said stock in accordance with said agreement; also that prior to September 24, 1912, plaintiff notified defendant that plaintiff required defendant to purchase said stock in accordance with said agreement. These two findings are not sustained by the evidence.

On the former finding the only evidence is that, as testified by plaintiff, he said to Mr. Ingersoll, referring to such stock, "I guess I will let you have that," to which it does not appear that Ingersoll made any reply. On the 19th day of March, 1913, McManaman sent to Ingersoll a letter in which the writer said:

"I notified you verbally many months ago, and now I notify you in writing, that the Colorado-Wyoming Coal Company stock purchased at your request, and which you guaranteed to take, is still awaiting your fulfillment of the agreement. I have deposited these shares of stock in care of the First National Bank, Monrovia, and hope you will attend to this without further delay."

Prior to that letter, in a personal interview between the parties, the plaintiff said to defendant, "Mr. Ingersoll, you can have that stock," to which Ingersoll replied that he did not want the stock, and that McManaman could not get anything out of him. The plaintiff in his testimony fixes the date of that conversation at a time one month, a little more or less, before the writing of said letter. From this testimony, the effect of which is not changed by any other evidence in the case, it follows that the plaintiff did not declare his election to sell the stock to Ingersoll until at least as late as the 1st of February, 1913. Nevertheless, the court further found that within a reasonable time after April 1, 1912, plaintiff demanded that Ingersoll purchase said stock and pay therefor in accordance with the terms of said agreement, and offered to deliver the \$5,000 worth of preferred stock, together with the common stock included as a bonus, and offered to do everything to be done by plaintiff in accordance with the terms of said agreement.

[3] Appellant contends that plaintiff's election was not made within a reasonable time after one year from the date of the option, and that for that reason his option to sell the stock to Ingersoll cannot be enforced. This would seem to be the principal question in the case, and it is the only question that we shall discuss, although other points are urged in support of the appeal. In *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938, it was held that the determination of what is a reasonable time is a question of law for the court, and that a notice of acceptance of an option to purchase personal property given ten months after the offer was not given within a reasonable time. In *Roberts v. Evans*, 43 Cal. 380, the court said:

"An offer to sell, when no time is given, must be accepted at once, or within a reasonable time thereafter. A year, or even six months, must be held, as a matter of law, to be an unreasonable time."

If this is the rule under an option to sell or purchase ordinary merchandise, it applies with increasing force to an option to sell mining stock, which notoriously is property of uncertain and rapidly fluctuating value.

[4,5] There is evidence that prior to the letter of March 19, 1913, the plaintiff wrote two other letters to Ingersoll relating to this matter, but the record does not contain the contents of those letters, and the testimony of plaintiff's daughter, who wrote the letters for the plaintiff, is that both of them were written after the time of the conversation in which Ingersoll told the plaintiff that plaintiff could get nothing out of him, etc. Respondent insists as an excuse for his delay that Ingersoll urged him to defend the action against McManaman on the notes, and that therefore he was justified in waiting until after the determination of that litigation. But the plaintiff further testified that he had already made arrangements for his defense of that action, and therefore did not "go in" with Ingersoll, who offered to join him in fighting that action. There is nothing in the record tending to support a claim that Ingersoll did anything to interfere with the plaintiff's exercise of his option to sell the stock to Ingersoll or to delay the same. The plaintiff having failed to exercise the option within a reasonable time, he is not entitled to recover on the option agreement.

The appeal from the order is dismissed, and the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

BOYD v. CITY OF SIERRA MADRE et al. (Civ. 2910.)

(District Court of Appeal, Second District, Division 2, California. June 10, 1919.)

1. MUNICIPAL CORPORATIONS ⇨589—POLICE POWER—SCOPE.

Police power granted municipalities by Const. art. 11, § 11, is as broad as the power possessed by the Legislature itself, except that its exercise by city must be confined to the city, and must not conflict with the general laws of the state.

2. MUNICIPAL CORPORATIONS ⇨605—POLICE POWER—NUISANCES.

The exercise of police power by a city is not limited to the regulation of such things as already have become nuisances, or have been declared such by judgment of a court, but extends to everything expedient for the preservation of the safety, health, or comfort of the city's inhabitants.

3. MUNICIPAL CORPORATIONS ⇨605—POLICE POWER—MULES AND BURROS—CORRAL.

A municipality has power by ordinance to divide its territorial limits into business and

residence districts, and to prohibit in the residence district the maintenance of any corrals wherein mules and burros are kept for hire; the keeping of such corrals in a populous city or town being a nuisance.

4. MUNICIPAL CORPORATIONS §611—REGULATION OF OCCUPATIONS—NOISE—OFFENSIVE ODORS.

Occupations which by the noise made in their pursuit or the odors they engender are offensive to the senses may be interdicted by law in the midst of populous communities on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community.

5. MUNICIPAL CORPORATIONS §626 — OBNOXIOUS OCCUPATIONS — RESIDENCE DISTRICT.

For the purpose of regulating occupations causing noise or offensive odors, city may divide its territorial limits into residence and business districts, and prohibit the obnoxious occupation within the former.

6. MUNICIPAL CORPORATIONS §625—VALIDITY OF ORDINANCE—LIVERY BARN—CORRAL.

Ordinance, dividing city into residence and business districts, and prohibiting the keeping of a livery stable or corral for the keeping of horses, mules, etc., for hire, in residence district, and requiring a permit for maintenance thereof in business district, is not arbitrary.

7. CONSTITUTIONAL LAW §237—ORDINANCE—MAINTENANCE OF CORRAL IN BUSINESS DISTRICT—DISCRIMINATION.

Ordinance prohibiting maintenance of corral for mules and burros in business district without a permit does not impair any constitutional right in giving city authorities the power to grant permit to one person and deny it to another.

8. MUNICIPAL CORPORATIONS §604—POLICE POWER—MAINTENANCE OF CORRAL.

In action by keeper of burros and mules for hire to enjoin city from enforcing ordinance prohibiting maintenance of corral for mules and burros in residence district, and requiring permit for maintenance thereof in business district, it is not material that plaintiff may have kept his corral as clean as possible, and carried on his business in the most approved manner, or that it would be possible for one or more corrals to be maintained without an appreciable risk or peril to the health or safety of a community.

9. MUNICIPAL CORPORATIONS §63(1)—POLICE POWER—REGULATION OF BUSINESS—REVIEW BY COURTS.

It is for the city's legislative body, clothed with police power by direct grant from the Constitution, to determine when and what regulations of a business are essential, and its determination will not be disturbed by the courts unless the regulation has no relation to the protection of health, safety, comfort, or well-being of the community, but is a clear inva-

sion of personal or private rights under the guise of police regulation.

10. MUNICIPAL CORPORATIONS §605 — POLICE POWER—NUISANCES.

Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health or obnoxious to the comfort of a community if not suppressed or regulated, the legislative body in the exercise of its police powers may make and enforce ordinances to regulate or prohibit it, although it may never have been, obnoxious or injurious in the past.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by John Boyd against the City of Sierra Madre and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rose & Scoyille, of Los Angeles, for appellant.

Charles C. Montgomery, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action to enjoin the city of Sierra Madre from enforcing an ordinance that forbids, in the residence district of the city,—defined by the ordinance—any livery stable or corral for the keeping therein of horses, mules, jennies, jacks, or burros for hire, and which likewise forbids, in the business district—defined in the ordinance—any such livery stable or corral without a permit from the city board of trustees, on written application specifying the number and kind of animals desired to be so kept, the period of time, and the place of keeping and the kind of business to be transacted. Plaintiff is engaged in the business of furnishing burros and mules for hire. For that purpose he has ten burros and four mules, keeping them in a corral within the residence district of the city.

The appeal is upon the judgment roll. The lower court found that appellant has kept and maintained his corral "in a cleanly, wholesome (sic), and sanitary manner," but that, prior to the passage of the ordinance, there were, in the vicinity of appellant's corral, two other corrals, wherein such animals were kept for hire, in which there was "an accumulation of manure and other filthy substances of various kinds, generating noxious odors and breeding and attracting flies and other vermin; that said corrals and the business conducted therein and thereupon were the source of many loud, disagreeable, and discordant noises from the braying of the animals, their footbeats on the street and sidewalk, the cries and loud talk of their attendants, and otherwise; and that said businesses were the cause of much dust, dirt, and discomfort to the inhabitants of the residential district described in the ordinance."

Appellant claims that the ordinance is un-

- reasonable and unjustly discriminatory, and that its enforcement will deprive him of his constitutional rights.

[1, 2] In this state the Constitution itself makes a direct grant of police power to municipalities. Article 11, § 11, Cal. Const. The power so conferred is as broad as that possessed by the Legislature itself subject to the two exceptions that its exercise by any city must be confined to the municipality, and must not conflict with the general laws of the state. *Odd Fellows' Cem. Ass'n v. San Francisco*, 140 Cal. 226, 230, 73 Pac. 987. The exercise of this power is not limited to the regulation of such things as already have become nuisances or have been declared such by the judgment of a court. A city's power to prohibit or regulate not only includes nuisances, but extends to everything expedient for the preservation of the safety, health, or comfort of the city's inhabitants. *Odd Fellows' Cem. Ass'n v. San Francisco*, supra; *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714.

[3] A municipality has power, by ordinance, to divide its territorial limits into business and residence districts, and prohibit in the residence district the maintenance of any corral wherein mules and burros are kept for hire. It is a matter of common knowledge that such corrals, by reason of the excrement from the animals, the dropping of which to some extent is unavoidable, are not only rife with offensive, foul-smelling odors, but are breeding places for germ-laden, disease-bearing flies and pestilential vermin. Not only this, but we know of no heaven-sent maxim to invent a silencer for this brute, that one beholding him, neck outstretched and jaws distended wide, could persuade himself that he but heard from the depths of the beast's crimson-coated cavern

"* * * a sound so fine there's nothing lives
"Twixt it and silence."

We fear that, until nature evolves the whispering burro or man invents some harmless but effective mule-muffler, we shall oft "in the dead and vast middle of the night," even in such corrals as appellant's, kept "in a cleanly, wholesome, and sanitary manner," hear the loud, discordant bray of this sociable but shrill-toned friend of man, filling the air "with barbarous dissonance," and drowning even that shout that

"* * * tore Hell's concave, and beyond
Frighted the reign of Chaos and old Night."

It should not be a matter of surprise, therefore, that the noisome smell from these animals and their loud, strident cacophonies bring the keeping of them in a populous city or town "within the legal notion of a nuisance." *Ex parte Foote*, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63. See, also, *In re*

Linehan, 72 Cal. 114, 13 Pac. 170; *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; *Ashbrook v. Commonwealth*, 1 Bush (Ky.) 139, 89 Am. St. Rep. 616.

[4, 5] Occupations which, by the noise made in their pursuit, or the odors they engender, are offensive to the senses may be interdicted by law, in the midst of populous communities, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community. For the purpose of regulating such occupations, a city has the power to divide its territorial limits into a residence and a business district, and prohibit the obnoxious occupation within the former. *Ex parte Moynier*, 65 Cal. 33, 2 Pac. 728; *In re Hang Kie*, 69 Cal. 149, 10 Pac. 327; *Ex parte Quong Wo*, supra; *In re Montgomery*, 103 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; *Ex parte Hadacheck*, 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B, 1248.

[6] The ordinance is not arbitrary nor unjustly discriminatory. It operates alike upon all persons similarly situated within the confines of the city. All have the same rights, and all are subject to the same burdens. It matters not that this particular ordinance is aimed only at those who keep such animals for hire. The record shows that there is another city ordinance that regulates the keeping of such animals for purposes other than hire. Moreover, there is a greater reason for regulating, or even prohibiting, in populous residential communities, the keeping of such animals for hire than there is for regulating or prohibiting their keeping for domestic use or for purposes other than hire. He who keeps a horse, mule, or burro for his own private use, if he does not keep it in a public corral or other place that is equally subject to the most stringent regulation, such as a livery stable, for instance, must keep it in a private stable or corral. But the owner of a private stable or corral, for his own comfort and welfare, has a strong and compelling motive for maintaining the place with due regard to his own, and thus indirectly his neighbors', health and well-being.

[7] The ordinance does not absolutely forbid the maintenance of a corral in the business district, but provides that no corral of the kind interdicted by it shall be maintained in the business section without a permit from the city trustees. Appellant claims that the ordinance does not merely regulate, but that, by requiring a permit for the maintenance of such a corral in the business district, it confers upon the trustees a power that is susceptible of abuse, that the applicant for a permit may be unfairly discriminated against, and that, therefore, in the practical application of the trustees' discriminatory

power, the right to maintain such a corral in any part of the city may be unjustly prohibited. We cannot subscribe to this criticism of the ordinance. The proposition that a man has a natural, innate, inviolate, common-law, or constitutional right to maintain, in a populous community, a place where foul-smelling, loud-braying animals are kept has no foundation in reason or authority. In *re Flaherty*, 105 Cal. 566, 38 Pac. 981, 27 L. R. A. 529. If, therefore, it is not a right that may not be entirely suppressed, it may be regulated as the law-making power may determine. The fact that permission to maintain, in the business district, a corral for horses, mules, or burros may be granted by the city trustees to one person and denied to another does not impair any constitutional right. Such discrimination might well be made where one person desired to keep 2 mules, or 2 burros, and another 50; or where one desired to establish a corral in the heart of the business section, and another nearer the confines of that section of the city; or where one may be known to keep his corral in a filthy condition, and another has established a reputation for good order and cleanliness. The question in each case is whether the establishing of a corral is likely, in the hands of the applicant, to be a nuisance to the neighborhood; and in the absence of any evidence to the contrary, we must assume that the discrimination will be made with due regard to the interests of the applicant and the public, and upon conditions that will accord with the health and comfort of the community. It has been held by some of the courts of this country to be contrary to the spirit of the American institutions to vest this dispensing power in the hands of a single individual; and by others that such authority cannot be delegated to the adjoining lot owners; but the power to delegate such discrimination to the town trustees, as in this case, or to a board appointed for that purpose, is sustained by the great weight of authority. *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; In *re Flaherty*, supra; *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 370; *City of Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385; *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860.

There is absolutely nothing to indicate that the ordinance was intended in any of its features to operate peculiarly against appellant or against any other particular person or persons or class of persons. It is fair on its face, applying equally and uniformly to all engaged in keeping, in corrals, horses, mules, or burros for hire; and it is not to be presumed that the trustees will exercise their power wantonly or for purposes of oppression, or accord permission to social or political favorites and deny it to others.

[8, 9] The fact that appellant may have kept his corral as clean as is possible in such cases, and has carried on his business in the most approved manner, is not material. *City of Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988. Nor would it be of any consequence that it would be possible for one or more such corrals to be maintained without appreciable risk of peril to the health or safety of the community. It is almost unavoidable that some noxious odors shall emanate from, and some disease-bearing flies breed in, some, if not all, such places—to say nothing of the unconstrainable, raucous sounds. It is enough that there are offensive noises and odors intolerably obnoxious to the senses of hearing and smelling. Moreover, the fact that in two corrals, in the vicinity of appellant's, there was "an accumulation of manure and other filthy substances of various kinds, generating noxious odors and breeding and attracting flies and other vermin," was sufficient to justify the passage of such an ordinance as that in question here. The fact that appellant's corral was kept in a cleanly and sanitary manner affords no reason why he should be specially exempt from the provisions of an ordinance designed to regulate a business which, as conducted by some persons at least, is fraught with peril to the community's comfort, if not its very health. Primarily, it is for the city's legislative body, clothed with police power by direct grant from the Constitution, to determine when and what regulations are essential; and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with due regard for the rights of all parties, will not be disturbed by the courts, unless it plainly can be seen that the regulation has no relation to the protection of the health, safety, comfort, or well-being of the community, but it is a clear invasion of personal or property rights under the guise of police regulation. *Ex parte Quong Wo*, supra; *Ex parte Hadacheck*, supra; *Pierce Oil Corp. v. Hope*, 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381.

[10] Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health or obnoxious to the comfort of a community, if not suppressed or regulated, the legislative body, in the exercise of its police powers, may make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been obnoxious or injurious in the past. *Odd Fellows' Cem. Ass'n v. San Francisco*, supra.

We see no force in any of appellant's objections to the ordinance.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 2948.)

(District Court of Appeal, First District, Division 1, California. June 12, 1919.)

1. MASTER AND SERVANT — 385(1)—WORKMEN'S COMPENSATION ACT—COMPENSATION—TIPS—"OTHER ADVANTAGES" RECEIVED BY EMPLOYÉ.

Tips received by employé are "other advantages received by the injured employé as part of his remuneration," within the meaning of Workmen's Compensation Act, § 17b, as amended by St. 1915, p. 1087, and should be considered in determining the "average weekly earnings" of the employé for the purpose of fixing compensation.

2. STATUTES — 226 — WORKMEN'S COMPENSATION ACT—CONSTRUCTION—ADOPTION OF FOREIGN STATUTE.

Compensation acts of this country being generally based upon the English Workmen's Compensation Act, the rulings of the commission and courts of England are persuasive, where the language of the statute is not materially dissimilar.

Proceedings by H. F. Weldemann under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by A. J. Wagner, the employer, and the Hartford Accident & Indemnity Company. There was an award of compensation, and the indemnity company applies for a writ of review. Award affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for petitioner.

A. E. Graupner and Warren Pillsbury, both of San Francisco, and John R. Cronin, of Stockton, for respondents.

RICHARDS, J. This is an application for a writ of review. The petitioner was the insurer of one A. J. Wagner at the time of the injury for which compensation was sought by one H. F. Weldemann, an employé of said Wagner. Weldemann was a waiter employed in a hotel owned and operated by his employer in Stockton, Cal., on August 15, 1916, the date of his injuries. According to the findings of the Industrial Accident Commission he was at that time earning \$45 per month in regular wages and his board, amounting to \$30 per month. In addition to the foregoing earnings he received tips averaging \$1.25 per day. The commission based its award not only upon the aforesaid regular wages and board of the applicant for compensation, but also upon the amount so being received by him in tips at the time of his injury. It is this portion of the award to which the petitioner herein objects in this proceeding, basing its objection upon the fol-

lowing two grounds: First, that the undisputed evidence showed that the applicant for compensation was paid the sum of \$5 per month more than other waiters, which was to be in lieu of tips and which was included in his regular wages of \$45 per month, for which allowance in his award was fully made; second, that under the Workmen's Compensation Act of California (St. 1913, p. 279) tips are not the proper subject of an allowance in the case of injured employés.

As to the first of the foregoing contentions, we do not find it is borne out by the evidence in the case. The applicant for compensation was one of the waiters in the establishment of his employer, but in addition to his regular duties as such he was required during a portion of his time to absent himself from the regular dining room in order to wait upon the officers and certain other employés of the hotel in their private dining room, and for this special service he received an extra \$5 per month. It does not appear that this increase in wages was expressly to be in lieu of all the tips he would receive in the course of his regular duties. The findings of the commission, on the contrary, would seem to show that during such regular service he actually did receive a sum averaging \$1.25 per day from that source, upon the basis of which the extra allowance was made which is objected to in this proceeding. The first point urged by the petitioner is therefore without merit.

[1, 2] As to the petitioner's second objection, viz. that tips are not to be made the basis of an allowance to an injured employé under our California statute, we are also unable to give our assent to the petitioner's contention. It is insisted first that under the terms of the Workmen's Compensation Act the remuneration received by the employé and which forms the basis of the award must come directly from the employer; second, that tips, not being included in the employer's pay roll, could not be considered in calculating an award; third, that the insurer's policy does not cover remuneration other than that which passes from employer to employé. The answer to these several contentions is contained in section 17b of the Workmen's Compensation Act as amended in 1915 (St. 1915, p. 1087), which reads as follows:

"In determining such average weekly earnings, there shall be included the market value of board, lodging, fuel and other advantages received by the injured employé, as part of his remuneration and which can be estimated in money, but such average weekly earnings shall not include any sum which the employer paid to the injured employé to cover any special expenses entailed on him by the nature of his employment."

We are satisfied that the phrase "other advantages received by the injured employé as

part of his remuneration and which can be estimated in money" is broad enough to permit the inclusion of tips in the "average weekly earnings" of such employé, upon which the amount of his award is to be calculated. There is nothing in the act which can be construed as restricting the earnings of the employé either to those which the employer directly pays to him in the form of wages, or to those which are embraced within the employer's pay roll. The Workmen's Compensation Acts of this country are, generally speaking, based upon the English Workmen's Compensation Act, and the rulings of the commission and courts of England are persuasive where the language of the statutes is not materially dissimilar. The question as to whether tips were to be considered in estimating the compensation of injured employés has been uniformly decided in favor of their inclusion under the English statute. *Penn v. Speirs, etc.* (1908) 1 K. B. 766, 4 B. W. C. C. 401; *Skalles v. Blue Anchor Line* (1911) 1 K. B. 360, 4 B. W. C. C. 16; *Knott v. Tingle, etc., Co.*, 4 B. W. C. C. 55; *Gt. Northern Ry. Co.*, 7 W. C. C. 177; *Helps v. Gt. Western Ry., W. C. & Ins. Rep.* 199.

The statutes of Massachusetts and New York, whose statutes are even less broad in their definition as to what earnings of the employé are to be made the basis of his award, have each followed the English rule as declared in the foregoing cases and proceedings. *Hatchman v. New England Casualty Co.*, 2 Mass. I. A. B. 419; *Sloate v. Rochester Taxi Co.*, 221 N. Y. 491, 118 N. E. 1076.

In the latter case the court quite aptly says:

"The employé could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the tips were an advantage received from the employer similar in effect to board, lodging or rent furnished in addition to the wages paid. * * * The usual tips have come to be considered as a part of the cost of entertainment at a hotel, upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages which the employer compels the persons served to pay. In effect, therefore, the employer and not the employé alone is benefited * * * by the patrons of the company. * * * The court should treat these tips in the same manner in which the employer and employé treat them, as a part of the compensation to be received by the employé for the services rendered the employer—a part of the wages, a part of the average annual earnings of the employé."

We are satisfied with the reasoning and conclusion of the foregoing authorities and with the action of the respondent herein, which was based thereon. We are also satisfied that the policy of the petitioner herein covers the entire liability imposed upon the

employer by the terms of the California statute.

The award of the commission is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

DICKERSON v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al. (Civ. 2675.)

(District Court of Appeal, Second District, Division 1, California. June 10, 1919.)

1. PROHIBITION \S 10(2), 11 — ERROR IN COURSE OF TRIAL—REPUDIATION OF VER- DICT—EXCESS OF JURISDICTION.

If, upon the assumption that an action is one of law, the court submits the case to a jury, and thereafter, upon rendition of verdict, concludes that issues are of an equitable character and repudiates the verdict, such ruling, like the denial of jury trial to one entitled thereto, is mere error committed in the course of trial, and not in excess of jurisdiction.

2. PROHIBITION \S 3(2)—SETTING ASIDE VER- DICT—ADEQUATE REMEDY BY APPEAL.

Where court set aside verdict for defendant and entered judgment for plaintiff, defendant's remedy is not by writ of prohibition, even though court acted without jurisdiction, he having had a plain, speedy, and adequate remedy by appeal from judgment rendered.

3. PROHIBITION \S 3(5)—ADEQUACY OF REM- EDY BY APPEAL—INABILITY TO FURNISH UNDERTAKING.

That petitioner for writ of prohibition is unable, by reason of his financial condition, to comply with the statute by giving undertaking giving him right to retain possession of property is immaterial, and does not affect the question of adequacy of remedy afforded by appeal.

Petition for prohibition by W. W. Dickerson against the Superior Court in and for the County of Imperial, State of California, and Franklin J. Cole, Judge of said court. Proceeding dismissed.

B. D. Noel, of El Centro, for petitioner.

Frank Thunen, of San Francisco, for respondents.

SHAW, J. Prohibition. The question involved is whether the alternative writ heretofore issued should be made peremptory or the proceeding therefor be dismissed.

The petition for the writ is founded upon facts as follows: The Southern Pacific Land Company instituted an action against petitioner in the Superior Court of Imperial county to recover possession of a tract of land occupied by petitioner, together with damages for the retention thereof, and to quiet its title thereto. The rights of the plaintiff, as asserted in the complaint, were

put in issue by an answer filed by the petitioner, and the case was submitted to a jury called for the trial thereof. The jury brought in a verdict for defendant. Thereupon plaintiff, waiving all claim to damages for defendant's withholding possession of the property, immediately moved the court to set aside the verdict and, as to title to the property and right of possession thereof, render judgment in favor of plaintiff. This motion was granted, followed by findings made by the court upon which judgment was entered, from which defendant appealed. To this petition the respondents have interposed a general demurrer.

[1] The court had jurisdiction of both the subject of the action and the parties thereto; and petitioner, while claiming that he was rightfully entitled to a trial by jury, concedes that if the court in the first instance had denied him such right, the ruling would have been mere error to be corrected on appeal. *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143. He insists, however, that the action of the court in setting aside the verdict rendered presents a different case, and one wherein the court's action was in excess of its jurisdiction; that it could only act in the matter upon motion made for a new trial. We are unable to perceive the distinction suggested. In each case the ruling would constitute error in the course of the trial. If, upon the assumption that an action is one of law, the court submits the case to a jury and thereafter, upon the rendition of a verdict, concludes the issues are of an equitable character, repudiates the verdict, such ruling, like the denial of a jury trial to one entitled thereto, is mere error committed in the course of the trial, and not in excess of jurisdiction. As said in *Clark v. Superior Court*, 55 Cal. 199:

"If, after acquiring jurisdiction of the parties and subject-matter of an action, a superior court should order judgment in favor of one of the parties without a trial, that judgment would neither be 'without or in excess of the jurisdiction of such tribunal,' although it might be erroneous."

[2] Moreover, conceding petitioner's claim that the court acted without jurisdiction, we are clearly of the opinion that he had a plain, speedy, and adequate remedy in the ordinary course of law by an appeal from the judgment rendered, which is a sufficient answer to the application made. By the taking of an appeal and giving of a sufficient undertaking, not only would he be accorded redress for any errors committed by the court in the trial of the case which resulted in the adverse judgment, but likewise protected in his right to the possession of the property pending the final determination of the case.

[3] That petitioner is unable, by reason of his financial condition, to comply with the statute by giving an undertaking entitling him to retain possession of the property, if true, is wholly immaterial, and does not affect the question as to adequacy of the remedy afforded by an appeal.

The proceeding is dismissed.

We concur: CONREY, P. J.; JAMES, J.

BARRIOS v. PACIFIC STATES TRADING CO. et al. (Civ. 2849.)

(District Court of Appeal, First District, Division 1, California. June 17, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. SALES ⇨261(4)—WARRANTIES.

Acceptance of order for "export cured" codfish amounted to a warranty that goods, when packed for shipment, should measure up, in regard to quality, to the full meaning of the term "export cured," although the word "warranty" was nowhere used.

2. SALES ⇨441(3)—WARRANTIES—BREACH—SUFFICIENCY OF EVIDENCE.

In action for damages for breach of a warranty to ship "export cured" codfish, evidence held sufficient to sustain a finding that codfish shipped was not "export cured."

3. APPEAL AND ERROR ⇨1050(3)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

It was not prejudicial error to admit improper evidence, which was merely cumulative of uncontradicted evidence on a point practically conceded.

4. SALES ⇨280—WARRANTIES—CONDITIONS.

In action for breach of warranty to ship "export cured codfish," it was not incumbent upon plaintiff in first instance to show that condition "Perishable, store away from boilers," stamped on the packages, had been complied with during the shipment; such condition forming no part of the contract between the parties, and being placed upon the outside of the packages by the packer without any knowledge on the part of the purchaser.

5. SALES ⇨288(2)—WARRANTIES—WAIVER.

A buyer was entitled to rely upon the assurances of packer of codfish that goods ordered would be of the quality warranted by the terms of their written agreement, and mere fact that an agent of buyer saw goods in process of preparation and expressed a doubt as to their being sufficiently dried cannot be held to either constitute a waiver of the warranty that the codfish would be "export cured," nor to have required a further inspection of the goods after they had been sealed and packed and delivered on shipboard for the place of their destination.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by O. Barrios against the Pacific States Trading Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

McWilliams & Hatfield, of San Francisco, for appellants.

Wise & O'Connor and Richard S. Goldman, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action brought by him as the assignee of Lewis-Simas-Jones Company, a copartnership, to recover from certain stockholders of the Pacific Trading Company, a corporation, their proportionate share of the liability of said last-named corporation arising out of its alleged breach of warranty. The transaction out of which the cause of action arose was one in which the Lewis-Simas-Jones Company gave its written order to the Pacific States Trading Company for a certain quantity of "export cured boneless codfish" and for a certain further quantity of "export cured whole codfish," to be packed by the latter corporation in or near San Francisco, for shipment by the copartnership, the plaintiff's assignor, to Valparaiso, Chile, which order being accepted, the fish, in due course, were packed and delivered in hermetically sealed tins, cased for foreign shipment, to the steamship company at San Francisco consigned to said foreign port. Arriving there in December, 1915, they were on examination found to be spoiled and unfit for human consumption, and were destroyed by the public authorities. Thereafter the plaintiff, as assignee, commenced this action and recovered judgment against the several appellants herein upon their proportionate liability as stockholders of the said defendant corporation.

[1] The appellants urge several points against the judgment. The first of these is that there was no warranty as to the quality of the fish sold embraced in the written order and its acceptance out of which the cause of action arose. It is true that the word "warrant" is not to be found in the language of the written order or of its acceptance, but we do not think that this is necessary to the creation or existence of an express warranty of goods sold, where the terms of the agreement designate the particular quality of the article to be delivered in phrases which are well known to the trade in respect to the particular article purchased, and sold. The order in the instant case was for "export cured codfish." The evidence showed that these terms had a well-defined meaning as applicable to codfish, which were so prepared and packed through the extraction of all moisture as to be able to withstand the varying heat and other perils incident to a long sea-voy-

age across the equator to a distant country. We are of the opinion that the acceptance of the order expressly requiring the pack to be "export cured" codfish amounted to a warranty that the goods when packed for shipment should measure up in point of quality to the full meaning of the term "export cured." *Coats v. Hord*, 29 Cal. App. 115, 154 Pac. 491.

[2] The next contention of the appellants is that, conceding that the terms of the written order and of its acceptance amounted to a warranty that the goods packed and delivered thereunder would be "export cured codfish," there is no evidence of the breach of such warranty. But in this respect, also, we cannot concur in the appellant's contention. The evidence showed that there were two qualities of cured codfish known to this particular trade. One was "domestic cured codfish," intended for use in domestic trade. In packing this quality of codfish it was not required that all moisture should be dried out of the fish before being packed in tins; but as to the other quality, defined as export cured codfish, it was essential that all moisture should be extracted by the drying process in order that the sealed product might be able to withstand the extremes of climate incident to its shipment to foreign and, as in this instance, tropical lands. Upon the trial of the cause the plaintiff Barrios, who was one of the members of the copartnership and an experienced exporter, testified to having been present when a considerable number of the cases containing the hermetically sealed cans of the shipment in question were opened at Valparaiso, and when it was found that every can to the number of 80 or 100, selected at random from the general lot, contained a quantity of foul liquid, the codfish therein being entirely decomposed. The witness further testified that the codfish thus found to be in that condition was not "export dried codfish." We think this testimony, if believed by the court, would suffice to sustain its finding in that regard.

[3] In this same connection the appellants insist that the court committed reversible error in the admission in evidence of certain depositions given by several persons who also witnessed the opening of the tins containing the codfish in question at Valparaiso, and whose testimony was to the same effect as that given by the witness Barrios. It is practically conceded by the respondent that these depositions were not entitled to admission in evidence, and that the action of the trial court in their admission was an error. It does not follow, however, that it was a reversible error, since the condition in which the codfish was found to be when opened at Valparaiso was not a seriously controverted fact in the case; the testimony of the witness Barrios being uncontradicted by the

defendants, who offered no evidence whatever as to the condition of the goods upon their arrival at Valparaiso. It is a practically conceded fact in the case that the goods were spoiled in transit, and this being so, the evidence embraced in the depositions properly objected to by the defendants was merely cumulative of the uncontradicted evidence of the witness Barrios, and hence the defendants were in no wise prejudiced by its admission. It is, however, contended in this connection by the appellants that two of the witnesses whose depositions were thus erroneously admitted gave testimony in the nature of opinion evidence that the fish had not been export cured, and that in this respect their wrongly admitted testimony was prejudicially injurious. Counsel for the appellants, however, are at pains to point out to the court that these particular witnesses were in no sense experts in the matter of what did or did not constitute "export cured codfish," and that their evidence in that respect was therefore of the weakest and most unsatisfactory character. If this be true, as the record seems to show it to be, an added reason is furnished why evidence of such flimsy and ineffectual quality should not be regarded as sufficiently prejudicial in its influence upon the mind of the trial court to justify a reversal of the case.

[4] The next contention of the appellants is that conceding the warranty upon which this action is predicated to have been embraced in the terms of the writings, it was a warranty subject to an express condition which was contained in the words stamped upon each package of codfish "Perishable, store away from boilers," and that no proof had been presented on the part of plaintiff that this condition had not been broken, or that the spoiled state in which the codfish upon its arrival at Valparaiso was found to be was not the result of its breach. The difficulty with this contention is that the words above quoted constituted no part of the contract between the parties; they were placed upon the outside of the packages which the packer had prepared without any knowledge on the part of the purchaser as to their presence there, and hence without any concurrence in or consent to their existence or effect as a limitation upon the warranty of the goods within. If the car-

rier disobeyed the instructions evidently intended for its guidance, its breach of duty in that regard cannot be charged to plaintiff's assignor, who was entirely ignorant of such a direction, and upon whom it was not incumbent, in the first instance, to show whether or not it had been disobeyed.

[5] The final contention of the appellants is that the plaintiff should have reduced his damages by a sale of the 'codfish in question at San Francisco prior to their shipment to their ultimate destination. This contention is based upon the claim of the defendants that the fact that the goods were not "export cured" was known to one of the buyers' authorized agents before the goods were fully packed. We do not think that the evidence sustains this contention, for while it is true that one of the buyer's agents visited the drying and packing grounds of the packer while the goods were being canned, and there expressed his doubts as to whether they were sufficiently dry for export shipment, the evidence also shows that he was assured by the more experienced representative of the packer that they were sufficiently dried to withstand a trip to South America. The buyer was entitled to rely upon the assurances of the packer that the goods shipped would be of the quality warranted by the terms of their written agreement with it, and the mere fact that an agent of the purchaser saw such foods in process of preparation and expressed a doubt as to their being sufficiently dried cannot be held to either constitute a waiver of such warranty, nor to have required a further inspection of the goods after they had been sealed and packed and delivered on shipboard at San Francisco for the place of their destination. *Grace v. Levy*, 30 Cal. App. 231, 156 Pac. 626; *North Alaska S. Co. v. Hobbs, etc., Co.*, 159 Cal. 381, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501. There is no merit, therefore, in the appellants' contention that the goods should have been examined at San Francisco, and if found defective in quality sold there in order to reduce the defendants' bill for damages. *Kraslinskoff v. Dundon*, 8 Cal. App. 406, 97 Pac. 172.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

HILLCREST CO. et al. v. SHRIER et al.
(Civ. 2689.)

(District Court of Appeal, Second District, Division 1, California. June 16, 1919.)

1. MECHANICS' LIENS ⇨264(1)—DIRECTING THIRD PERSON TO BE A PARTY—PROCEDURE.

In an action against owner of property for foreclosure of mechanic's lien, where a bonding company was made a party defendant in the complaints of some of the plaintiffs, and the owners in their answers in all of the actions asked that the bonding company be made a defendant, and that judgment be entered in their favor against the bonding company, and the bonding company made answer in the proceedings, the actions having been consolidated, raising issues on the facts necessary to a complete determination of the merits which were fully determined, the bonding company cannot complain that it was not properly before the court, it not appearing that the plaintiffs, who did not first make the bonding company a defendant, did not later join in the owners' request that it be made a defendant.

2. MECHANICS' LIENS ⇨264(1), 315—FORECLOSURE — MAKING SURETY A PARTY DEFENDANT.

In action to foreclose mechanics' liens, defendant owners who have paid contractor in full may call upon contractor's surety to pay as for the default of the contractor in such proceeding, although owners have not paid any of the claims against the property, and they may have the surety made a party defendant, and ask for judgment against him for any sums that might be rendered, in view of Code Civ. Proc. § 578.

3. APPEAL AND ERROR ⇨1039(13)—HARMLESS ERROR—VARIANCE.

Surety cannot complain of variance increasing amount of recovery against principal, where indebtedness of principal, if increase were deducted, was more than penalty of bond.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Actions by the Hillcrest Company and others against Clara Shrier and Blanche L. Ehrenberg. On defendants' request the Commonwealth Bonding & Casualty Insurance Company was made a party defendant. From an adverse judgment, the latter appeals. Affirmed.

Hoff & Chatterson, of San Diego, for appellant.

Binnard & Weinberger and W. P. Cary, all of San Diego, for respondents.

CONREY, P. J. Several actions were brought for the foreclosure of numerous lien claims incurred during the performance of a contract between the defendants Blanche L. Ehrenberg and Clara Shrier, as owners, and defendant W. B. Johnson, as contractor, for

the construction of a flat building and garage in the city of San Diego. The contractor, together with the appellant bonding company, executed to the owners an undertaking in the sum of \$5,000, conditioned for the performance of the contract by the contractor, and that he would finish and deliver the work free from all liens and pay in full all the claims of any person performing labor or furnishing materials to be used in the work. Both contract and bond were dated on the 20th day of May, 1913. The bond further contained the terms provided for in section 1188 of the Code of Civil Procedure, as amended in 1911 (St. 1911, p. 1313.) It complied with the requirements of that section, with the exception that the bond was for only the sum of \$5,000, which was less than 50 per cent. of the contract price.

The court found that the owners fully performed their part of the contract, and that they paid out for the construction of the building the full sum of \$12,450, which was the contract price, and the further sum of \$193 for additional work not provided for in the contract; that the contractor failed to pay the sum of \$5,093.41, due to the several plaintiffs for materials used and labor done upon said building. The several actions having been consolidated prior to the trial, the court, pursuant to the findings made, rendered judgment in favor of the plaintiffs against the owners for the several sums claimed, amounting in the aggregate to more than \$5,000, and for the foreclosure of their liens against the property of the defendant owners, and further rendered judgment in favor of the owners against the defendant bonding company in the sum of \$5,000, with costs. From the judgment rendered against it the bonding company prosecutes this appeal.

The appeal is presented upon a record certified to contain a full copy of the judgment roll, except the pleadings relating to that portion of the action and judgment from which no appeal is taken, and that portion of the findings of fact which relates to that part of the judgment from which no appeal is taken.

Appellant urges upon this court the following reasons why the judgment is erroneous: (1) Because the order of court directing the bonding company to be made a party was made without any legal showing, and was not made in pursuance of any code provision or law. (2) That the pleading of the defendants, to which said bonding company was made a party and denominated an answer, was and is not a pleading known to the Code of Practice. That it did not in any way plead to the complaint of the plaintiff, but was directed toward one who was not a party to the action, and who was only conditionally liable to the party offering the pleading, and, that condition not being fulfilled, and no cause of

action being stated in the said answer against the bonding company, the judgment based thereon was erroneous. (3) The defendant owners not having paid any of the claims against the property, they had no right in contract or law to call upon the guarantor to pay as for default of the contractor, until default was established, and the owners had been required to pay something by such default, until which time they had not been damaged. (4) The enforcement of the Fruer lien ignored the principle that the contract sued upon must be sustained by the proof; otherwise the variance is fatal. In this case the complaint made new contracts for Fruer, ignored his sworn lien claim, and enforced a contract not even alluded to in his claim of lien.

Will take up these points in the order above stated.

[1] 1. The only complaint contained in the transcript is the amended complaint of A. H. Busch Company, filed November 20, 1914. In that complaint the bonding company is one of the defendants against whom judgment is demanded. The order of consolidation of the actions was made pursuant to stipulation on the 8th day of June, 1914. The transcript shows that on May 4, 1914, according to minutes of the court of that date under the heading "Title of Court and Cause," the demurrer of the defendant "to plaintiff's complaint" was argued and submitted and overruled, and "the bonding company is ordered to be made party defendant and summons issued to bonding company and facts upon which it is claimed by defendant Shrier to be set forth in her answer. Defendant Shrier given ten days to comply with the above order of court." We may infer that in some one of the several and at that time separate actions pending the bonding company had not been made a party defendant. So far as appears from this record, it was a party defendant in the other actions. On April 13, 1914, the defendant owners had filed an answer in the Hillcrest Company case, setting out certain facts concerning the undertaking given by the bonding company, and demanding that the bonding company be made defendant in that action in order to litigate the rights and liabilities of all the parties and for the purpose of avoiding a multiplicity of suits. Presumably it was in response to that answer that the court made the order referred to as above stated, and presumably that is the case in which the bonding company had not been made a party by the plaintiff. It does not appear that the Hillcrest Company did not then or subsequently join in the request that the bonding company be made defendant in the action. By its answer filed in response to the several pleadings against it, the bonding company seems to have raised issues upon the facts necessary to a complete determination of the merits of the action, and, so far as appears, those merits were fully deter-

mined by the court in its decision. We are satisfied that appellant was properly before the court, and that it has suffered no prejudice by reason of the order of which it complains.

[2] 2 and 3. The answer of the defendant owners filed in the Hillcrest Company case on the 13th day of April, 1914, was followed by an amendment to said answer, filed May 11, 1914, in which amendment the undertaking made by appellant was set forth, together with the facts occurring subsequent to the execution of the undertaking, and then demanding that appellant be held liable on its bond as against said claims of lien to the full extent of \$5,000. We do not agree with the contention of appellant that the defendant owners, not having paid any of the claims against the property, therefore had no right to call upon appellant to pay as for the default of the contractor until such default had been established by a separate judgment and the owners had been required to pay out moneys on account of such default. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Code Civ. Proc., § 578. It appears to us that the judgment rendered against appellant appropriately determines the ultimate rights existing between appellant and defendant owners. The owners had fully performed their contract and paid the contractor in full for the building. Nevertheless, lien claims were being asserted against the property of the owners by reason of default on the part of the contractor for whom appellant had become surety. Upon enforcement of these liens the property of the owners would be sold, and they would have no recourse except against the contractor and upon the undertaking made by appellant. Appellant has been given every opportunity to defend against these claimed liens, but, nevertheless, the liens were legally established by this judgment. Every right which appellant could have in a separate action against it by the owners of the property to recover on the undertaking has been preserved to appellant in this action. Our attention has not been drawn to any decision by a court of this state determining this point. The case of *Massachusetts Bonding & Insurance Co. v. Realty Trust Co.*, 137 Ga. 693, 73 S. E. 1053, cited by respondents here, appears to sustain their contention. It was there held by the Supreme Court of Georgia that for the purpose of avoiding vexatious delays and a multiplicity of suits where there are numerous lien claims arising out of a building contract, equity will take cognizance and settle all the matters in one proceeding, and the owner may have relief against the surety on the contractor's bond, without first discharging

the lien. "By bringing the lienors into the case their rights will be fixed as against the plaintiff, and at the same time the extent of liability of the surety and its principal will be fixed."

[3] 4. Assuming a variance between the Fruer claim of lien and the contract concerning the same as proved and found by the court, the effect of the court's error in making full allowance of that claim was not such as to increase the amount of the allowance more than \$190 above the correct amount; but, after making this deduction, the total amount of the judgment for the lien claims against respondent owners (including interest and expense for filing liens) would be in excess of the sum of \$5,000, the penalty named in the bond. Therefore this error, if there was any error in the amount allowed on the Fruer claim, is without importance to appellant.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

OPELT v. AL G. BARNES CO. (Civ. 2668.)

(District Court of Appeal, First District, Division 1, California. June 27, 1919.)

1. PLEADING §35 — SURPLUSAGE — PERSONAL INJURY ACTION.

The complaint for personal injury from a leopard in a circus being predicated on the keeping of a vicious and dangerous animal, known to defendant to be such, would have been sufficient without allegation of negligence, so that any averment thereof may be treated as surplusage.

2. ANIMALS §69 — KEEPING DANGEROUS ANIMALS—DUTY TO GUARD.

The owner of a leopard, knowing it was untamed, vicious, and dangerous, was bound to so guard it as absolutely to prevent occurrence of injury to others through such vicious acts as it would naturally be inclined to commit.

3. ANIMALS §71 — PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE.

If one injured by an animal, wild, vicious, and dangerous to the knowledge of its owner, imprudently or negligently placed himself in a position to be attacked, or by his own negligence contributed to his injury, the owner may be exonerated.

4. ANIMALS §74(5) — INJURY FROM WILD ANIMAL—WANT OF CARE BY INFANT—EVIDENCE.

Evidence held to sustain finding that plaintiff, a boy of 10½ years, injured at a circus by a leopard reaching out a paw between bars of its cage, when he went within the guard rope, failed to use ordinary care.

5. APPEAL AND ERROR §991 — REVIEW — QUESTION OF FACT.

What was the capacity of a child of tender years to exercise care in avoiding a particular danger, and whether he comported himself with the care and prudence due from one of his years and experience, is a question of fact for the triers thereof, and not for the court on appeal.

6. ANIMALS §74(8) — CONTRIBUTORY NEGLIGENCE OF INFANT—AGE.

It cannot be said as matter of law at what age a boy would be possessed of such intelligence, foresight, and judgment as to be charged with negligence in getting inside the guard rope, close to the cage of a leopard in a circus.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Luther Opelt against the Al G. Barnes Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ostrander, Clark & Carey, of Oakland, for appellant.

Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

WASTE, P. J. Plaintiff, by his guardian ad litem, brought this action against defendant for injuries, alleged to have been received by being scratched by a vicious leopard, one of a number of animals kept by defendant corporation in its circus. The animal was securely caged, and was not at large. Defendant had judgment and plaintiff appeals.

Plaintiff, at the time of the accident was a boy of 10½ years of age. On the day in question, having paid the price of admission, he entered the circus to view the animals, and witness the performance in the main tent. He first entered the tent in which the animals were kept in cages, arranged in a row around the circular walls of the inclosure. A guard rope, securely fastened to posts extended entirely along, and in front of, this row of animal cages, about 3 feet from the ground, and placed at such a distance that spectators could not approach within range of possible injury from the animals. This guard rope turned at a right angle from a post, near the passageway from the animal inclosure into the main tent, from which post, about 3 feet in height, it was carried across the end of the row of cages and fastened at a point about 7 feet in height, to a pole supporting the wall of the tent. In the cage nearest to the passageway, and just behind the slanting rope, was the leopard.

After viewing the animals, the plaintiff and his companion started to go into the main tent, the entrance to which they found barred by a rope. Many other people were crowding toward the same place. The boys decided to wait, and turned aside. Their view of the cages was cut off by the crowd,

and, there being no obstruction to bar their way, other than the slanting rope referred to, in order to get a better view of the animals they walked under the rope, and into the space between the leopard cage and the side wall of the tent, which space appears to have been about 2 feet wide. While the plaintiff was in this position, the leopard reached his forearm, or paw, between the bars of the cage, which were perpendicular and about $3\frac{1}{2}$ inches apart, and struck the boy's face, inflicting an injury to his right eye.

The court found that the plaintiff was injured solely because he willfully and knowingly, and without cause or excuse, placed himself within reach of the wild animal, which he knew to be ferocious and dangerous, and that the defendant, owner of the circus, was in no way guilty of negligence or lack of care in the premises, either in the keeping or exposing the leopard to view, and that the defendant did not omit to perform any duty in the premises.

[1] Appellant contends that defendant's answer fails to deny plaintiff's allegation of negligence, and that it does not set up any contributory negligence of plaintiff as a defense to the action. The complaint being predicated upon the keeping by defendant of a vicious and dangerous animal, known to defendant to be such, would have been sufficient without alleging negligence on the part of defendant. *Congress, etc., Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487; 3 *Corpus Juris*, par. 358. Such averment, if made, may properly be treated as surplusage. *Corpus Juris*, supra. The question of the owner's negligence is not in the case. *Clowdis v. Fresno Flume, etc., Co.*, 118 Cal. at page 321, 50 Pac. 373, 62 Am. St. Rep. 238. However, the answer denies that the injury was caused by or through any negligence of the defendant, and specifically denies each fact which the plaintiff asserts, in his attempt to charge facts showing negligence. It contains certain affirmative allegations tending to negative any claim of negligence charged against defendant. The answer appears to be an express disclaimer of any negligence on the part of the defendant; and pleads that the injury occurred to the plaintiff solely by reason of the plaintiff's negligence, and want of care, in willfully placing himself within the guard rope, and behind the cage. The question of contributory negligence does not appear to have entered into, or to have been an issue of, the case. In other words, as counsel for respondents say in their brief, the defense is based "upon the proposition that the defendant was not negligent in any way, or manner, and that the injury occurred solely by reason of the fault and trespass of the plaintiff."

[2] The answer admits that defendant, and its employes, knew "that the leopard was a wild, untamed animal, of fierce, dangerous,

vicious, ferocious character, nature, and disposition." By this admission, defendant charged itself with the duty toward the plaintiff, as well as all other persons, to guard the leopard in such manner as to absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as it would naturally be inclined to commit. *Gooding v. Chutes Co.*, 155 Cal. 620, 102 Pac. 819, 23 L. R. A. (N. S.) 1071, 18 Ann. Cas. 671; *Parker v. Cushman*, 195 Fed. 715, 117 C. C. A. 71; 3 *Corpus Juris*, par. 315, and cases cited. The liability of the owner is absolute, in such cases, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, in making compensation for the mischief done, unless it can be shown that the person injured voluntarily, or consciously, did something to bring about the injury. *Molloy v. Starin*, 191 N. Y. 21, 83 N. E. 583, 16 L. R. A. (N. S.) 445, 14 Ann. Cas. 57. The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. *Hammond v. Melton*, 42 Ill. App. 186. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case. *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269; *Clowdis v. Fresno Flume, etc., Co.*, supra.

[3] While the burden of the duty to exercise the highest degree of care rested upon defendant, it appears from the above authorities, and many others, to be equally as well established in this class of cases that, if the injured party imprudently, or negligently, places himself in a position to be attacked, or by his own negligence contributes to his injury, the owner of the wild beast may be exonerated from liability. 3 *Corpus Juris*, par. 315, and cases cited.

[4] In the present case, the court found that the injury to the plaintiff resulted solely by reason of his own fault; that the plaintiff "was a bright, intelligent and alert boy, and was as well able to care for himself as an adult person of average intelligence; that he knew that the leopard was a wild, untamed animal, of fierce, dangerous, vicious, ferocious character, nature, and disposition; that he knew the guard rope was there, and knew its purpose was to prevent spectators from approaching within range of possible injury from the leopard; that he knew that the leopard could reach its paws out through the $3\frac{1}{2}$ -inch space between the iron bars composing the cage, in which it was confined; and that he willfully and knowingly placed himself within reach of the animal." If this finding shall be allowed to stand it will be sufficient to support the judgment in the case.

On the stand, the boy testified that he knew that the leopard was dangerous and ferocious, and that the guard rope was placed to keep people away from the animals, be-

cause they were dangerous; that he knew the safe place from which to look at the animals would have been on the outside of the rope. He further testified "there was such a crowd of people, that I could not see the animals, so I walked back of the cage." He further testified that he did not know how close to the cage he was when the leopard hit him: that he thought he was far enough from the cage, so that the leopard would not touch him. The boy's companion said to him while they were standing between the wall of the tent and the leopard cage, "Don't go too close." There was evidence, also, that the manager of the show, and the superintendent, were standing about 30 feet away from the leopard cage. They saw the boys go under the rope "and hollered to them." Before they had time to do more than start to get the boys out of the dangerous place, the plaintiff had been hurt. No other guards, or attendants, appear to have been near the scene of the accident. Signs reading: "Danger. Keep Away"—were placed on all of the animal cages.

In view of the testimony in the case, we are of the opinion that we cannot go behind the findings of the court, to the effect that the plaintiff failed to use ordinary care. "Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness" (Guyer v. Sterling Steam Laundry Co., 171 Cal. 761, 154 Pac. 1057), but the law imposes upon minors the duty of giving such attention to their surroundings, and care to avoid danger, as may fairly and reasonably be expected from persons of their age and capacity. Studer v. Southern Pacific Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39.

[5, 6] Whether a minor of tender years comports himself with the care and prudence due from one of his years and experience is strictly a question to be determined on the evidence. The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact, falling within the province of a jury (or court) to determine. Mayne v. San Diego Electric Ry. Co. (Sup.) 175 Pac. 690, citing Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, and Consolidated, etc., Ry. Co. v. Carlson, 58 Kan. 66, 48 Pac. 635. We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight, and judgment as to charge him with negligence in a case like the present. Biggs v. Consolidated, etc., Wire Co., 60 Kan. 223, 56 Pac. 4, 44 L. R. A. 655. The care which a child is required to exercise in such matters is to be determined from the circumstances of the particular case in which his conduct is involved, and under the evidence there presented. Mayne v. San Diego Electric Ry. Co., supra.

We cannot say, as matter of law, that the plaintiff entered into the forbidden space, be-

tween the leopard's cage and the wall of the tent, without a full appreciation of the dangers and risk, and without sufficient judgment to know how to avoid them. These matters, and the further question whether or not he duly exercised such judgment as he possessed, were considerations of fact. *Foley v. California Horseshoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87. We do not consider the present case such an exceptional one as to present the questions to us as unmixt questions of law to be determined by the court.

Just how far to apply the rule of accountability to a bright, 10 year old boy, at a circus, with the allurements and excitement attendant thereto, and keeping in mind the propensity to curiosity every normal boy possesses, was, no doubt, a matter of grave concern to the trial court, as it has been to us. The court below, having before it all the facts, and witnesses in the case, and particularly having an opportunity to hear the testimony, observe the actions, and determine the intelligence of the injured boy, has determined and announced its conclusion, which we do not feel we may properly reject.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

METROPOLITAN LIFE INS. CO. v. DEASY, Auditor, et al. (Civ. 2973.)

(District Court of Appeal, First District, Division 1, California. June 19, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. MUNICIPAL CORPORATIONS — 889 — FUNDS — BUDGET — JUDGMENTS.

San Francisco Charter, art. 3, c. 1, §§ 1-5, providing for a budget of amounts estimated to be required for expenses of conducting the public business of the city and county for the ensuing fiscal year, and providing the time of making a tax levy therefor, does not apply to or embrace obligations in form of final judgments.

2. MUNICIPAL CORPORATIONS — 865(2) — LIMITATIONS ON INDEBTEDNESS — JUDGMENTS — CONSTITUTIONAL PROVISIONS.

Judgments obtained against municipalities for torts constitute liabilities not within Const. art. 11, § 18, prohibiting cities from incurring liability in excess of the annual income without the assent of two-thirds of the voters.

3. MUNICIPAL CORPORATIONS — 865(2) — LIMITATION OF INDEBTEDNESS — JUDGMENTS — LEVYING OF TAXES — VALIDITY OF STATUTES.

St. 1901, p. 794, providing for the payment of final judgments against municipalities, must be construed as constitutional and as applying to judgments not within the provisions of Const.

art. 11, § 18, prohibiting cities from incurring liability in excess of annual income.

4. MUNICIPAL CORPORATIONS — 1038 — ENFORCEMENT OF JUDGMENT—COMPLEMENTARY STATUTES.

St. 1901, p. 274, relating to procedure for collection of final judgments against municipalities, is not in conflict with San Francisco Charter, art. 3, c. 11, §§ 1-3, providing for payment of judgments from the surplus fund, the two acts being in effect complementary, so that a judgment may be collected under the former, where the city does not choose to pay it under the latter. Const. art. 11, § 6.

Original petition by the Metropolitan Life Insurance Company, for mandamus to compel Cornelius J. Deasy, as Auditor of the City and County of San Francisco, and others, to certify to the treasurer of said city and county the amount of a certain judgment, interest, and cost obtained by the petitioner against the municipality and remaining unpaid, and have the same included in the budget of expenses and taxes levied for its payment. Writ granted.

Samuel Knight and F. E. Boland, both of San Francisco, for petitioner.

Maurice T. Dooling, Jr., Asst. City Atty., of San Francisco, for respondents.

RICHARDS, J. Application for a writ of mandate directed to the auditor of the city and county of San Francisco, and also to the persons constituting the board of supervisors of said city and county and to the mayor thereof, by the terms of which writ the said auditor shall be commanded to certify to the treasurer of said city and county the fact and amount of a certain judgment for the sum of \$29,808.94, and interest and costs, obtained by the petitioner herein against said municipality and remaining unpaid; and by the terms of which writ the said mayor and board of supervisors shall be required to include within the budget of estimated expenses and required finances of said municipality for the ensuing year the amount due upon said judgment, and to levy a tax for the payment of the same, as required by law.

The respondents have appeared to oppose the issuance of said writ upon several grounds to be hereinafter considered.

The facts upon which the petitioner predicates its demand for the issuance of said writ of mandate are undisputed, and are briefly these: On the 1st day of December, 1917, the petitioner herein recovered a judgment against the said city and county of San Francisco for the sum of \$29,808.94, together with costs amounting to \$112, in an action instituted by it against said municipality for damages arising out of certain alleged injuries to its land and the buildings thereon, occasioned by and during the excavation of a certain

tunnel under and along the line of Stockton street therein; the said petitioner not being a party to the proceedings for the construction of such tunnel. This judgment has since the rendition thereof remained unpaid, and was at the time of the application for this writ and still is an existing and unsatisfied judgment in favor of said petitioner and against said municipality. The demands of the petitioner upon the several officials of said city and county named as respondents herein for the taking of the steps alleged by it to be necessary to the levy of a special tax for the liquidation of such judgment have been refused, whereupon it seeks this writ.

[1] The respondents interpose several obstacles to the issuance of the writ. The first of these, standing upon the threshold, is that the application for the writ comes too late for action on the part of the municipal officials during the current year, for the reason that under the provisions of the San Francisco Charter (sections 1 to 5, c. 1, art. 3 thereof) the board of supervisors must, prior to the first Monday of June in each year, make "a budget of the amounts estimated to be required to pay the expenses of conducting the public business of the city and county for the next ensuing fiscal year"; that the time has gone by for the inclusion of the amount of the petitioner's judgment in such budget, and hence that by the express terms of section 5 of said chapter and article of said charter its amount cannot be embraced in the tax levy which, under another section of said charter, is to be made on or before the third Monday of September of each year.

We do not think this objection a valid one against the issuance of this writ. The budget provided for by the provisions of the charter above referred to was evidently not intended to apply to or embrace those obligations of the municipality which are of the nature of stated obligations or liabilities by reason of being either established by law or of being fixed in the form of final judgments. By the very terms of the section providing for said budget the matters to be included therein are the "estimated expenses of conducting the public business of the city and county for the next ensuing fiscal year." Clearly, this refers to those expenditures of the several departments of the municipality which are yet to be made in the course of their current operation, and which require the process of estimation in order to determine the probable cost of conducting the business of the municipality as a going concern. It has no reference to liabilities which do not require estimation and which could not in their nature be affected by the fact that they were or were not included in the budget of the fiscal year. For example, the municipality could not evade its liability to pay the stated salaries of its officials by failing to include

these in its budget, or even by failing to embrace them in its tax levy. *Lewes v. Widber*, 99 Cal. 412, 33 Pac. 1128. The same reasoning applies to those liabilities of the municipality which have ripened into final judgments and which are not otherwise of a nature which would bring them within the prohibition of section 18 of article 11 of the state Constitution as to the fund available for their payment.

[2] This brings us to the next contention of the respondents, which is that the judgment upon which petitioner bases its demand for the issuance of the writ of mandate herein is one which comes within the prohibition of the above section and article of the state Constitution. This contention was, however, disposed of by the Supreme Court in the recent case of *City of Long Beach v. Leisenby* (Sup.) 179 Pac. 198, wherein it was held that judgments obtained against municipalities for torts constituted liabilities which were not within the contemplation, purpose, or meaning of section 18 of article 11 of the state Constitution.

[3] Having disposed of these two contentions, we approach the main obstacle which the respondents urge against the issuance of this writ, which is, in substance, that in the matter of the payment of whatever judgments may be obtained against the city and county of San Francisco its charter has provided a means for their liquidation which is exclusive, and that, the petitioner herein not being able by proper averment or proof to show that the means thus provided is available for the satisfaction of its judgment, it has no other present remedy. In support of this contention we are directed to the provisions of sections 1, 2, and 3 of chapter 11 of article 3 of the San Francisco charter, which provide for the apportionment of the revenues of the municipality into separate funds, which are to be drawn upon for the payment of its various sorts of liabilities. Among these is the "surplus fund," which shall consist of the moneys remaining at the end of any fiscal year in any other of these funds after all valid demands against said other funds incurred within the fiscal year have been paid and discharged. Section 3 of said article and chapter then provides as follows:

"The surplus fund shall be used for the purposes and in the order following:

"1. In the payment of any final judgment against the city and county.

"2. In liquidation and extinguishment under such regulations as the supervisors may adopt of any outstanding funded debt of the city and county;

"3. To be carried over and apportioned among the funds and used in the ensuing fiscal year as part of the income and revenue thereof."

It appears from the record herein that there are and have been since the rendition

of the petitioner's judgment herein no money in the surplus fund of the city and county of San Francisco; and, this being so, the respondents claim that the petitioner has by law no other means by which its judgment can be paid.

In answer to this contention the petitioner falls back upon the provisions of an act of the Legislature approved March 23, 1901, entitled, "An act to provide for the payment of judgments against counties, cities, cities and counties and towns." Stats. 1901, p. 794. Said act provides that all final judgments then existing or thereafter obtained against any of the enumerated municipalities shall be paid by the treasurer thereof in the following manner: The clerk thereof shall file with the auditor and furnish the board of supervisors or other governing body of such municipality authorized by law to levy taxes a complete list of all final judgments against such municipality of record in his office at least 15 days before the day on which the tax levy must by law be made; the auditor shall examine and audit the judgments so reported by the clerk, and certify the amount of the same to the treasurer within five days after the list of such judgments has been filed by the clerk with him, and thereupon the board of supervisors or other governing body of the municipality authorized by law to levy taxes must include in the tax levy for the next fiscal year a rate or sum sufficient to pay such final judgments as are thus found to exist against the said municipality. The act permits the tax-levying body to spread the payment of such judgments over a series of years, not exceeding ten, by providing for an aliquot or fractional part of the amounts due upon such judgments to be levied, collected, and paid thereon each year for that period of time. It is upon the provisions of this statute that the petitioner herein places its main reliance for its right to the writ, and has framed its application herein accordingly.

The respondents, on the other hand, urge several reasons why the terms of this statute cannot be availed of by the petitioner in furtherance of its demand for a writ of mandate herein. It is claimed by the respondents that the statute is unconstitutional because, being general in its terms, it is in contravention of section 18 of article 11 of the Constitution in so far as it might be held to include judgments against municipalities which are based upon contracts the liability upon which must be payable and paid out of the funds of the fiscal year in which the obligation was incurred. We fail to perceive, however, upon what theory the respondents can be heard to urge this contention, since the judgment to the payment of which the object is not the class coming within the prohibitive terms of said article and section of the Constitution. We must assume that the Legislature, in the adoption of the act of 1901 above referred to,

had in mind the said provision of the state Constitution, and intended the operation of the act to be confined to such final judgments against municipalities as were legally payable out of the revenues of succeeding years; and we do not understand that the case of *Arthur v. City of Petaluma*, 175 Cal. 216, 165 Pac. 698, contains anything which militates against this view.

[4] The next contention of the respondents is that, even if the statute in question is not obnoxious to the foregoing provision of the state Constitution, it has no application to the city and county of San Francisco because it is in conflict with the provisions of its charter above set forth, providing for the creation of the "surplus fund" out of which final judgments against said city and county shall be paid. In making this contention the respondents apparently rely upon the provisions of article 11, section 6, of the Constitution, which declares that in respect to municipal affairs the charters of municipalities shall prevail, and that as to such matters they shall not be subject to or controlled by general laws. Conceding, for the sake of the argument, although not deciding, that the subject of the payment of final judgments against municipalities is a municipal affair, we are still of the opinion that the clauses of the charter of the city and county of San Francisco providing for the creation of a "surplus fund" out of which final judgments obtained against said municipality shall be payable, are not in conflict with the provisions of the statute of 1901 so as to prevent us from making application of its terms and requirements to the instant case. We are aided in reaching this conclusion by the reasoning of the Supreme Court in the case of *City of Long Beach v. Leisenby*, supra. In that case the court had under consideration the question whether the statute of 1897 (St. 1897, p. 75), as amended by an act of the Legislature approved March 12, 1901 (Stats. 1901, p. 274), was repealed by the passage during the same session of the Legislature of the later act approved March 23, 1901, which is the act in question in the instant case. The earlier act provided for the funding of judgments obtained against certain municipalities through the voluntary action of the governing bodies of such municipalities in providing for the issuance of long term bonds for the eventual payment of such judgments. The later act provided, as we have seen, for the compulsory payment of such judgments through the levy of special taxes. In comparing these two acts the Supreme Court pointed out that they were not in conflict, for the reason that by the former act the governing bodies of the municipalities affected by it were invested with a discretion as to whether or not they would adopt the funding plan of paying the outstanding indebtedness

of such municipalities, the exercise of which discretion could not be compelled by the judgment creditor, while the later act was compulsory in its nature, and imposed upon the official body invested with the power to levy taxes the duty of making a special tax levy to pay judgments against the municipality, the performance of which duty the judgment creditor could compel by an appropriate writ. These two acts were thus stated to be "in effect complementary in providing a twofold means by which municipalities may elect, or if they do not do so, may be compelled to pay such of their debts as are payable out of revenues other than those of the year in which the obligation was incurred." This reasoning applies in our opinion to the situation presented in the instant case. The city charter, through its provisions as to the "surplus fund" as the source from which judgments obtained against the municipality may be paid, leaves the matter of creating or replenishing such a fund entirely in the discretion of its various boards and officials in charge of the replenishment and disbursement of the revenues of the municipality distributed among its other funds. If they do not choose to have left on hand a surplus which would flow into the surplus fund, the judgment creditor is remediless, in so far as the charter is concerned, to compel the creation or replenishment of the only fund from which his judgment might be satisfied. The statute in question steps in at this point to provide a means by which municipalities may be compelled to liquidate their just debts. The view that the charter and statute are not in conflict is one which is in accord with the principle of justice and fair dealing which imposes upon municipalities the same moral and legal duty which rests upon individuals to pay their just obligations either voluntarily or upon compulsion. This equal duty was well exemplified in the early case of *McCracken v. City of San Francisco*, 16 Cal. 591, in which Mr. Justice Field, in dealing with certain restrictive provisions of the charter of San Francisco then in operation, says:

"In addition to this we are clear that the provision refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys; not to justify the detention of the property of her citizens which she may have unlawfully obtained. The plaintiff claims that the city has got his money without any consideration—by mistake—and has appropriated it to municipal purposes, and he insists that she is responsible to him for it, because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice—to restore what belongs to others—which rests upon all per-

sons, whether natural or artificial. And it may well be doubted whether it would be competent for the Legislature to exempt the city, any more than private individuals, from liability under circumstances of this character. Suppose, for example, that the city should recover judgment against an individual for \$100,000, and collect the money upon execution, and upon appeal the judgment should be reversed; would it be pretended that the money could not afterwards be recovered? * * * Suppose, again, the city should neglect to keep the streets in repair, and an individual should be injured in consequence—should break his leg or be otherwise crippled—could she allege her insolvency against his claim for damages? Would her pecuniary condition be an answer for the neglect of every duty, legal and moral? If this were so, she would be the most irresponsible corporation on earth, and her treasury in many instances but a receptacle for others' property without possibility of restitution. The truth is there is no such exemption from liability on her part. The same obligations to do justice rest upon her as rest upon individuals. She cannot appropriate to her own use the property of others and screen herself from responsibility upon any pretense of excessive indebtedness. The law casts upon her the legal liability and the moral duty to make restitution. Admitting that the charter restricts her power to incur liabilities by her own acts—though, as already shown, its provision in this respect is merely directory—it still leaves her liable according to the general law. The restriction can in any event only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include the liabilities arising from torts, or trespasses or mistakes."

Our conclusion upon this branch of the case is therefore that the provisions of the statute of 1901 upon which the petitioner relies are not in conflict with the provisions of the San Francisco charter with relation to liquidation of judgments out of the surplus fund; nor, for the same or still better reasons, do we think they are in conflict with those other provisions of the charter to which we are referred by the respondents and which relate to the auditing and payment of demands against the treasury, these provisions having reference, in our opinion, only to such obligations and demands as the officials charged with the approval thereof have the power to create, or the discretion to audit, approve and allow.

It follows from the foregoing discussion that the petitioner herein is entitled to the issuance of a writ of mandate conformable to the prayer of its petition and to the terms of the statute upon which its application for such writ is predicated. Let the writ issue accordingly.

We concur: WASTE, P. J.; KERRIGAN, J.

CHAPUIS v. PESANTE. (Civ. 2787.)

(District Court of Appeal, First District, Division 2, California. June 21, 1919.)

APPEAL AND ERROR §—422—NOTICE OF APPEAL—MOTION TO AMEND.

Where plaintiff's notice of appeal conformed precisely to the requirements of Code Civ. Proc. § 941b, and required no amendment, her motion to amend the notice to embody a notice to the clerk, requesting the transcript of the testimony required by section 953a, under which plaintiff had intended to perfect her appeal, was properly denied.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Marie Chapuis against Peter Pesante. From an order denying plaintiff's motion to amend her notice of appeal, she appeals. Order affirmed.

Brun, Fairchild & Shields, of San Francisco, for appellant.

Zabala & Sargent, of Salinas, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court for the county of Monterey denying plaintiff's motion to amend her notice of appeal. Judgment was entered for the defendant on December 11, 1917. A notice of appeal was filed with the clerk on January 3, 1918. It appears that the plaintiff and appellant intended to perfect her appeal in accordance with the provisions of section 953a, Code of Civil Procedure, but neglected to file, within the required time, the notice to the clerk requesting the transcript of the testimony, etc., as required by that section. Appellant contends that she should have been permitted to amend her notice of appeal so that it would embody this notice to the clerk requesting the transcript.

We cannot see how the motion of the plaintiff could have been granted. The notice of appeal in the record conforms precisely to the requirements of section 941b, Code of Civil Procedure, and required no amendment whatsoever. It could not be amended to include something entirely disconnected from it. It has been decided in the case of *Lang v. Lilley & Thurston Co.*, 161 Cal. 295, 119 Pac. 100, that the notice of appeal is not connected with sections 953a, 953b, or 953c of the Code of Civil Procedure, and that these sections are entirely independent of sections 941a, 941b, and 941c, Code of Civil Procedure. See, also, opinion of Supreme Court upon denying rehearing in the case of *Smith v. Jaccard*, 20 Cal. App. 280, 287, 128 Pac. 1023, 1026; *Garner v. Meizel*, 22 Cal. App. 256, 257, 133 Pac. 1165.

As pointed out by the respondent, the affidavit filed by the plaintiff in support of her motion does not relate to reasons for amending the notice of appeal, but is merely an explanation of why a request to the clerk for the transcript was not filed in time. The order appealed from is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

McCLURE v. SOUTHERN PAC. CO.
(Civ. 2636.)

(District Court of Appeal, Second District, Division 1, California. June 18, 1919.)

1. RAILROADS — 348(4) — CROSSING ACCIDENT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF RAILROAD.

In action for death of an occupant of an automobile struck by a train, pushed around a curve without the warning signals required by Civ. Code, § 486, and without attaching the air brakes, evidence held to warrant a finding that railroad was negligent.

2. RAILROADS — 350(17) — CROSSING ACCIDENT—QUESTIONS FOR JURY—FAILURE TO STOP, LOOK, AND LISTEN — CONTRIBUTORY NEGLIGENCE.

Where a railroad track was obscured because it was constructed in a narrow cut and was covered with dirt at the crossing, and the position of crossing sign was such that it could not be seen by the occupants of an automobile, who were strangers unaware of railroad's existence, the question whether their failure to stop, look, and listen, constituted contributory negligence was for the jury.

3. APPEAL AND ERROR — 999(1)—REVIEW—VERDICT.

Jury's conclusion upon jury question cannot be disturbed by Court of Appeal.

4. NEGLIGENCE — 74—CONTRIBUTORY NEGLIGENCE—EFFORT TO RESCUE PERSON FROM PERIL.

One is not guilty of contributory negligence in attempting to rescue another placed in peril by the negligent act of third person, unless he acts with a recklessness unwarranted by the judgment of a prudent man.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Charles B. McClure as administrator of the estate of Robert W. Guard, deceased, against the Southern Pacific Company. From judgment for plaintiff and from order denying motion for new trial, defendant appeals. Affirmed.

Henry T. Gage, W. I. Foley, W. I. Gilbert, and C. F. Cable, all of Los Angeles, for appellant.

John E. Bibby, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff, as administrator, sought to recover damages for the death of his intestate, Robert W. Guard, which is alleged to have been caused by the negligence of defendant in the maintenance of a railway track over which it at the time carelessly and negligently operated a train which collided with the deceased and an automobile in which he was traveling. In addition to denials, the answer alleged contributory negligence on the part of deceased.

A jury before which the case was tried rendered a verdict in favor of plaintiff, in whose favor judgment was entered, and from which, and an order denying defendant's motion for a new trial, this appeal is prosecuted.

The sole contention made in appellant's brief is that the evidence is insufficient to justify the verdict of the jury.

The accident occurred at a point in that part of the city of Los Angeles known as San Pedro, where defendant's railway track crosses Fourteenth street at its intersection with a highway extending north and south known as Beacon street. The railway track, following the line of a curve and over an elevation, enters Beacon street on the east side thereof at a point north of Fourteenth street and south of Thirteenth street, the roadbed being in a cut of considerable depth, and Fourteenth street crosses the track in a like cut, down to which the surface of the roadway of Beacon street leads, and from which last-mentioned street the railway track was not visible to one traveling on Beacon street parallel to the track. There were no telegraph poles or other structures, other than a crossing sign placed on a high bank, which stood some 25 feet above the surface of the crossing, to indicate the presence of the railway track to those unacquainted with the fact. Fourteenth street was rough and broken, due to work thereon, and recent rains had washed the mud and dirt down upon and covered the track, not often used, at the crossing. On the day in question the deceased, with a Mr. Scherrer, the latter's wife and three others, as guests of Mr. Scott, who was driving the automobile in which they were traveling, were out sight-seeing. All of them were strangers in the vicinity. Scott upon reaching Thirteenth street, turned east thereon to Beacon street, along which he drove south to Fourteenth street, at which point, without stopping to look or listen, he turned east across the intersecting cut in which defendant's railway track was constructed. The top of the automobile was up, and, due to its height above the roadway, he did not see the crossing sign, and, owing to the fact that the cut was narrow, the banks high, and the track covered with mud, neither he nor any of the party were made aware of the railway track until he stopped his car thereon with a view of ascertaining the con-

dition of the road and going back. At the point where he stopped, the railway track, the existence of which they then for the first time discovered, was, to the north, visible for 180 or 200 feet, and no cars were in sight, and nothing to indicate their approach. Immediately thereafter, attracted by the cries of some men to get off the track, they looked to the north, and saw the front car of a train, composed of 18 flat cars, backing down upon them at a speed of four or five miles per hour. Two men, who were in the front car, yelled to them to get off the track, and at the same time signaled the engineer to stop the train. Scott attempted to start his auto, but by some misdirected effort killed the engine, whereupon, saying his engine was dead, he told the members of his party to jump, which advice all of them, except Mrs. Scherrer, an elderly, stout woman, immediately acted upon. In attempting to get Mrs. Scherrer out of the car, Guard was struck by the approaching flat car, and both he and Mrs. Scherrer received injuries alleged to have caused their death. Owing to the curved track and hill over which the train was being pushed, the engine was not at that point in sight of the two men on the approaching flat car, and in order to reach the engineer the signals given by them to stop the train had to be relayed by a man some five or six cars in front of the engine. No warning by bell or whistle was given, as required by section 486, Civil Code, and, although the train was equipped with air brakes, they were not attached. Nevertheless, the engineer testified he could and did stop the train within 15 or 20 feet after receiving the signal so to do. There is evidence that the man whose duty it was under the circumstances to receive and transmit the signals, was sitting down, looking to the west, and hence did not get the signals so frantically given by the men on the front car, some 480 feet distant from him. But the engineer acted upon signals from a bystander near the track, who witnessed the dangerous situation of the auto party, and stopped the train some 30 feet beyond the point where it collided with the automobile.

[1] From all the circumstances surrounding the case and the foregoing facts which the evidence tended to establish the jury might very properly have concluded that defendant was chargeable with negligence; indeed, counsel for appellant omit any serious discussion of this point, but insist that, for the reason that the railway track in itself was a warning of danger (*Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 149 Pac.

175), and that proceeding to cross the same without stopping to look and listen constituted negligence not only on the part of Scott, the driver of the automobile, but also of deceased. *Loftus v. Pacific Electric Ry. Co.*, 166 Cal. 464, 137 Pac. 34. Conceding that it was the duty of Guard, notwithstanding the fact that he, as a guest of Scott, was a passenger in the automobile, to exercise reasonable care for his own safety (*Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651; *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 134 Pac. 709; *Mittelsdorfer v. West Jersey, etc., R. Co.*, 77 N. J. Law, 698, 73 Atl. 538.), we are of the opinion that, under the circumstances shown, both deceased and the driver were excusable for not complying with the rule. They were all strangers in the vicinity and unaware of the existence of the railway. There was nothing to indicate its presence at the crossing. The position of the crossing sign was such that it could not be seen by members of the party. The track, constructed within the banks of a narrow cut, was, by reason of the manner of its construction and maintenance, covered with dirt and mud so that it was not visible. No warning by bell or whistle was given, and no train at the time was in sight.

[2, 3] Upon these facts and the inferences to be drawn therefrom, the question as to whether neglect to "stop and look and listen" constituted contributory negligence was clearly one for the determination of the jury, and its conclusion thereon cannot be disturbed by this court on review. It cannot be said as a matter of law that a stranger traveling upon a highway over which, unknown to him, a railway track crosses, is, by reason of his failure to stop and look and listen, guilty of negligence, where such track is obscured and there is nothing to indicate its presence or warn him of its existence.

[4] While concededly deceased could have escaped except for his efforts to save the life of Mrs. Scherrer, it is not claimed that he acted with a recklessness unwarranted by the judgment of a prudent man, and it is only in such case that one, in attempting to rescue another placed in peril by the negligent act of a third person, can be said to be guilty of contributory negligence. *Saylor v. Parsons*, 122 Iowa, 679, 98 N. W. 500, 64 L. R. A. 542, 101 Am. St. Rep. 283; *Becker v. L. & N. Ry. Co.*, 110 Ky. 474, 61 S. W. 997, 53 L. R. A. 287, 96 Am. St. Rep. 459.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

SCHERRER v. SOUTHERN PAC. CO.
(Civ. 2637.)

(District Court of Appeal, Second District, Division 1, California. June 18, 1919.)

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Jacob Scherrer against the Southern Pacific Company. From judgment rendered and from order denying motion for new trial defendant appeals. Affirmed.

Henry T. Gage, W. I. Foley, W. I. Gilbert, and C. F. Cable, all of Los Angeles, for appellant.

John E. Biby, of Los Angeles, for respondent.

PER CURIAM. Appeal by defendant from a judgment and from an order denying a motion for new trial.

The plaintiff sued to recover damages for the death of Leontine Scherrer, his wife, which he alleged was caused through the negligent acts of defendant. The wife was riding in an automobile which was struck by moving cars on a track of the defendant railway company, by reason of which collision she suffered injuries which caused her death. The questions argued in the briefs in this case are the same as those presented in *McClure v. Southern Pacific Co.*, Civ. No. 2636, 183 Pac. 248, which was an action for damages growing out of the same accident. It will be unnecessary to here repeat the discussion of those questions, and upon the authority of the conclusions expressed in the *McClure* Case, the judgment and order herein appealed from are affirmed.

RYAN v. INYO CERRO GORDO MINING & POWER CO. et al. (Civ. 2594.)

(District Court of Appeal, First District, Division 2, California. June 26, 1919.)

1. CORPORATIONS — 52—RESIDENCE.

The residence of a corporation is in the state under whose laws it is incorporated.

2. CORPORATIONS — 666 — "RESIDENCE" OF FOREIGN CORPORATION—VENUE.

A foreign corporation doing business in California, after complying with Civ. Code, § 408, does not establish a "residence" in any particular county, such as is contemplated by the provisions of Code Civ. Proc. relating to the place of trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Residence.]

3. CORPORATIONS — 666—ACTIONS AGAINST NONRESIDENTS—STATUTE.

A foreign corporation, a nonresident of the state, is not entitled to have an action against it for personal injuries tried in the county where the injury occurred; Code Civ. Proc. § 395, in so far as pertinent, not applying to nonresidents, and not limiting the rights of plaintiffs against nonresidents.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by H. S. Ryan against the Inyo Cerro Gordo Mining & Power Company, the Cerro Gordo Mines Company, and another. From an order denying a motion of the Cerro Gordo Mines Company for change of venue, it appeals. Affirmed.

See, also, 183 Pac. 251.

F. J. Hambly, of San Jose, S. E. Vermilyea, of Los Angeles, and A. H. Swallow, of Bishop, for appellant.

Louis Oneal, of San Jose, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the state of California, in and for the county of Santa Clara, denying the motion of the defendant Cerro Gordo Mines Company for a change of venue from Santa Clara to Inyo county.

The action was one to recover damages for personal injuries alleged to have been sustained by the plaintiff arising out of an alleged accident occurring at the mining properties of the defendant in Inyo county, Cal. Appellant's motion was made upon the grounds that it was a resident of Inyo county and entitled to be sued in said county, and that the cause of action arose in Inyo county; also upon the ground that the defendant Edward Campbell was a resident of Inyo county. Prior to the hearing of the motion, the plaintiff dismissed the action as to the defendant Campbell, and the record presents but one question for our determination: Has the appellant, a corporation organized and existing under the laws of the state of Arizona, acquired a residence in the county of Inyo, state of California? It is urged by appellant that by reason of having complied with the provisions of section 408, Civil Code (in force at the time of the alleged injury and at the time of the motion), requiring a foreign corporation to file a certified copy of its articles of incorporation with the secretary of state and with the county clerk of the county where its principal place of business is located and where it owns property, appellant became a resident of Inyo county, the county where its principal place of business in this state is located, so as to be entitled to have this action transferred to that county for trial.

[1, 2] The residence of a corporation is in the state under whose laws it is incorporated. 1 Cook on Corporations (7th Ed.) § 1, p. 3; section 757, Id.; *Boyer v. Northern Pac. Ry. Co.*, 8 Idaho, 74, 66 Pac. 826, at page 827, 70 L. R. A. 691; *Thomas v. Placerville G. Q. M. Co.*, 65 Cal. 600, 4 Pac. 641; *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239; *Waechter v. Atchison, etc., Ry. Co.*, 10 Cal. App. 70, 101 Pac. 41; *St. L. & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 Sup. Ct.

§21, 40 L. Ed. 802. A foreign corporation doing business in this state does not establish a residence in any particular county, such as is contemplated by the provisions of the Code of Civil Procedure relating to the place of trial. *Thomas v. Placerville G. Q. M. Co.*, supra; *Waechter v. Atchison, T. & S. F. Ry. Co.*, supra; *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239.

Compliance with section 408, Civil Code, does not give a foreign corporation a residence in this state, or give it the rights of a domestic corporation in regard to the place of trial of actions. *Waechter v. Atchison*, etc., Ry. Co., 10 Cal. App. at page 74, 101 Pac. 41. Although the language with reference to this question in the last-cited case is dictum, the reasoning in the other decisions cited herein clearly applies to this question. In the case of *Boyer v. Northern Pac. Ry. Co.*, supra, the Supreme Court of Idaho considered almost precisely the same question. In that case the corporation designated an agent for the service of process and its principal place of business in the state, under a statute requiring such designation, and claimed that it thereby acquired a residence at such principal place of business entitling it to be sued at the place of its residence under a statute similar to our statute covering the same matter. The court held that both upon principle and authority private corporations are residents of the state in which they are created; that they have, and can have, but one domicile, the state of their birth, which is fixed by their articles of incorporation. They may migrate into other countries and jurisdictions for the purpose of business, yet so far as jurisdiction of courts is concerned, they are treated, both by our federal courts and by our state courts, as residents of the state in which they are created and nonresidents of other states.

In the case of *Jenkins v. Cal. Stage Co.*, 22 Cal. 538, one of the cases relied upon by appellant, it does not appear from the opinion whether the court was considering a domestic or a foreign corporation. The case of *C. S. R. R. Co. v. S. P. R. R. Co.*, 65 Cal. 394, 4 Pac. 344, which overruled the *Jenkins* Case, also does not state whether the question under consideration related to domestic or foreign corporations, but the language in that case is sufficiently broad to embrace both classes of corporations. However, the case of *Cohn v. Cen. Pac. R. R. Co.*, 71 Cal. 488, 12 Pac. 498, also cited by appellant, and which it urges reaffirmed the *Jenkins* Case, certainly only reaffirms that case in so far as it applies to domestic corporations. For in the *Cohn* Case, it is said that the question whether a domestic corporation had any place of residence in the state where it was entitled, as a matter of right, to a trial of a suit brought against it in another county,

did not necessarily arise in the case of *C. S. R. R. Co. v. S. P. R. R. Co.*, supra, and therefore that case does not overrule the *Jenkins* Case, and that therefore the *Cohn* Case is decided upon the authority of the *Jenkins* Case. It is apparent, then, that the court in construing the *Jenkins* Case, and in reaffirming it, limited the application of this rule to domestic corporations.

As stated in *C. S. R. R. Co. v. S. P. R. R. Co.*, supra, there is no statute in this state defining the place of residence of a corporation. A line of judicial decisions seems to have settled the matter, however, in regard to domestic corporations. With respect to foreign corporations, we find no authority for extending to them the rule applied to domestic corporations.

[3] Our conclusion, as above stated, also settles the contention of appellant that it is entitled to have the action tried in Inyo county because such county is the place where the injury occurred. If the appellant is a nonresident, this contention is without merit, because the case of *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239, holds that the portion of section 395, Code of Civil Procedure, relied upon by appellant, does not apply to nonresidents, and does not limit the rights of a plaintiff against a non-resident.

The order appealed from is affirmed.

We concur: HAVEN, J.; BRITTAI, J.

RYAN v. INYO CERRO GORDO MINING & POWER CO. et al. (Civ. 2882.)

(District Court of Appeal, First District, Division 2, California. June 26, 1919.)

1. VENUE §52(1) — CHANGE — CONVENIENCE OF WITNESSES—DISCRETION OF COURT.

In a woman's action for personal injuries against two mining companies and an individual, denial of the motion of one mining company for change of venue on account of convenience of witnesses and the ends of justice held not an abuse of the discretion of the trial court.

2. APPEAL AND ERROR §965—CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.

The granting or denial of motion for change of venue for convenience of witnesses will be disturbed only when an abuse of discretion is clear.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by H. S. Ryan against the Inyo Cerro Gordo Mining & Power Company, the Cerro Gordo Mines Company, and another. From an order denying the motion of the

Cerro Gordo Mines Company for change of venue, it appeals. Affirmed.

See, also, 183 Pac. 250.

F. J. Hambly, of San Jose, S. E. Vermilyea, of Los Angeles, and A. H. Swallow, of Bishop, for appellant.

Louis Oneal, of San Jose, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the state of California, in and for the county of Santa Clara, denying the motion of defendant Cerro Gordo Mines Company for a change of venue from the county of Santa Clara to the county of Inyo. Said motion was made while an appeal was pending from an order denying a similar motion of the present appellant based upon other grounds. The action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff arising out of an alleged accident occurring at the mining properties of the defendant Cerro Gordo Mines Company, in Inyo county, Cal., on July 22, 1916. Defendant's motion was made upon the ground that the convenience of witnesses and the ends of justice would be promoted by such change in the place of trial.

The evidence contained in the bill of exceptions consists of the complaint and answer and affidavits and counter affidavits. The complaint alleges that at all the times mentioned therein the defendant companies were in possession of certain real property situated in the county of Inyo, state of California, which property said companies worked and operated for mining purposes; that at all times material to this action the defendants had and maintained on said property, for the purpose of carrying and transporting ore from said defendants' slag dumps to their ore bins, what is known as a jig back, consisting of two wire cables, 1 inch in diameter, stretched over and laid upon supports about 15 feet from the ground between said slag dumps and ore bins; that said wire cables are parallel and formed a track about 30 inches in width, upon and over which said defendants ran and operated a car for the purpose of carrying ore from said slag dumps to said ore bins; that said car is pulled and propelled by means of a 1/2-inch wire cable, one end of which is attached to said car and the other end to the drum of a gasoline engine belonging to said defendants; that said jig back or cable track crosses over and above the public highway running between the towns of Keeler and Cerro Gordo, in said county of Inyo, which road or highway is the only public highway between said towns, and said ore car is operated upon said track where same crosses said highway; that on July 22, 1916, plaintiff was riding on a burro and traveling on said public road and it was necessary for plaintiff to pass and travel over said road where said cable track or jig back crossed said road as aforesaid; that while plaintiff

was traveling over said road at the point where same was crossed by said cable track, and while said defendant John Doe was in charge of the engine which propelled the ore car, said defendants carelessly and negligently operated said engine and the drum thereof, so that the 1/2-inch cable which was attached to and pulled said ore car became slack and dropped from the level of said track down upon plaintiff with great force and violence causing serious injury to her. The answer denies all the material allegations of the complaint, and alleges that if any injuries were suffered by plaintiff such injuries were caused by her failure to exercise ordinary care. It thus appears that some of the important issues are as to the ownership of the machinery or appliances causing the alleged injury, the character of the place where the alleged injury occurred, the negligence of the plaintiff, the negligence of the defendants in operating the said machinery and appliances, and the nature and character of the injuries to plaintiff.

Defendant and appellant sets out in its affidavit the names of 33 witnesses, who it alleges are material and necessary witnesses, all of whom reside in Inyo county, the place where the cause of action arose, and alleges that if the trial is had in said county said witnesses will be produced by the defendant and appellant; that if the action is tried in Santa Clara county said witnesses would have to travel over 500 miles for the trial, and the loss of time and expense incident to said journey would preclude their attendance; that said witnesses cannot and will not attend the trial if had in Santa Clara county, and the defendant, in the event of a trial in Santa Clara county, would be compelled to take depositions of such witnesses, and defendant cannot have a fair trial under such circumstances; that there are no other witnesses residing outside of Inyo county by whom the defendant can prove the same facts which can be proven by said witnesses. Defendant sets out in detail the facts it expects to prove by said witnesses, which evidence relates to the ownership of the machinery alleged to have caused the injury; that the accident did not occur upon any public road or crossing; that the machinery and appliances were being carefully and properly operated at the time of the alleged accident; that said machinery and apparatus were properly constructed and were in good working condition at the time of the alleged accident; that the jig back was perfectly visible to plaintiff at the time of the accident, and that said plaintiff stopped under said machine at a place where there was no highway or road and at a point more than 200 feet from where the plaintiff alleges in her complaint the accident occurred; that the cable mentioned in the complaint did not drop upon or strike plaintiff or drag her from her burro; that various persons saw plaintiff im-

mediately after the accident and observed her closely and saw no marks, bruises, lacerations, or other signs of injury upon her person; that certain persons saw plaintiff daily between July 29, 1916, and August 11, 1916, and knew her physical condition, and knew that there were no marks or bruises upon her body during that time; that the physician who examined plaintiff on the afternoon of the alleged accident found no marks, bruises, or contusions on her body nor any evidences of injury whatsoever; that another physician examined plaintiff about ten days after the accident and found no evidences of injuries; that in furtherance of justice it is necessary for the jury and court to view the place of the alleged accident, together with the jig back and appliances, in order that they may have a complete understanding of the surrounding circumstances; that the place of alleged accident is but a short distance from Independence, the county seat of Inyo county, where said trial would take place if defendant's motion were granted, and that the trip of the jury and court to said place could be made at slight expense and in a single day.

Plaintiff, in her counter affidavit, denied that convenience of witnesses and the furtherance of justice demanded the change of place of trial, and alleged that a large number of the witnesses named in the affidavit of the defendant are employes of the defendant company and the wives of such employes; that defendant has a capital stock of \$2,000,000, fully subscribed for and paid, and is well able to bear the expense of bringing said witnesses from Inyo to Santa Clara county; that the president and leading counsel of defendant company reside in and have their offices in San Jose, county of Santa Clara, and that the ownership of the machinery and apparatus may be proven by such officers; and then plaintiff names 20 witnesses, who she alleges are material and necessary witnesses for the trial of said action, asserting that 16 of said witnesses reside in Santa Clara county and that the other witnesses named will be able to attend the trial if held in Santa Clara county but not if held in Inyo county; that plaintiff will be unable to secure the attendance of any of these witnesses if the trial is had in Inyo county and will be obliged at great expense to take their depositions, and that she cannot have a fair trial if compelled to produce her evidence in this form; that plaintiff has not the financial means either to take her witnesses to Inyo county or to take the depositions of said witnesses; that there are no other witnesses outside of Santa Clara county by whom plaintiff can prove the same facts which can be proven by said witnesses; that plaintiff expects to prove by certain of said witnesses that the place where the accident occurred was at the time a public road and has been

so used for many years prior to the date of the accident; that the plaintiff was on said highway at the time of the accident; that certain of said witnesses will testify as to the serious injuries sustained by plaintiff, having seen her immediately after said accident and for a number of days following said accident; that one of said witnesses is over the age of 70 years and is not physically strong enough to go to Inyo county, and that such witness will testify that the place where the accident occurred has been a public highway to her own knowledge from 1878 to 1914, and that during all of said time the said road was used as a public highway by the defendant and its predecessors in interest; that certain other witnesses named will testify as to the previous negligent operation of said machinery, etc.; that it will not be proper nor in furtherance of justice for the jury and court to view the place where the accident occurred, because of the fact that since said accident occurred said defendants have obstructed said highway and have moved said jig back and have erected a large store building across said road, and a view of said premises as they now stand would not be of any assistance to said court and jury; and, furthermore, that the place where the accident occurred is over 35 miles from the county seat of Inyo county, and that it would take said court and jury two days to make the trip thereto. Plaintiff later filed a supplemental affidavit giving the names of about 25 other witnesses, who it is alleged are material and necessary witnesses and who are residents of Santa Clara county; and it is alleged that some of these witnesses will testify to the fact that the place where the injury occurred was for many years immediately prior to the accident a public road and was used for the defendant companies and by all of the residents of the town of Cerro Gordo during said time as a public road, and that the other witnesses will testify as to the injuries of the plaintiff.

[1, 2] Without going into a detailed discussion of the materiality and admissibility of the evidence alleged by each party to this controversy to be proper and available in support of the respective allegations of the complaint and answer, it would appear from the foregoing broad outline of the contents of the affidavits that the equities of the parties in regard to the convenience of witnesses are probably rather closely balanced. This certainly cannot be said to be a case where the trial court has exceeded the bounds of reason, all the circumstances before it being considered, which is the definition given by our Supreme Court in the case of *Sharon v. Sharon*, 75 Cal. 1, 48, 16 Pac. 345, of an abuse of legal discretion. The granting of a motion for a change of venue upon the ground of the convenience of witnesses rests largely in the discretion of the trial judge, and orders

upon such motions will only be disturbed when the abuse of discretion is clear. *Pascoe v. Baker*, 158 Cal. 232, at 235, 110 Pac. 815; *Tait v. Midway Field Oil Co.*, 28 Cal. App. 107, 109, 151 Pac. 378; *Bird v. Utica Gold Mining Co.*, 2 Cal. App. 672, 86 Pac. 509. The order appealed from is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

WALBERG v. UNDERWOOD et al.
(Civ. 2914.)

(District Court of Appeal, Second District, Division 2, California. June 20, 1919.)

1. EVIDENCE ⇨135(1)—SIMILAR SUBSEQUENT TRANSACTION.

In an action in equity by a stockholder to enjoin execution and set aside a judgment in favor of an individual defendant against the company, the judgment being claimed to have been obtained by fraud and collusion between the individual defendants and the directors of the company, having been obtained by one individual defendant as assignee of a claim of salary of the other, a director and the president of the company, evidence of a subsequent transaction whereby the directors of the company fraudulently endeavored to profit by a sale of the company's property on execution held inadmissible to show fraud in the transactions leading up to the judgment.

2. EVIDENCE ⇨135(1) — SURROUNDING AND SUBSEQUENT CIRCUMSTANCES.

The surrounding facts and circumstances may be liberally used in determining fraud, and subsequent conduct and declarations of the parties may be shown in evidence of antecedent fraud if they are such as are related to the principal transaction so that a logical and legal inference may be drawn.

3. APPEAL AND ERROR ⇨757(3)—BRIEFS—EXPLORATION OF TRANSCRIPT.

Under the rule of Code Civ. Proc. § 953c, where an appeal is taken under the alternative method with a typewritten transcript of 289 pages, the District Court of Appeal should not be expected to explore, unaided by a statement in the briefs, such a volume of evidence to determine whether a finding of fact by the trial court was supported by evidence.

Appeal from Superior Court, Kern County; M. T. Farmer, Judge.

Action by Carl A. Walberg, suing in behalf of himself and for all other stockholders and creditors of the corporation defendant, against Charles D. Underwood, the Valley View Mines Company, a corporation, and others. From judgment for defendants, plaintiff appeals. Affirmed.

See, also, 180 Pac. 55.

Charles J. Kelly, of Los Angeles, for appellant.

Stahl & Sayles, of Los Angeles, and Kaye & Siemon, Boyce R. Fitzgerald, and Erwin W. Owen, all of Bakersfield, for respondent Underwood.

SLOANE, J. This is an action in equity brought by the plaintiff, a stockholder in the Valley View Mines Company, to enjoin execution and set aside a judgment in favor of defendant Underwood against said company. The judgment is claimed to have been obtained by fraud and collusion on the part of and between the defendants Underwood and Brown and the directors of said defendant company. The judgment was obtained by Underwood as assignee of a claim of salary of Brown, who was a director and the president of defendant company.

On the trial of the case in the superior court of Kern county the court found against all of the allegations of fraud, collusion, and unfairness in the matters on which the action was predicated, and denied the relief demanded by plaintiff.

There is no question raised as to the sufficiency of the evidence admitted on the trial to support the findings and judgment. The only error assigned on this appeal is the action of the court in sustaining objections, and denying plaintiff's offer to produce certain evidence.

[1] The purport of the proposed evidence, as nearly as we can gather from the general discussion between court and counsel, appearing in the record, was to show that subsequent to the entry of the judgment in question some sort of a collusive arrangement was entered into between the defendant Brown and other directors of the judgment debtor corporation to sell the property of the corporation, which was subject to levy under the judgment, in such a manner and for such a price that the directors would participate in the proceeds of the sale. It is conceded that this alleged transaction was entirely subsequent to the cause of action sued on, which was charged as a fraudulent combination of the plaintiff and the directors in obtaining the judgment which the action seeks to vacate for the fraud. But appellant's contention, in offering this evidence, was that the evidence of a participation by the directors in a subsequent fraudulent effort to profit by a sale of the property of the corporation would tend to prove that their connection with the transactions leading up to the judgment was also fraudulent. The court properly sustained objections to certain questions propounded to plaintiff's witness on this point, on the ground that they called for hearsay testimony, and denied the general offer of proof on the theory outlined, on the ground that the transaction referred to was

entirely independent of, and subsequent and irrelevant to, the attack on the judgment itself.

Stated in its strongest light, the offer made by appellant may be put in the following words:

"We offer to show that after this judgment, which we allege was fraudulently procured was entered, Brown, the assignor of the claim on which the judgment was predicated, attempted to make a sale of the property of the corporation through the directors. We will show that Brown was the agent for this purpose. When Mr. Baldwin discovered that the sale was going through, and that the directors, or some of them, were profiting to the extent of \$100,000—reporting a sale for \$50,000, whereas it was in fact made for \$150,000—that he then stopped the sale; that the sale was stopped, and the defendant Brown said he had this judgment up here and that he could go up and sell the property under the judgment, and then would have the sale of the property that he had made under the contract."

Counsel for appellant stated that this offer of proof of subsequent acts of defendants was made as tending to support the allegations of fraud and collusion in the procurement of the judgment in question.

The court sustained the objection to the offer on the ground that the transactions referred to were immaterial and independent matters, occurring subsequent to the judgment in controversy, and having no connection with the judgment or the claim on which it was obtained. We think the trial judge was right in this ruling.

There was nothing in the offer tending in any way to connect the subsequent alleged attempts of Brown and other directors of the corporation to sell the corporation's property, with this judgment. If it appeared that such action on the part of the directors was in any way necessary to the collection of the judgment, it might be assumed that Brown still had some interest in the claim he had assigned to Underwood, and that he and other directors of the corporation were conniving to convert it into cash. But Underwood (and Brown, if he was still interested in it) had this judgment, and could proceed to sell at execution sale, and if the property was worth \$150,000, or even \$50,000, would have no difficulty in realizing the amount of the claim. In fact, it would appear from appellant's statement that this subsequent transaction was entirely independent of the judgment. It was only after it had been blocked in some way by the witness Raymond that Brown is claimed to have referred to the judgment by the declaration that he could sell under the judgment and then could make the sale that had been agreed to under the alleged contract.

Assuming the proof offered was to have been such as is for the first time specifically indicated by appellant's reply brief, namely,

a contract between Brown and Gordon, two of the directors of the mining corporation, to sell the mining claims of the corporation to a Mrs. Eaton for \$50,000, and a contract between Brown and Mrs. Eaton and a third party not named in this action, whereby the profits of a resale of the same property for \$150,000 was to be divided between them, it does not appear in any way how such transaction could be in aid of or grow out of the transaction culminating in the alleged fraudulent judgment. In other words, this subsequent transaction could have been just as well carried out entirely without reference to the judgment, and the judgment just as well collected without the contract of sale. Neither is it, if the facts indicated were proved, a fraud of such a similar character as would raise a presumption of fraudulent intent of the parties in the matter leading up to the judgment.

[2] Appellant correctly states the rule that the surrounding facts and circumstances may be liberally used in determining fraud, and that subsequent conduct and declarations of the parties may be shown in evidence of antecedent fraud. *Butler v. Collins*, 12 Cal. 457. But the circumstances must be such as are related to the principal transaction, and from which a logical and legal inference may be drawn as to the nature and quality of the act under investigation. A defendant cannot be convicted of two independent offenses, even though occurring against the same person and at approximately the same time, by proving him guilty of one, and inferring his guilt as to the other. This would be equivalent to offering evidence of his bad reputation for honesty and integrity as proof that he had committed some specific wrong. Under no circumstances would it be permissible to establish fraud in a prior transaction, which was honest on its face, by showing fraud in subsequent transactions. At best, such evidence could only be used in corroboration after a reasonable foundation had been laid.

[3] The court here found from the evidence before it that the transaction complained of was regular and free from fraud or collusion on the part of defendants; and there is no record in the printed briefs to show what, if any, evidence was before the court to raise even a presumption of fraud. This appeal was taken under the alternative method, with a typewritten transcript of 289 pages. Under the rule of section 953c, Code of Civil Procedure, we should not be expected to explore, unaided by counsel, such a volume of evidence for the material necessary for a decision. But, independent of this consideration, we do not think the evidence offered was relevant or competent.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

TRADERS' BANK OF LOS ANGELES v. WILCOX. (Civ. 2137.)

(District Court of Appeal, Second District, Division 2, California. June 28, 1919.)

1. PLEDGES §56(1) — SALE BY PLEDGEE—STATUTE—WAIVER.

The provisions of Civ. Code, § 3006, as to a sale of securities by the pledgee, were designed for the benefit of the pledgor, and may be waived by him.

2. PLEDGES §56(1)—COLLECTION OF COLLATERAL—DECREE OF SALE.

The pledgee of commercial paper pledged as collateral is bound to collect, and, if necessary, to sue upon it as and when it falls due, and apply it on the debt secured; and, in the absence of compelling reasons, a court of equity will not decree the sale of such pledged collateral before its maturity; the right to collect the debt pledged when it falls due and to sue therefor, if necessary, being an adequate legal remedy.

3. PLEDGES §56(1)—EVIDENCES OF DEBT — SALE—STATUTES.

Both under the common law and Civ. Code, §§ 3006, 3011, where personal evidences of indebtedness are pledged as collateral security, no right is created in the pledgee, in the absence of express agreement, to personally cause a sale of the security, and he is entitled to equitable relief and an order for judicial sale only when there are special conditions shown not in the contemplation of the parties when the contract was made, and imposing additional hardship on the pledgee if required to rely on collection at maturity.

4. PLEDGES §55—ACTION BY PLEDGEE—RECOVERY OF DEBT.

A pledgee may bring an action at law and recover the amount of his debt from his debtor by independent suit for personal judgment without selling or foreclosing the pledge, and is entitled to the same relief where he has sought to procure a sale of the pledge by judicial process, but has failed because the pledge is commercial paper and not salable.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Traders' Bank of Los Angeles, a corporation, against W. W. Wilcox. From the judgment, plaintiff appeals. Reversed, and trial court directed to enter judgment for plaintiff.

J. W. McKinley, of Los Angeles, for appellant.

Barstow, Beach & Rohe, of Los Angeles, for respondent.

THOMAS, J. This is an action brought to foreclose defendant's equity of redemption in a note, copy of which is set out in plaintiff's complaint, which was pledged by defendant to plaintiff as security for the payment of defendant's note for \$2,000, which is

also set out in plaintiff's complaint, and upon which default was made by defendant in payment according to its terms. The appeal is taken by plaintiff from the judgment, upon the judgment roll alone.

By the briefs on file in this case in this court it is made to appear that the only question here is as to whether plaintiff is entitled to foreclose against defendant and procure a judicial sale of the note pledged with it, or is obliged to wait the maturity of the pledged note and then collect the same from the makers.

Counsel for respondent contend, and the court found, that appellant held said collateral note under the terms of section 3006 of the Civil Code, and, it being so held, that appellant was not entitled to foreclose against respondent and procure a judicial sale of the note pledged with it; while appellant insists that the provisions of section 3006 of the Civil Code only apply to sale by the pledgee himself, and in no way affects the general rule that appellant is entitled to enforce an obligation in accordance with its terms, and to procure a decree of foreclosure of the equity of redemption of any property which has been placed in its hands as security. Appellant further insists that the provision of section 3011 of the Civil Code is not to be given the strict construction contended for by respondent, and is not only applicable to cases in which the pledgee would have the right, without court procedure, to make a sale of the pledged property, but is intended to apply to all cases in which property is pledged; that this is the plain and reasonable interpretation of the section by itself; that in the absence of any provision of the Civil Code upon the subject the plaintiff would have, as it still has, an equitable right to foreclose the security given by defendants for the performance of the express obligations of his note, the payment of which was, at the time of the commencement of this action, ever since has been, and now is, in default; that section 3011 is apparently applicable to any pledge, and simply recognizes the right of any pledgee to foreclose the right of redemption by judicial sale; that the court has always had this power, from the very earliest time, as shown by the sections in the Practice Act and decisions by the courts in two different cases under that section; and that the Code has not changed this power of the court by section 3006 of the Civil Code, which refers to another matter, but, on the contrary, that section 3011 of the same Code expressly gives the court this power. In other words, appellant's contention, briefly put, is that the remedy provided by the latter section is cumulative, and that it is not limited to the remedy provided by section 3006; but, while it may use that, it can also invoke the procedure provided by section 3011, supra.

[1] We are not able to agree with appellant's contention here. Section 3006, supra, in our judgment settles this phase of the case. The provisions of this section were designed, we think, for the benefit of the pledgor, and may be waived by him. We find nothing, however, in the record here showing any such waiver. The pledgor being himself the respondent here, appellant, we think, is bound to a strict compliance with the terms of this section.

[2] There can, we think, be no doubt that, prior to the Codes, where the contract did not expressly give the pledgee the right to sell or foreclose commercial paper pledged as collateral, a court of equity would not order a judicial sale of the security save under special circumstances. Such security has no market value. It is presumed to be not readily marketable, and generally must be sold at a sacrifice. Hence its sale, whether by the pledgee or by the sheriff under judgment of a court, may not bring a fair price. The general rule is that the pledgee is bound to collect, and, if necessary, sue upon, the collateral as and when it falls due, and apply it upon the debt secured. Jones on Collateral Securities, § 651. There is therefore ordinarily no reason why the pledgor should be compelled to suffer the loss consequent upon a sale of the collateral at a sacrifice. In our opinion, the most compelling reason why a court of equity will not decree the sale of such collateral, in the absence of special circumstances, is that, ordinarily, the pledgee or principal debtor has an adequate remedy at law. That is to say, the principal debtor may, and, indeed, is in duty bound to, collect the debt pledged as collateral as and when it falls due, and bring suit therefor if necessary. This right to collect the debt pledged as security affords, as a rule, a complete and adequate legal remedy; and for this reason there is no reason for the interposition of equity. *Whitaker v. Charleston Gas Co.*, 16 W. Va. 717, 722. See, also, *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806; *Cleghorn v. Minnesota Title, etc., Co.*, 57 Minn. 341, 59 N. W. 320, 47 Am. St. Rep. 615; *Donohoe v. Gamble*, 38 Cal. 354, 99 Am. Dec. 399. Special circumstances such as will be held sufficient to take a case out of the general rule and justify the interposition of a court of equity to decree a judicial sale of notes or other evidence of indebtedness pledged as collateral security, exist where the pledgor is insolvent and the collateral note has many years to run after the maturity of the principal debt (*Cleghorn v. Minnesota Title, etc., Co.*, supra), or where the principal debtor is a nonresident and has no property within the jurisdiction of the forum (*Donohoe v. Gamble*, supra). No circumstance of a special or peculiar nature, such as would justify a court of equity in ordering a judicial sale, has been pleaded or shown in this action.

[3] We think, therefore, that the correct interpretation of the rule, both under the common law and the Code, is that, where personal evidences of indebtedness are pledged as collateral security, no right is created in the pledgee, in the absence of express agreement, to personally cause a sale of the securities; and that he is only entitled to equitable relief and an order for judicial sale when there are special conditions shown which were not in the contemplation of the parties when the contract was made, and which would impose additional hardships on the pledgee if he was required to rely upon the collection of the collateral debts at their maturity.

Sections 3000-3005 of the Civil Code provide that when the performance of an act for which a pledge is given is due, the pledgee may collect the same by a sale of the property pledged, "subject to the rules and exceptions hereinafter prescribed," and further direct the manner and conditions under which such sale shall be made. Section 3006 states what is excepted from the right to sell, as follows:

"A pledgee cannot sell any evidence of debt pledged to him except the obligations of governments, states, or corporations; but he may collect the same when due."

This is conclusive of the whole matter, unless section 3011 enlarges the pledgee's remedy with regard to this class of securities. It provides that—

"Instead of selling property pledged, as heretofore provided, a pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent court."

There are two reasons within the terms of the statute itself why we think the section last cited does not apply to ordinary commercial paper. First, section 3006, in forbidding such sale by the pledgee, goes on to point out how he may realize on his security by the clause, "but he may collect the same when due"; and, second, section 3011, in authorizing equitable foreclosure and judicial sale of property pledged "as heretofore provided," limits its application to the character of pledges which are theretofore, by the sections above cited, permitted to be sold. In other words, it provides an alternative method of selling pledges other than evidences of indebtedness. It may be conceded that this latter reference is not conclusive, as the section, so far as its wording is concerned, might be open to the construction contended for by appellant; but, in our opinion, there is no legal escape from the conclusion that the denial of right to sell such securities in section 3006, coupled with the provision, "but he may collect the same when due," was intended to provide an exclusive remedy, in the absence of some special claim to equitable relief such as might arise under any

contract. Although there has been no direct judicial construction of these Code provisions in this state, as to this limitation of section 3011, the interpretation here presented seems to be suggested by practically every reference we have found to section 3006 in the California decisions. In *McArthur v. Magee*, 114 Cal. 126, 45 Pac. 1068, the court says:

"It need only be pointed out that by section 3006 of the Civil Code a pledgee is forbidden to sell any evidence of debt pledged to him, but his right is limited to collecting the same when due"

—and to the same effect in other decisions. *Gault v. Wiens*, 32 Cal. App. 1, 161 Pac. 996; *Woolf v. Clark*, 17 Cal. App. 696, 121 Pac. 407; *Frese v. Mutual Life Insurance Co.*, 11 Cal. App. 387, 105 Pac. 265; *Hunt v. Glassell*, 30 Cal. App. 676, 159 Pac. 227; *Kelly v. Matlock*, 85 Cal. 122, 24 Pac. 642.

We find the same limitation recognized generally, whether under statutory provisions or the common-law rule governing pledges of this character. The commonly accepted rule is stated in *Jones on Collateral Securities*, § 651, as follows:

"A pledgee of commercial paper as collateral security cannot, in the absence of special authority for that purpose, sell it upon the non-payment of the debt upon notice to the pledgor, either at public or private sale, but he is bound to hold and collect the same when it falls due, and apply the money to the payment of the debt secured." *Wheeler v. Newbould*, 16 N. Y. 396; *White v. Phelps*, 14 Minn. 27 (Gil. 21), 100 Am. Dec. 190; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimpleman v. Veeder*, 98 Ill. 613; *Stone v. Dickinson*, 89 Mass. (7 Allen) 26; *Miller v. Horton* (Okla.) 170 Pac. 509, L. R. A. 1918C, 625; *Keeble v. Jones*, 187 Ala. 207, 65 South. 384.

The only decisions cited, or which we have been able to find, that recognize the right of a pledgee to go into a court of equity to obtain an order of sale of this class of collateral security, including *Donohoe v. Gamble*, supra, were clearly influenced, at least, by the existence of special circumstances creating equitable claims of the pledgee not entering into the original pledge transaction. It is true that most of the decisions denying the right of sale of this class of securities arise on attempted sales by the pledgee, but in nearly every instance this negation of the right of sale is coupled with the statement that the pledgee is "bound to look to the collection of the collateral debt for his security," without making reference to any possible recourse to a court of equity. Yet the right to an equitable foreclosure and sale of all pledges that are subject to sale is universally recognized, and was formerly the sole method of procedure. In two cases that we have found, the right of resort to a court of equity for an order of sale of commercial paper is, however, presented and expressly denied. In *Whitaker v. Charleston Gas Co.*,

supra—which was a proceeding in chancery to obtain an order of sale—it is held that where a chose in action is pledged as collateral security, the pledgee has no right to sell such pledge unless a power of sale is added to the agreement, "and a court of equity has no jurisdiction to sell such order on the application of the creditor." In *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806, the Supreme Court of Missouri says:

"The right of disposition by sale of the notes held as collateral is not one incident to the delivery and hypothecation of same. Although there is some conflict in the courts of our country on the last proposition, we think the great weight of authority, as well as the reason of the rule, sustains the proposition that the holder of commercial paper as collateral for the payment of a debt cannot, in the absence of special power for that purpose, sell the security so pledged upon default of payment of the debt at public or private sale, with or without notice, as in the case of ordinary property, on timely notice, nor by order of court dispose of same. He is bound to hold and collect the security as it becomes due, and apply the proceeds to the payment of his debt."

The opinion above cited, however, refers to the rule that equity may, under special circumstances, order a sale. The court on this point further says:

"Some of the courts of our country, however, hold to the rule that where great inconvenience and loss are threatened by reason of the long delay in the maturity of the collateral, the court on proper showing may order the collateral sold and its proceeds immediately applied to the payment of the original indebtedness."

If such a rule prevails, as it justly should, it is not a right inherent in any implied condition of the pledge contract, but arises from general principles of equity jurisdiction, and depends upon circumstances extraneous to the pledge contract.

No such conditions are pleaded here, or appear from the record, other than the mere fact that the collateral note in question is payable in monthly installments of \$50 each, and that it would take a period of 28 months from the date this action was commenced to collect on the collateral the balance of \$1,400 then due on the principal obligation. As this action was commenced September 4, 1915, and the findings show that the makers of the collateral note were entirely solvent, and one of them a director of the plaintiff bank, it is probable that the entire debt is paid off long before this. But in any event, the parties to the pledge contract entered into the agreement with full knowledge of the time and manner in which the collateral note was payable, and with presumptive knowledge of the law relating thereto; and there has nothing arisen subsequently to in any way jeopardize the value of the security.

We do not see that there is anything controlling in the point raised here, and re

ferred to by the Supreme Court in *Donohoe v. Gamble*, supra, that commercial paper may, under the statutory law of California, be seized and sold under execution, or a sale may be ordered on foreclosure of chattel mortgage of the same. In the instances cited, the Code of California permits the sale; in the matter of a pledge it forbids it. We are satisfied that plaintiff is not entitled to an order directing the sale of this collateral note.

[4] But there is another question which we think should have our consideration, and that is the fact that the learned trial judge denied appellant all relief—not only a judgment foreclosing the collateral security, but even a personal judgment upon respondent's personal liability as maker of the principal note. We think that appellant was entitled to a personal judgment against respondent. There certainly can be no doubt but that a pledgee may bring an action at law and recover the amount of his debt from his debtor by an independent suit for a personal judgment, without selling or foreclosing the pledge. *Commercial Savings Bank v. Hornberger*, 140 Cal. 16, 73 Pac. 625. Is there any reason why he should not be entitled to the same relief where, as here, the pledgee has sought to procure a sale of the pledge by judicial process, even although we assume that he is not entitled to relief by foreclosure? We think not.

The judgment is reversed, and the trial court directed to enter judgment in favor of plaintiff for the amount due on the principal obligation.

We concur: FINLAYSON, P. J.; SLOANE, J.

SHATTUCK v. PALMER et al. (Civ. 2850.)

(District Court of Appeal, Second District, Division 1, California. June 23, 1919.)

1. APPEAL AND ERROR §916(4)—SUBSTITUTION OF COPY FOR ORIGINAL—PRESUMPTION.

Though the complaint in the judgment roll offered by plaintiff in evidence is in printed form containing a printed verification, the presumption should prevail on appeal that the court had for good cause permitted a copy of the complaint to be substituted for the original as allowed by Code Civ. Proc. § 1045, in view of the recitations of regularity in the order for publication of summons and, the judgment in proper form.

2. JUDGMENT §632(1)—CONCLUSIVENESS—PERSONS BOUND—GRANTEE OF PARTY.

In ejectment defendants cannot attack, on the ground of fraud, a judgment rendered against their grantor in a prior suit by plaintiff to quiet title.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by J. E. Shattuck against Lillian Pray Palmer and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Luce & Luce, of San Diego, for appellant. Wright, Winnek & McKee, of San Diego, for respondents.

JAMES, J. Plaintiff brought this action in ejectment; the complaint being in the ordinary form appropriate to such a suit. Defendants in their answer first denied that plaintiff was the owner of and entitled to the possession of the real estate in controversy, and alleged that they (defendants) were the owners and in possession and were entitled to have the property. As a separate defense, they alleged that prior thereto plaintiff had obtained a judgment quieting title against their grantor, which judgment was based upon service of summons by publication and mailing; they particularly alleged that the order for the publication of summons was obtained by fraud, in that by the verified complaint filed by the plaintiff and his proof by affidavit made in support of the order a false statement was made as to the ownership and title to the property being in the plaintiff in that suit, who is also the plaintiff here. On the ground that the judgment quieting title against their predecessor in interest was obtained by fraud, they asked judgment, and upon a recitation of the same alleged facts embraced within a cross-complaint, asked for an affirmative decree in their favor. The plaintiff demurred to the several parts of the answer and cross-complaint on the general and on special grounds, and, his demurrer being overruled, made answer to the cross-complaint wherein he admitted the commencement of the quiet-title suit and the filing of the verified complaint and affidavit, and denied that any fraud was committed or that any false statements were made therein. This cause came on for trial and resulted in a verdict of the jury being returned in favor of the defendants, which verdict was rendered under express instructions of the trial judge. The appeal is from the judgment.

There is a purported appeal from the order denying a motion for a new trial, but, as no appeal was permissible at the time of the making of the order on that motion, it should be, and hereby is, dismissed. *Hirsch v. All Persons*, 173 Cal. 268, 159 Pac. 712. All of the questions which might properly be included formally under the appeal from an order denying a motion for a new trial are reviewable on this appeal from the judgment.

A further statement of admitted facts may briefly be made in order to illustrate the contentions argued on this appeal. The action to quiet title to the real property in contro-

versy was brought by this plaintiff against the grantor of defendants by the filing of a complaint on June 30, 1906. In March, 1907, after affidavit filed, an order was made for the publication of summons, and the publication was completed on the 23d day of May, 1907; the mailing having been made of summons and complaint to defendant in that action on the 28th day of March of the same year. On the 15th day of September, 1907, defendants acquired such title to the property as the defendant in the quiet-title suit had to confer, and in June, 1909, a decree was entered against defendants' grantor in the quiet-title suit in favor of this plaintiff. This action was commenced on June 19, 1912, more than three years after the entry of the judgment last referred to. It appears from the bill of exceptions that during the trial of this case the plaintiff offered in evidence the judgment roll in the quiet-title suit against defendants' grantor, to which defendants objected, basing their objection on the ground that the judgment rendered in the quiet-title action was void because it had not been made to appear by the oath of any person that the plaintiff had a good cause of action, that, such a showing having been omitted, the court had no legal right to make an order for the publication of summons, and that subsequent proceedings based thereon were null. The court sustained the objection. The entire judgment roll which was offered in evidence is set forth in the bill of exceptions, but we are not able to determine what other evidence may have been before the court at that time, for nothing appears other than the matters composing the judgment roll which the court refused to allow to be considered by the jury. As the defendants acquired whatever title they had to the property before judgment was entered in the quiet-title suit, it may have been important to a consideration of the question of the relevancy of the offered evidence that it also be shown or offered to be shown that, upon the filing of the suit to quiet title and before defendants obtained their deed, a *lis pendens* had been filed with the county recorder. However, the questions are argued apparently upon the agreed state of mind of counsel on both sides that the record evidence was relevant and material, unless, as pointed out by counsel for defendants, the judgment was void because of an insufficient statement of the facts in the affidavit used to procure the order for publication of summons. The case is to be considered, then, without incumbering the question with anything more than is included in the argument of counsel. In the opening brief filed by appellant it was urged that upon the face of the cross-complaint the right to relief for the alleged fraudulent procurement of the order for publication of summons was barred by the laches of the defendants, in support of which contention appellant cited, among others, the case of *Lady*

Washington Co. v. Wood, 113 Cal. 496, 45 Pac. 809, which appears to be in point. Appellant also contended that the legal proposition was not to be gainsaid that a grantee, such as defendants here are, has no right to attack a judgment rendered against his grantor on the ground of fraud. A number of decisions were also cited in support of this proposition. Respondents in their reply brief make no argument against either of these contentions of appellant, and seem to concede that both propositions are well founded in law. They assert, however, that the first judgment is not sustainable, because they contend that its void character appears by an inspection of the judgment roll, and that they were entitled to make the objection and have it sustained whenever the record of the judgment was presented. Upon the concessions made by respondents, therefore, there is but the one question last mentioned to be considered as being the subject of serious debate. Examining the offered judgment roll in the quiet-title suit, we find, first, a complaint setting forth, in substance, sufficient facts to constitute a good cause of action to quiet title, an affidavit for publication of summons made by an agent of the there plaintiff, an order for publication of summons, due proof of publication and mailing and the entry of default, together with a judgment in proper form. In the affidavit made upon the application for an order for publication of summons it was not asserted, except by reference to the complaint on file, that a good cause of action existed in favor of the there plaintiff against defendants' grantor. Respondents concede that the complaint in its statement of facts was sufficient, but contend that it was not verified. Color for this contention is given by the fact, as shown in the bill of exceptions, that when the judgment roll was examined the complaint in its printed form was found therein, this printed form containing also an attached printed verification, with the signatures of affiant and the notary public all printed, as was the body of the complaint. The trial judge held that such a complaint did not show at the time the order for publication of summons was made that the court had before it any verified pleading, and that it should not be concluded that the printed complaint was a copy which had been for good cause substituted in lieu of the original. The order for publication of summons contained the following recitation:

"It further appearing from the verified complaint on file herein that a good cause of action exists in favor of the plaintiff and against each and all of said defendants. * * *

The judgment entered recited that the defendants had been "duly and regularly summoned to appear and answer plaintiff's complaint," and had made their default, which had been regularly entered, and that documentary evidence was considered. Section

1045, Code of Civil Procedure, provides as follows:

"If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original."

[1] It seems to us very plain that the printed document appearing in the judgment roll is a complaint purporting on its face to be a copy of some original. It had attached the names of counsel, an affidavit of verification in due form, and the name and style of the notary public who apparently attested the same. This being true, we think the presumption should prevail by reason of the recitations of regularity in the order for publication of summons and in the judgment, that the trial court in the quiet-title suit had for good cause permitted a copy of the complaint filed therein to be substituted in lieu and place of the original, and that the burden of proof was upon the respondents to show the contrary. This conclusion, we think, is fully sustained by the case of *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220. Without restating in detail the facts of that case, it may be said that the question considered was parallel to that presented here, and the conclusion reached by the court in that case fully supports plaintiff's position. And it may further be observed that in that case the attack upon the default judgment was directly made by appeal therefrom, while here, considering, as before mentioned, that respondents stated no cause of action in their cross-complaint or alleged special defense for fraud, the attack is collateral.

[2] Our conclusion is that the trial judge was in error on the main question last considered, and from what has been first stated he was also in error in holding, when considering the demurrer of plaintiff to the further defense of fraud set up in the amended answer and cross-complaint, that such defense was available to defendants as grantees of the defendant in the quiet-title action.

The judgment is reversed with direction to the trial court to sustain the demurrer of plaintiff to the fourth and separate defense alleged in the amended answer of defendants and to the cross-complaint of said defendants.

We concur: CONREY, P. J.; SHAW, J.

WRIGHT v. ALLEN et al. (Civ. 2288.)

(District Court of Appeal, Second District, Division 1, California. June 27, 1919.)

1. LIMITATION OF ACTIONS §197(1)—STATUTE OF LIMITATIONS—BOOK ACCOUNT—LAST ENTRY—EVIDENCE.

The limitation of four years upon a cause of action on book account under Code Civ. Proc.

§§ 337, 344, applies from the date of the last item charged.

2. LIMITATION OF ACTIONS §197(1)—STATUTE OF LIMITATIONS—BOOK ACCOUNT—LAST ENTRY—EVIDENCE.

In an executrix's action on open book account to recover for legal services rendered by her decedent, evidence *held* to justify the trial court's finding that the last charge against defendants was entered in the books of plaintiff's decedent not later than March 27, 1911, so that the cause of action was barred by the limitation of four years, under Code Civ. Proc. §§ 337, 344.

3. LIMITATION OF ACTIONS §183(1)—STATUTE OF LIMITATIONS—PLEADING.

In an executrix's action on open book account to recover for legal services rendered by her decedent, answer *held* to have presented an issue of the statute of limitations on the cause of action first set forth in the amended complaint, properly presenting an issue covering the date on which the original complaint was filed.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Bernice Wright, executrix of the last will and testament of W. S. Wright, deceased, against William H. Allen, Jr., and J. S. Torrance. From judgment for defendants, plaintiff appeals. Affirmed.

V. L. Ward, of Pasadena, and Howard W. Wright, of Los Angeles, for appellant.

Charles H. Brock, of Los Angeles, for respondents.

PER CURIAM. Appeal by plaintiff from an adverse judgment.

W. S. Wright, Esq., now deceased, was an attorney at law practicing his profession in this state. He was employed by these defendants and some 16 other persons and corporations to represent them in protecting large interests which involve the matter of bonds and lien claims affecting the Wentworth Hotel at Pasadena. The engagement of Wright was made by a writing to which were attached various signatures of his employers, including those of the defendants here. That the employment was so made, and that valuable services were rendered to the defendants, no question is made or suggested in this suit. Neither are the following facts in any wise disputed: After completion of the legal services, Wright mailed a detailed statement to all of the persons employing him, apportioning the total sum agreed to be paid, which was \$10,000, among his debtors. Practically all of these debtors, except these defendants, responded, and Wright received \$8,482.37 on the account. The statement of account was sent out on the 8th day of June, 1911. Wright was unable, notwithstanding his importunities in that regard, to obtain any money from these de-

fendants upon their admitted indebtedness, and under date of February 13, 1912, more than six months after this statement had been sent out, he wrote to one of these respondents as follows:

"February 13, 1912.

"Mr. Wm. H. Allen, Title Insurance & Trust Company, Los Angeles, California.—My Dear Mr. Allen: Isn't it a shame, after I did all that work in the Wentworth matter, defending bonds, and in the matter of the liens, that neither of my three good friends—Wm. H. Allen, Sydney Torrance, and Gen. Wentworth—pays his share of the bill? You know when I employ the Title Insurance & Trust Company, as I have for twenty years, and it sends its bill, it is always paid. It really shocks me to think that, though I have sent you a bill several times, you have not even answered it. I cannot afford to do the work without pay. I do not quite know what to think about it. Of course, in the case of Gen. Wentworth, I can understand, because—just because.

"Yours truly, W. S. Wright."

He received a response to this letter which in substance was that the writer had some understanding with Mr. Torrance, the codefendant here, that he was to take care of the debt. At the trial Mr. Allen admitted that his contract with Wright contained no hint that another person was to pay his debt, but stated that, through an individual arrangement between himself and Torrance, Torrance had guaranteed to take care of it. Mr. Torrance, on his side, testified that, in some conversation with Wright when payment of the account was requested, he had stated that his understanding was that Mr. Allen had charge of the matter of arranging for payment. And so, to speak colloquially in the expressive slang of the street, "the buck was passed." This testimony, of course, furnished no defense to the claim, and it is not pretended anywhere by counsel in his argument that respondents had any defense which involved the merits of the claim, either on the ground that they had not received full value in the time and labor of Mr. Wright, or that the amount charged was improper or in any wise different from what they had agreed to pay. The sole and only defense urged against this suit of the executrix to collect the money due is that the statute of limitations had run against the claim. This defense was pleaded under all of the statutes that might be deemed applicable, and was allowed by the trial court and is urged here insistently in defense of the judgment, and this defense, by reason of the evidence and the law, we are compelled to sustain.

[1, 2] The cause of action pleaded was as upon an open book account, under which the limitation of four years (Mr. Wright having died in May, 1915) would apply from the date of the last item charged. Sections 337, 344, Code Civ. Proc. The ledger kept in Mr. Wright's office was produced before the court,

and the young woman who was familiar with the keeping of the accounts was asked to testify as to the date when the total \$10,000 charge had been entered therein; that charge appearing to be the item last in date. Just above this charge, under the year date of 1909, had appeared several items, including one (the last) of February 17th. A new year date then appeared, that of 1911, and immediately under this date were the words and figures, "March 27. To services in the matter of defending bonds and the liens, 10,000." It was noted that a line had been drawn through the word and figures "March 27," and the witness' attention was called to that fact, and she was asked to explain the reason for the apparent cancellation. She replied:

"I could only—I couldn't say accurately—it must have been after February of that year. I see I have written 'March' and for some reason crossed that out; so presumably it was shortly after that previous date."

The previous date, as we have noted, was the date of February 17th, but it was in the year 1909. The court had no other evidence than the testimony of this witness and an inspection of the original ledger to guide it in making findings, and the finding was that the entry was made "not later than the 27th day of March, 1911." Respondents insist that, this action having been commenced on September 28, 1915, applying the limitation period of the statute of four years and six months, the cause of action would, as the court found, have been completely barred before commencement of suit. Counsel for appellant admits that that conclusion follows if the fact is correctly determined as to the date of the entry of the item, but insists that the evidence was not sufficient to warrant the court in finding that the item was entered not later than March 27th. We think that the court, having before it the original book, with whatever aid the testimony of the young woman witness afforded, was justified in making the finding as it did. There was no other evidence tending in any way to show that the entry was made at a later date.

[3] The further contention is advanced by appellant that the plea of the statute of limitations as against the book account was insufficiently stated, in that defendants in their answer referred to the amended complaint only, and did not properly present an issue which would cover the date upon which the original complaint was filed. We have read carefully the allegation of the answer, and think that it must be held to have presented an issue upon the cause of action first set forth in plaintiff's amended complaint. The allegation is quoted in full:

"Defendant further states that the first cause of action set forth in plaintiff's complaint constitutes a new and different cause of action from that contained and set forth in plaintiff's

first amended complaint, that the said second amended complaint herein was filed more than four years and six months after the entry, if any, upon the book of accounts of W. S. Wright, deceased, and more than four years and six months after the last service rendered by the said W. S. Wright, deceased, in and about the litigation mentioned in plaintiff's second amended complaint, and that therefore plaintiff's first cause of action is also barred under the provisions of subdivision 2 of section 337 and section 353 of the Code of Civil Procedure, in that the said action, purporting to be upon an open book account, was not commenced within a period of four years and six months from the time that the said open book account, if any, was created, or from the time that the said last services of W. S. Wright, deceased, were rendered to the defendant in said action."

Having determined these questions adversely to appellant's contention, it is unnecessary to enter into any further discussion of the argument presented. It may be remarked, however, in emphasis of what has been stated earlier in this opinion, that in further answering the argument of appellant defendants have insisted that, as the account had never been disputed, its correctness was admitted, and that a shorter statute of limitation (which was pleaded), to wit, that upon a stated account, should be applied in the event that the first plea to the open account was not held good. For obvious reasons it is unnecessary to consider the argument of authorities presented under this head.

The judgment appealed from is affirmed.

ROSSI et al. v. SCOTT, MAGNER & MILLER. (Civ. 2795.)

(District Court of Appeal, First District, Division 2, California. June 18, 1919. Rehearing Denied by Supreme Court Aug. 16, 1919.)

1. EXCEPTIONS, BILL OF ~~43~~(2) — LATE SETTLEMENT OF EXCEPTIONS — CONSIDERATION.

Where bill of exceptions was settled on a date beyond the time allowed by law, and appellant failed to incorporate any matter which might excuse its delay, the bill, though settled, cannot be considered on appeal.

2. APPEAL AND ERROR ~~801~~(4) — RULING ON MOTION FOR DISMISSAL—EFFECT.

Ruling of the Supreme Court denying respondent's motion for dismissal of the appeal on the ground the transcript was not filed within the time prescribed by Supreme Court Rule 2 (176 Pac. vi), because it appeared the transcript was filed within 40 days after actual settlement of the bill of exceptions, cannot be considered as determinative of the merits of the appeal or the right of the appellate court to consider the bill of exceptions on final hearing; there being a question as to whether it was properly settled.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Maria Rossi and Luigi Rossi against Scott, Magner & Miller, a corporation. From judgment for plaintiffs, defendant appeals. Affirmed.

A. A. Sanderson and Sterling Carr, both of San Francisco, for appellant.

James A. Bacigalupi, Sylvester Andriano, F. M. Andreani and Harry G. McKannay, all of San Francisco, for respondents.

HAVEN, J. Defendant appeals from a judgment entered against it upon verdict of a jury in an action for damages for personal injuries, basing its appeal upon the judgment roll and a bill of exceptions. Respondents make the preliminary objection that the bill of exceptions cannot be considered upon the appeal for the reason that it was not prepared and settled within the time prescribed by law. The record, as it appears from the recitals in the bill of exceptions, is as follows: A motion for a new trial was made by the appellant, which was denied. Written notice of the denial of said motion was served upon appellant's attorneys on January 30, 1918. The proposed bill of exceptions was served upon respondents' attorneys on April 4, 1918. At the time of such service respondents' attorneys reserved their objection thereto upon the ground that said bill had not been prepared or served within the time allowed by law, or any extension thereof. Thereafter, and within the time allowed by law, respondents prepared and served upon appellant's attorneys their proposed amendments to said bill of exceptions, and in submitting such amendments again objected and excepted to the settlement of the bill, and reserved all rights to object to the settlement thereof, upon the same ground as above stated. The objection thus reserved was urged by respondents upon the judge of the trial court when the bill was presented to him for settlement; but such objection was overruled and disallowed, and said bill was settled and allowed on August 6, 1918.

Under section 650 of the Code of Civil Procedure, the time for the preparation and service of the proposed bill of exceptions expired in 10 days after the service of respondents' notice of the denial of the motion for a new trial, or on February 9, 1918. Such time could not be extended by the court for more than 30 days without the consent of the adverse party. Code Civ. Proc. § 1054. The actual service of the bill was on April 4, 1918, or nearly one month beyond the date to which the court could lawfully grant an extension of the time therefor. The record

discloses no evidence of any extension of time by stipulation.

In *Higgins v. Mahoney*, 50 Cal. 444, 445, it is said:

"The right of the appellant to present a bill of exceptions after the entry of judgment is limited in point of time to the period of 30 days. After the expiration of that period, unless further time had been in the meantime obtained, the right to present the bill of exceptions for settlement is taken away. If, therefore, the respondents, objecting to the settlement of the bill of exceptions, rely upon the lapse of the period limited by the statute, it becomes the duty of the appellant, in answer to the objection, to incorporate into the bill the matter, if any, going to excuse his apparent delay; otherwise the exceptions, though settled, cannot be considered here."

The above rule has been followed in many subsequent cases, of which the following are illustrative: *Connor v. Southern Cal. Motor Road Co.*, 101 Cal. 429, 431, 35 Pac. 990; *Wheeler v. Karnes*, 125 Cal. 51, 53, 57 Pac. 893; *Cameron v. Arcata, etc., R. R. Co.*, 129 Cal. 279, 280, 61 Pac. 955; *Estate of Kruger*, 130 Cal. 621, 625, 63 Pac. 31.

[1] In this case respondents complied with rule 15 of the Supreme Court (176 Pac. x) by serving upon the attorneys for appellant an exception to the record on appeal and an objection to the consideration of the bill of exceptions, upon the ground that the same was not prepared or served within the time allowed by law. No additional showing has been made by the appellant in response to such notice.

It appears, therefore, upon the face of the bill of exceptions, that timely objection was reserved by the respondents to the failure of appellant to prepare and serve its bill within proper time, and that such objection had been consistently urged by the respondents, both before the judge of the lower court and upon appeal. As the date upon which the bill was settled was beyond the time allowed by law, and appellant has failed to incorporate in the bill any matter which might excuse such delay, we are compelled to hold that the bill of exceptions, although settled by the trial court, cannot be considered upon this appeal.

[2] Appellant contends that the Supreme Court has decided otherwise in denying respondents' motion for dismissal of this appeal. That motion was made upon the ground that the transcript on appeal was not filed within the time prescribed by rule 2 of the Supreme Court (176 Pac. vi). The court denied the motion, for the reason that it appeared that the transcript on appeal was filed within 40 days after the actual settlement of the bill of exceptions, and declined to pass upon the question of whether or not the bill of exceptions was properly

settled. This ruling cannot be considered as determinative of the right of the appellate court to consider the bill of exceptions upon final hearing of the appeal. The denial of such a motion is not a determination of the merits of the appeal, nor of the sufficiency of all parts of the record. *Fish v. Benson*, 71 Cal. 428, 430, 12 Pac. 454; *Estate of Scott*, 124 Cal. 671, 673, 57 Pac. 654.

This elimination of the bill of exceptions leaves the appeal dependent upon the judgment roll alone, from which no error appears. The conclusion which the law compels in this case is arrived at the more willingly for the reason, that an examination of the briefs of the respective parties convinces us that no different result would have been reached had we been permitted under the law to consider the bill of exceptions.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRIT-TAIN, J.

SHAW, J., not participating.

VOILMER et al. v. WHEELER. (Civ. 2650.)

(District Court of Appeal, Second District, Division 1, California. June 27, 1919. Rehearing Denied by Supreme Court Aug. 25, 1919.)

1. LIMITATION OF ACTIONS \Leftrightarrow 179(2)—STATUTE OF LIMITATION—FRAUD OR MISTAKE — COMPLAINT.

Under Code Civ. Proc. § 338, enumerating the kind of actions which must be commenced within three years, subdivision 4, specifying an action for relief on the ground of fraud or mistake, the cause of action not accruing until discovery of the facts, where a complaint for partition was silent as to when the fraud or mistake on account of which it was sought to reform the contract between the parties was discovered, since it failed to show such discovery within three years prior to the bringing of the action, it was obnoxious to demurrer.

2. CONTRACTS \Leftrightarrow 152—CONSTRUCTION.

A contract, whether construed according to its terms or in the light of circumstances surrounding its making, should be interpreted in accordance with the plain import of the language used.

3. TENANCY IN COMMON \Leftrightarrow 28(1)—RIGHT TO RENTS AND PROFITS.

Where defendant in partition by conveyance from the parties' predecessor was the owner of a quarter interest in the property, subject only to payment to plaintiffs of \$10,200 derived from the proceeds of the sale of the whole property, in the absence of any provisions transferring his right, defendant was entitled to his proportionate share of rents and profits derived from the property up to sale thereof.

4. PARTITION — 77(2)—SALE—CONTRACT OF PARTIES.

Though the agreement between plaintiffs and defendant in partition, joint owners of land, provided a sale should only be made by all of the parties uniting in a joint transfer, under Code Civ. Proc. § 752, the court could order a sale for purposes of division of proceeds; it appearing that a partition could not be made without great prejudice to the joint owners.

Appeal from Superior Court, San Luis Obispo County; Thomas A. Norton, Judge.

Action, by August Vollmer and others against Alfred A. Wheeler, resulting in an interlocutory decree for plaintiffs. From an order denying defendant's motion for new trial, he appeals. Judgment affirmed in part, and reversed and new trial ordered in part.

W. H. Spencer and C. P. Kaetzel, both of San Luis Obispo, for appellant.

Wm. Shipsey and S. V. Wright, both of San Luis Obispo, and Chas. F. Blackstock, of Oxnard, for respondents.

SHAW, J. In this action plaintiffs sought a decree for the partition by sale of certain real estate described in the complaint, of which they and defendant were owners as tenants in common. The court upon trial granted the interlocutory decree prayed for. Thereafter defendant moved for a new trial, which was denied, and the appeal is from that order.

It appears from the original complaint filed, and upon which and the answer thereto the case was tried, that plaintiffs, being the owners of the property, conveyed to defendant an undivided one-fourth interest therein upon an agreement that he held the same subject to plaintiffs' right to the rents, issues, and profits derived therefrom until a joint sale thereof was made, at which time plaintiffs were to have and receive from the proceeds of such sale \$10,200, and that defendant was to have and receive one-fourth of the excess over and above said sum of \$10,200. In his answer defendant alleged that he was and had been since February, 1901, the owner in fee simple absolute of an undivided one-fourth interest in the property and entitled to the rents, issues, and profits therefrom, all of which since said date had been collected and appropriated by plaintiffs, and, upon allegations that the property could be partitioned in kind, asked for a decree accordingly.

Over defendant's objection, the court permitted plaintiffs to introduce much evidence wholly outside of and not pertinent to the ample issues joined, by reason of which fact plaintiffs, at the close of the trial, by leave of court, filed an amended complaint to conform thereto. The amended complaint contained two counts. In the first count thereof, in addition to the matters con-

tained in the original complaint, it was alleged that, to evidence the agreement made between the parties, defendant made and delivered to plaintiffs his written agreement, as follows:

"San Luis Obispo, Cal., February 12, 1901.

"To Messrs. August Vollmer, William F. Wood and Robert B. Edmondson:

"In the event that petroleum in paying quantity should not be found on some part of the following tract of land, which has been bought by you at my suggestion, to wit, the town site of El Moro conveyed by the county bank, the 161 acres bought of L. W. Booker, the 440 acres bought of Allen Foster and the tidelands in Morro Bay granted by the state of California, then I hereby agree, that in any sale made by us jointly of our respective undivided quarter interests in said lands, no proportionate division of the proceeds of such sales shall be made to me until you shall have each received the sum of three thousand four hundred (\$3,400) dollars, which has been contributed by each of you to the total purchase price. The surplus, if there be any, over and above the sum total of \$10,200.00 shall then be divided share and share alike between all four of us. It is clearly understood that this agreement shall take effect only in the event that the petroleum (or other hydrocarbons) in paying quantity shall fail to be discovered on some part of the aforesaid lands. Time is not of the essence of this agreement.

Alfred A. Wheeler."

Followed by an allegation as follows:

"That said agreement Exhibit B was then and there intended to mean, was then and there represented by defendant to plaintiffs to mean, and was then and there understood by plaintiffs to mean, and did mean that there should be no sale of said lands by any of the parties to this action otherwise than a joint sale; that in case petroleum or other hydrocarbons in paying quantity should fail to be discovered on said lands prior to a sale thereof defendant should receive no part of the rents, issues, and profits of said land until such sale (nor until the discovery of oil or hydrocarbons in paying quantity thereof, if such oil or hydrocarbons in paying quantity should be discovered thereon), and should likewise receive no part of the selling price of said lands until plaintiffs had been reimbursed therefrom the sum of \$10,200 paid by them as the purchase price of said lands, but that in the event that petroleum or other hydrocarbon substances in paying quantity should be discovered on said lands then and from that date defendant should have a full one-fourth interest in and to said lands;" and that no oil or hydrocarbon substances had been discovered on the land.

By the second count of said amended complaint plaintiffs alleged facts upon which they asked for the reformation of said contract on account of alleged mistake and fraudulent representations made by defendant. In answer to the first count of the amended complaint, defendant admitted the execution of the agreement, alleged that no

other agreement was ever made, and that he was the owner of a one-fourth interest in said land and entitled to the rents, issues, and profits thereof, from February 11, 1901, which rents, issues, and profits plaintiffs collected and appropriated to their own use and made no accounting thereof to him, that the real estate was susceptible of partition in kind, and prayed that an accounting be had. And in answer to the second count of said amended complaint defendant alleged, among other things, that said cause of action for the reformation of said written contract is barred by the provisions of subdivision 4 of section 338, Code of Civil Procedure.

[1] As to plaintiffs' right to have the contract revised, the court, upon evidence admitted, found in their favor, namely, that in case oil was not discovered upon the land prior to a sale thereof, plaintiffs should have the rents, issues, and profits derived therefrom to the time of such sale. In so finding and thus reforming the instrument the court erred. Section 338, Code of Civil Procedure, enumerates the kinds of actions which must be commenced within three years, and subdivision 4 of said section is as follows:

"An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The complaint is silent as to any allegation showing when the fraud and mistake on account of which it is sought to reform the contract was discovered, and therefore, since it failed to show such discovery within three years prior to the bringing of the action, it was obnoxious to the demurrer interposed. *Simpson v. Dalziel*, 135 Cal. 599, 87 Pac. 1080; *Castro v. Gell*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84. Moreover, it conclusively and affirmatively appeared from the evidence that plaintiffs discovered the fraud and mistake set up in the second count of the complaint more than five years prior to the commencement of the action, at which time they brought an action for reformation of the contract by filing a complaint substantially in the form of the second count of the amended complaint here under consideration, which action was thereafter dismissed for want of prosecution. The action for reformation of the contract was therefore barred, from which fact it follows that all parol evidence introduced touching the question of the reformation of the contract was incompetent, and for that reason the court erred in receiving it.

[2] To our minds, the terms of the contract are plain and free from ambiguity. Whether construed according to its terms or in the light of the circumstances surrounding the making of the same, it should be interpreted in accordance with the plain import of the language used therein. The facts are that defendant, who appears to have been recog-

nized by plaintiffs as an oil expert, held options to purchase the property; that in consummating the purchase plaintiffs furnished the money therefor, amounting to \$10,200. The deeds were taken in the name of Vollmer, who conveyed to each of his coplaintiffs a one-fourth interest and to defendant a one-fourth interest, which conveyance so made to the latter was subject to the sole and only condition that, if oil in paying quantities was found upon the property, he was to own the one-fourth interest absolutely and free from obligation to pay any sum of money on account of the purchase thereof. But the discovery of oil was prospective only. The land, besides larger tracts, comprised several hundred small town lots, and, owing to the difficulty of dividing it in kind, an advantageous sale thereof could only be made en masse. It is apparent that not only on this account, but for the reason that, since no transfer could be made without their participation, such provision would protect plaintiffs for and on account of the money advanced to defendant. Hence the purpose of the parties is clearly that, in the event that oil was not discovered, a sale of the property should only be made by all of the parties uniting in a conveyance of the property as a whole. Not only does the contract restrict the parties to joint action in making a sale, but, as we understand counsel, they agree that such was their intent, and, as thus construed, since no sale was made, all the parties appear to have acted in accordance therewith.

[3, 4] Since by virtue of the conveyance by Vollmer to defendant the latter was the owner of a one-fourth interest in the property, subject solely and alone to the payment to plaintiffs of the sum of \$10,200 derived from the proceeds of the sale of the entire property, it follows, in the absence of any provision transferring his right thereto, that he was and is entitled to his proportionate share of the rents, issues, and profits derived from the use of the property up to the time of making a sale thereof. The land was acquired in 1901. It is conceded that no oil has ever been discovered thereon. Nevertheless appellant insists that, since by the agreement it was provided that a sale and conveyance of the same should only be made by all of the parties uniting in a joint transfer thereof, no sale can be made because he refuses to join therein. We are not in sympathy with this contention. The statute (section 752, Code Civ. Proc.) provides that cotenants and owners of an estate such as the one here involved may have an action for a partition thereof, or where it appears that a partition cannot be made without great prejudice to the owners, the court may decree a sale of the property. We concede that there may be exceptional cases where a court of equity would, upon grounds in the nature of estoppel, be justified in refusing to

partition property, such as the cases of *Hunt v. Wright*, 47 N. H. 399, 93 Am. Dec. 451, and *Avery v. Payne*, 12 Mich. 549. No facts, however, are made to appear in this case constituting an exception to the rule declared in the section quoted as to a partition of the property, and since, owing to its condition, it cannot without prejudice to the parties be made in kind, a sale thereof is necessary. There is nothing in the contract showing a waiver on the part of plaintiffs to exercise their right to a partition, and since the order is for a sale of the entire interest, it would, though as to defendant involuntary, constitute a joint sale of the property by order of a court of equity, which, notwithstanding the existence of an agreement made by co-owners that the property should never be partitioned, will disregard the same unless supported by some fact other than the mere compact of the parties. *Freeman on Co-tenancy and Partition*, § 442.

The judgment, in so far as it decrees a partition of the property by sale thereof, is affirmed. In so far as it purports to revise the contract, it is reversed, and a new trial is ordered only as to defendant's right to have an accounting of the rents, issues, and profits derived from the use of the property by plaintiffs.

We concur: CONREY, P. J.; JAMES, J.

CITY PROPERTIES CO. v. FITZMAURICE et al. (Civ. 2846.)

(District Court of Appeal, First District, Division 1, California. June 28, 1919.)

1. JUDGMENT \S 800(1)—RECORD OF TRANSCRIPT—DISCHARGE OF LIEN.

When a transcript of judgment has been filed in another county than that of its rendition, under Code Civ. Proc. § 674, the lien thereby placed on all the real property of the judgment debtor in such county of filing is not discharged by the recordation of a copy of the clerk's docket, showing satisfaction of judgment, but is discharged by the satisfaction itself.

2. INFANTS \S 105—SATISFACTION OF JUDGMENT—MAJORITY OF.

A ward who, suing by guardian ad litem, had recovered a judgment on becoming of age was competent to sign satisfaction of the judgment; the fact of majority, under Code Civ. Proc. § 1760, alone terminating the guardianship.

3. JUDGMENT \S 800(1)—LIEN—SATISFACTION—RECORD.

Where a ward, suing by guardian ad litem, recovered judgment, transcript of which was recorded in another county where the judgment debtor owned realty, and after the ward reach-

ed her majority she filed satisfaction of judgment, which was recorded in the county where the property was situated, those dealing with the property were not charged to look further than the fact that the judgment had been satisfied in manner and form meeting all requirements.

4. JUDGMENT \S 800(1)—LIEN—DISCHARGE BY SATISFACTION—RESTORATION.

Lien upon judgment debtor's property in county other than that of suit having been discharged by satisfaction of judgment, it could not be restored except by the recordation anew of a transcript of judgment as required by Code Civ. Proc. § 674.

5. LIS PENDENS \S 22(2)—SATISFACTION OF JUDGMENT — NOTICE OF ACTION TO SET ASIDE.

Filing of notice of the pendency of a new action to set aside satisfaction by a ward of judgment obtained by her in suit by guardian ad litem as fraudulent to the creditors of the ward was not sufficient to put on notice persons dealing with the land of the judgment debtor situated in a county other than that of suit, but where transcript of judgment had been filed pursuant to Code Civ. Proc. § 674, the title having previously been legally transferred by the judgment debtor, defendant in the original action.

Appeal from Superior Court, Alameda County; Jos. S. Koford, Judge.

Action by the City Properties Company against D. Isabelle Fitzmaurice and others. From judgment for defendants, plaintiff appeals. Affirmed.

Crane & Crane, of Chicago, Ill., for appellant.

Metcalf & Black and Aaron Turner, all of Oakland, for respondents.

NOURSE, Judge pro tem. Appeal from judgment for defendants in an action to quiet title to real property in Alameda county.

On September 2, 1914, a judgment was recovered in the superior court of San Francisco in favor of Annie M. Cochran, a minor, by her guardian ad litem, and against Anne Marham. On September 5, 1914, a transcript of the docket of said judgment was recorded with the county recorder of Alameda county, Anne Marham being then the owner of the property involved in this proceeding. On October 8, 1914, Annie M. Cochran individually made and acknowledged a satisfaction of judgment, which was filed with the county clerk of San Francisco. On October 22d, of the same year a transcript of the docket of the county clerk of San Francisco county, showing this satisfaction to have been filed, was recorded in Alameda county.

On January 12, 1915, Anne Marham, for a valuable consideration, executed a trust deed to the property to secure a loan, and

on October 9, 1916, the trustees under this deed conveyed to one of the defendants through whom the other defendants claim.

On August 19, 1915, a notice was filed in Alameda county of the pendency of an action in San Francisco to set aside as fraudulent to creditors the satisfaction given by Annie M. Cochran on October 8, 1914. On January 12, 1916, said satisfaction was set aside by judgment of the superior court in San Francisco as a fraud upon the creditors of Annie M. Cochran. On February 21, 1916, the sheriff of Alameda county sold the property to appellant by virtue of an execution from San Francisco in the action entitled "Cochran v. Marham." This was subsequent to the execution of the deed of trust of January 12, 1915, but prior to all sales and transfers of title thereunder.

At the time of the trial the action was dismissed as to all defendants other than the actual occupant of the premises and those who held a deed of trust executed November 24, 1916. These all filed cross-complaints, and secured judgment against appellant.

The main ground of attack on this judgment is that the recordation in Alameda county of the copy of the docket of the county clerk of San Francisco, showing the filing of satisfaction, was not notice in Alameda county of the satisfaction of the judgment sufficient to relieve the respondents' predecessors in interest of further inquiry into the fact of satisfaction. In support of this proposition, appellant contends that the statute does not provide for such a method of releasing the lien previously placed by the recordation of the transcript of the judgment. In this appellant is technically correct. Section 674, Code of Civil Procedure, authorizes the filing of a transcript of the original docket of a judgment in another county where real property is situated. Thereupon the judgment becomes a lien on all the real property of the defendant in such county. The same section then provides: "The lien continues for two years unless the judgment is previously satisfied or the lien otherwise discharged."

[1-3] Respondents urge that the title of the property in Alameda county was cleared of the lien of the judgment when the certified copy of the county clerk's docket showing the filing of satisfaction, was recorded in that county. But the recording of a copy of this document could not give it greater force than the record of the original docket in the coun-

ty where made. Civ. Code, § 1218. Hence, when a transcript of judgment has been filed in another county under section 674, Code of Civil Procedure, the lien thereby placed is not discharged by the recordation of a copy of the clerk's docket showing satisfaction. The lien is discharged by the satisfaction itself. Here the case is that the judgment was obtained by the guardian ad litem of Annie M. Cochran, and the satisfaction was signed by her individually on the representation that she had then become of age. If it be a fact that the ward was then of age she was competent to sign the satisfaction, because that fact alone terminated the guardianship. Code Civ. Proc. § 1760. The subsequent attack, which was made upon this satisfaction, was confined to the ground that it was in fraud of the creditors of the ward, and at no stage of the proceedings is it suggested that she was not of age and competent to give satisfaction of judgment at the time this document was executed. Such being the case, those dealing with the property in Alameda county were not charged to look further than the fact that the judgment from which the lien arose had been satisfied by the actual plaintiff in the case in a manner and form fully meeting all the legal requirements.

[4] If the ward had not reached her majority, and if the satisfaction had been procured by the defendant or her agents through fraud upon the ward, then the trustees under defendant's deed of trust and those deraigning title through them might be charged with the fraud, but there is no evidence of any such facts in the record. The lien upon the property having been discharged by satisfaction of the judgment it could not be restored except by the recordation anew of a transcript of judgment as required by section 674, Code of Civil Procedure.

[5] The filing of notice of the pendency of the new action to set aside the satisfaction as fraudulent to the creditors of the ward was not sufficient to put defendants on notice, as the title had previously been legally transferred by the defendant in the original action. The respondents accordingly took free from the cloud of the proceedings pending in San Francisco county, and were entitled to judgment.

For these reasons, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

RATZLAFF v. TRAINOR-DESMOND CO.
(Civ. 1869.)

(District Court of Appeal, Third District, California. June 13, 1919. Rehearing Denied by Supreme Court Aug. 11, 1919.)

1. BROKERS ⇐85(1) — ACTION FOR COMMISSION — PROOF OF SERVICES — PAROL EVIDENCE.

In land broker's action upon principal's written agreement to pay commissions for services performed, where answer alleged there was no consideration for agreement, parol evidence as to such services was not inadmissible as being violative of statute of frauds requiring broker's authority to be in writing, but was admissible for purpose of showing consideration.

2. EVIDENCE ⇐422 — ACTION FOR COMMISSION—PAROL EVIDENCE — CONTRACT WITH PURCHASERS.

In land broker's action upon principal's written agreement to pay commission pro rata as purchase price was paid, parol evidence was admissible to show that the principal's contracts with purchasers were in full force at time of assignment thereof by principal.

3. BROKERS ⇐75—COMMISSION—CANCELLATION OF LAND CONTRACT.

Where broker's contract with owner provides for payment of commissions pro rata as purchase price is paid, broker is entitled to entire commission upon cancellation of owner's contract with purchaser by mutual consent of owner and purchaser.

4. BROKERS ⇐63(1)—COMMISSION CONTRACT —DUTY OF OWNERS.

Vendor, having agreed to pay broker commission pro rata upon payment of purchase price, is required to act in good faith and do nothing to prevent, discourage, or embarrass the completed purchase of the property and do everything possible to aid in securing the purchase price.

5. BROKERS ⇐75—COMMISSION CONTRACT—ASSIGNMENT OF CONTRACTS BY VENDOR.

Where vendor, having agreed to pay broker commissions pro rata upon payment of purchase price after payment of first 20 per cent., conveyed title to the land and assigned its interest in the contracts to another party, the entire commission became due; vendor having in effect abandoned and made it impossible to carry out its contract with purchasers procured by broker.

6. INTEREST ⇐43—COMMISSION CONTRACT — ANTEDATED CONTRACT.

Where antedated commission contract provided for payment of commissions pro rata upon payment of purchase price, with interest on commissions "payable as received," without specifying date from which interest was to be computed, interest was to be computed, not from time of default merely, but from date of the commission agreement, and from the real, not apparent, date of the execution of the agreement.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by D. B. Ratzlaff against the Trainor-Desmond Company. Judgment for plaintiff, and defendant appeals. Affirmed as modified.

Butler & Swisler and C. E. McLaughlin, all of Sacramento, for appellant.

Driver & Driver and B. F. Van Dyke, all of Sacramento, for respondent.

BURNETT, J. On or about the 1st day of March, 1912, the Sacramento Valley Colonization Company entered into a contract with the defendant to sell to the latter a large body of land in the Rancho del Paso in Sacramento county. At that time and for some time thereafter plaintiff was engaged in selling lands for defendant, and on or about March 26th following the former negotiated with one W. H. Stewart for the sale of some 1,608.33 acres, and thereafter defendant entered into a written contract with Stewart for the sale and purchase of said tract, acknowledging the receipt of \$5,000, and agreeing that, when Stewart paid an additional sum of \$12,000 on the purchase price, defendant would give Stewart a new contract according to a form attached to the first contract. When said \$12,000 payment was about due according to said contract, plaintiff ascertained that Stewart was having considerable difficulty in raising funds to meet this payment, and on the 12th day of June, following, without any objection from Stewart, plaintiff induced one W. B. Harrison to enter into a contract with defendant for the purchase of section 29 included in Stewart's contract. About this time defendant, without the assistance of plaintiff, sold to one Jonas 820 additional acres of said tract covered by the Stewart contract. Thereupon plaintiff persuaded Stewart that the latter could handle the residue of the land included in said contract, and he came to California from Oklahoma and entered into the second written contract with defendant, whereby the latter agreed to sell to Stewart the north one-half of section 65 and of section 62, being all the land covered by Stewart's first contract, after deducting those portions sold to Harrison and Jonas. Defendant gave Stewart credit on the second contract for the \$5,000 paid on the first, the second being dated July 1, 1912. Immediately after this plaintiff and defendant executed the following written agreement:

"In entering into an agreement with D. Ratzlaff in the sale of the following described property it is understood that the net price to him would be \$87.50, and the said Ratzlaff having disposed of the said land at \$92.50 per acre, it is therefore understood and agreed that in consideration of the work done and to be done in the sale of section No. 29, and the north half of section No. 62 and north half of section No.

65, amounting to 1,288.33 acres located on Rancho del Paso in the county of Sacramento, state of California, we agree to pay D. B. Ratzlaff, of the city of Sacramento, state of California, the sum of \$5 per acre as commissions; said commissions to be paid pro rata as paid by the purchasers after the first 20 per cent. payment is received; no commissions to be paid out of the first 20 per cent. The above commissions are to bear 8 per cent. interest, payable as received."

We may refer to this as "the commission contract," and upon it the action is based. It was dated February 19, but was actually executed in the early part of July, 1912. The reason for antedating is explained by plaintiff, but that consideration is of no importance here. Thereafter and on or about January 18, 1913, while said Stewart's second contract and the Harrison contract were in full force, defendant assigned to the Farmers' & Bankers' Investment Company its said contract of purchase with the Sacramento Valley Colonization Company and took in payment therefor the greater portion of the capital stock of said Investment Company. About the same time, at the request of said defendant, the Colonization Company conveyed the lands covered by said commission contract to the Investment Company, and on or about June 11, 1913, the Trainor-Desmond Company sold all of its said stock to one E. F. Robbins. Thereafter it is plain defendant had no interest whatever in any of said lands or in either of said contracts with Stewart and Harrison.

As to the complaint in the action, no criticism seems to be justified. In brief, it may be stated that it alleges the execution of said commission contract, the performance by plaintiff of the terms, covenants, and conditions therein recited, "that defendant has received payment in full for said lands, that heretofore, and while said contracts of sale were in full force and effect, defendant sold and transferred all its interest in the said lands," and that no part of said amount agreed upon has been paid. The complaint was verified and in the verified answer defendant admitted the execution of the commission contract, but claimed that plaintiff had sold thereunder only 648.33 acres, and was therefore entitled to the sum of \$3,241.65 as commissions instead of \$6,441.65, as claimed. A counterclaim was also set up for about \$1,600, and the prayer was that this sum might be set off against plaintiff's claim, and defendant offered to pay to plaintiff the difference. Defendant was permitted, however, by the court to file an amended answer, from which was omitted the express admission of any amount due plaintiff. No objection was made to the form of the amended answer, although somewhat uncertain in its denials of certain material allegations of the complaint, and the cause was tried by the court. The findings were in favor of plain-

tiff on the commission contract for the full amount claimed, to wit, the sum of \$6,441.65 together with interest thereon at 6 per cent. from the 19th day of February, 1912, amounting to \$8,060.23, and in favor of defendant for the counterclaim for a little less than the amount demanded. The judgment was for the difference, the sum of \$6,130.66 in favor of plaintiff, from which the appeal is taken.

[1] In the trial of the cause much parol evidence was received of the services performed by plaintiff in the effort to secure purchasers for said tract of land and to effect its sale. This included an account of the negotiations with said Stewart and Harrison and a statement of the contracts which plaintiff induced them to execute. The evidence was objected to principally on the ground that it was thereby sought to prove the authority of plaintiff as agent to represent defendant in the sale of real property, and it is claimed here that such evidence was inadmissible because violative of the statute of frauds, requiring such authority to be in writing. But appellant is entirely mistaken in the view that said rule is applicable to this case. The evidence was received and was certainly admissible for the purpose of showing the consideration for appellant's promise to pay respondent said commission of \$5 per acre. It was not required of respondent in the first instance to offer such evidence, since the written contract would raise the presumption of sufficient consideration. But the answer virtually denied that any service was performed that would support the said promise to pay, and respondent, by offering such proof, simply anticipated this defense. Plaintiff, let it be repeated, did not rely upon any parol authorization of agency, but this action was and is based upon said written promise to pay. If A. should enter into oral negotiations with B. to sell for the former a tract of land, and the service should be performed, and thereafter A. should execute a written promise to pay a commission therefor, would any one contend that, if the consideration for said promise were disputed, B. would not be permitted to testify as to the service he had performed for A? We think there can be no serious controversy above the matter, and the ruling was altogether correct.

[2] Parol evidence was also received to show that, at the time appellant disposed of all interest in said land and in said contracts with Stewart and Harrison, the agreements for the sale to them were in full force and effect. This was entirely proper in view of the condition prescribed in the written promise for the payment of the commission. It was to be paid "pro rata" as the purchase price was paid. If, therefore, the contracts were forfeited by Stewart and Harrison and they declined or refused to pay the purchase price, respondent would not be entitled to his commission, and appellant, of course, would

be released of liability therefor. Respondent assumed the responsibility of losing his commission if said Stewart and Harrison defaulted. But he claimed, and still contends, that his commission became due by reason of the default of appellant, and, manifestly, to take advantage of that default, he must show that he had not already lost his right in consequence of the forfeiture of the said Stewart and Harrison contracts.

There remains the important question whether the legal effect of the acts of appellant as to the sale of the property to the Farmers' & Bankers' Investment Company was to make the said commission immediately due. It is the contention of respondent:

That by said sale appellant "put it out of its power to ever receive any further payments or benefits under the Harrison and Stewart contracts of sale or to take steps to enforce payment thereunder. They likewise by this sale put it out of the power of plaintiff to do any further work for them under his commission contract, if there was any further work to be done thereunder."

In support of this claim they cite *Wolf v. Marsh*, 54 Cal. 228; *Love v. Mabury*, 59 Cal. 484; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117; *Grant v. Warren*, 31 Cal. App. 458, 160 Pac. 847; *Realty Bonds, etc., Co. v. Pt. Richmond Co.*, 171 Cal. 238, 152 Pac. 433; *Cheatam v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076.

In the *Wolf* Case the promise in writing was to pay W. a certain sum of money, but with the express understanding that, if certain mines belonging to M. should yield him no profit, then the note was not to be paid, and the obligation was to become null and void. It was held that the yielding of profit to M. from the mines was a condition precedent to the obligation incurred, but that, M. having rendered the happening of the condition impossible by selling the mines, the obligation became absolute. The decision followed the statement of the principle in *Bishop on Contracts*, § 690, as follows:

"If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor without demand, even though the time specified for performance has not expired."

In the *Love* Case the plaintiff's assignors "contracted to furnish materials and perform work in defendants' mine, in consideration of which the defendants agreed to pay them \$1,700—\$800 down during the progress of the work, and the balance out of the first proceeds of the mine, after deducting expenses." It was held that the contract contemplated that the defendants were to work the mine; and their failure and refusal to commence to work it within a reasonable time rendered them liable for the balance to be paid.

In the *Poirier* Case, *supra*, the promise was

to pay a certain sum of money in installments, when realized, from the products of certain land owned by the defendant, and it was held that the money immediately became due by the sale and conveyance by the defendant to others of the land and products.

In the *Bagley* Case a note was given to be paid out of the profits of a business, and it was held that the liability became fixed and absolute when the maker voluntarily put it out of his power to make any profit out of the business or to fulfill the contract according to its terms, by a sale and conveyance of the business.

In the *Grant* Case the balance of the purchase price of certain lands was to be paid out of the proceeds of a certain quarry, and, the vendee having repudiated his agreement to work the mine, it was held that the measure of plaintiff's damage was the full balance due in cash, and not the amount of the royalty that the quarry might have yielded had it been worked.

In the *Realty Bonds* Case the action was by an agent to recover commissions for the sale of a tract of land to be paid out of the purchase price. The vendor agreed, however, to make extensive improvements on the land. He failed to keep his agreement, and it was held by the Supreme Court that this tended to show that he had prevented the purchasers from paying the purchase price, and that, under these circumstances, the agent was entitled to his full commission.

In the *Cheatam* Case a real estate broker was to be paid his commission out of the purchase price, but it was held that he was entitled to said commission notwithstanding there was no sale, since the sale was not consummated by reason of a defect in the vendor's title.

[3, 4] The principle of the foregoing cases would assuredly apply here, if it be true, as claimed in the brief of appellant, that the Stewart contract was canceled by mutual consent of Stewart and appellant. If appellant consented to such cancellation, it would, of course, by this voluntary act, in a legal sense prevent the payment of the purchase price. The commission contract necessarily implied that appellant would act in good faith and do nothing to prevent, or even discourage or embarrass, the completed purchase of the property. Indeed, according to the plainest principles of honesty and fair dealing, appellant was required to do everything possible to promote the purchase of the land by Stewart and Harrison, and thereby to aid in securing the purchase price, to the end that respondent might receive compensation for the services which he had performed.

[5] The court, however, found that the said contracts of Stewart and Harrison were still in force at the time of the conveyance as aforesaid to the said Farmers' & Bankers'

Investment Company. But by this conveyance and the assignment to said company by appellant of all its interest in said Stewart and Harrison contracts it waived all interest in the payment of said purchase price, and violated its implied obligation to promote the purchase of the property by Stewart and Harrison. The commission contract clearly contemplated that appellant would not change its attitude towards the property to the detriment of respondent. This is not like the case where a vendor who has entered into an executory contract for the sale of real estate simply conveys the property to another before the maturity of the obligation under said contract or where he enters into a contract for the sale of property which he does not own at the time of the execution of the contract. But in the case at bar the vendor not only conveyed all of his title in the land, but also relinquished all of his interest in the contract of sale, in which contract respondent was directly interested and upon which the payment of his commission depended. The effect of appellant's conduct, as far as respondent's interest is concerned, was the same as though the former had entirely rescinded or abandoned the contracts with Stewart and Harrison.

In 39 Cyc. 1388, it is said:

"According to the weight of authority, where the vendor upon default in performance of the purchaser or in the absence of such default sells the land to a third party, this will amount to a rescission of the contract of sale, and a fortiori the contract will be considered as rescinded when in addition to the sale the vendor notifies the purchaser that he considers his contract rescinded. According to some decisions, however, sale of the property to a third person does not of itself constitute a rescission. These decisions proceed upon the theory that the vendor has not made performance on his part impossible, since he has it in his power to repurchase the property and perform the contract."

The rule as stated in the latter portion of the above quotation prevails in California. *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Shively v. Semi-Tropical Land Co.*, 99 Cal. 259, 33 Pac. 848.

But here, as we have seen, the appellant has gone further and assigned its agreement to sell. It has therefore in effect abandoned and made it impossible for it, at least, to carry out the contract with Stewart and Harrison.

In fact, by said commission contract, the parties contemplated that appellant should retain its interest in the property and in the purchase price until the commission was paid. *Love v. Mabury*, supra. While not explicitly stated it is fairly implied, indeed, that the commission was to be paid out of the purchase price. Is that not a reasonable inference from this language, "Said commissions to be paid pro rata as paid by the pur-

chasers after the first 20 per cent. payment is received, no commissions to be paid out of the first 20 per cent.?" Why should appellant be at pains to provide that no part of the commissions shall be paid "out of" the first 20 per cent. of the purchase price, if it was the understanding that it should be paid out of no portion of said price? The fact that the first 20 per cent. was thus distinguished creates the implication that the remaining 80 per cent. was to be impressed with the burden of the commission.

We may add that this view leads to no injustice, since the services were performed by respondent, and a large sum of money was paid to appellant by Stewart and Harrison, and the property was afterward sold for its full value.

Appellant claims that—

"The finding and judgment show that the court allowed \$5 per acre on 1,608.33 acres. The contract on its face provides only for commission on 1,288.33 acres."

We do not so read the record. The court found that the principal sum due for commissions is \$6,441.65. As we figure it, 1,288.33 acres at \$5 per acre would just equal that sum.

The remaining question relates to the allowance of interest. It is to be observed that the commission contract does not specify the date from which interest shall be computed. It is provided that "above commissions are to bear 6 per cent. interest payable as received." It thus appears that the interest was to be due at the same time as the installments of the commission, and the rate was to be 6 per cent., but the initial point for the computation was not specified. In R. C. L. § 23, it is said:

"It seems to be generally agreed that, where an instrument is payable at a future day, with interest, and nothing is said in it as to the commencement of the interest period, it is to be computed from the date of the instrument."

In one of the cases cited in support of the text, *Hackenberry v. Shaw*, 11 Ind. 392, the language of the stipulation was, "with 6 per cent. interest, if not paid at maturity." The Supreme Court of Indiana said:

"The only question raised * * * is whether interest should be computed from the date of the bill, or only from the time of the default. The court below allowed interest from the date of the bill. This, we think, was right. To construe the words 'with 6 per cent. interest, if not paid at maturity,' to mean interest from the time of default merely, would be equivalent to striking them out of the bill entirely. That would be the effect of the bill without any statement as to interest."

Lord Denman, C. J., delivering the opinion of the court in *Raffey v. Greenwell*, 10 Ad. & El. 222, said:

"Generally speaking, an installment of this sort carries interest from its date, whether payable on demand or at a time specified. The reason is that the party who makes the promise must expect to keep it; and, if he does, no interest can be due from any other period than the date."

[6] But it appears herein, and the court so found, that said commission agreement was executed on or about the 1st day of July, although it bears date of February, 19, 1912. We think the real rather than the apparent date is what the parties had in mind. It is hardly to be supposed that, in the absence of an agreement to that effect, the parties contemplated the payment of interest for a period prior to the execution of any promise on the part of the obligor. As we compute it, the court allowed as interest about \$43 in excess of the sum due. The facts fully appear in the findings, and the judgment may be modified here by reducing the amount to \$6,087, and, as thus modified, it is affirmed; respondent to recover his costs.

We concur: CHIPMAN, P. J.; HART, J.

ANDERSON v. NATIONAL ICE & COLD STORAGE CO. (Civ. 2792.)

(District Court of Appeal, First District, Division 2, California. June 18, 1919.)

LIMITATION OF ACTIONS § 130(12)—EXTENSION OF TIME—"REVERSAL OF JUDGMENT ON APPEAL"—CERTIORARI.

Where an award of compensation to a widow under the Workmen's Compensation Act for death of her husband was annulled by the Supreme Court on a writ of certiorari, such annulment was not the "reversal of judgment on appeal" within the provisions of Code Civ. Proc. § 355, providing that where judgment is reversed on appeal, plaintiff may commence a new action within one year.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Anna I. Anderson against the National Ice & Cold Storage Company, a corporation. From judgment for defendant on demurrer to the complaint, plaintiff appeals. Affirmed.

Charles L. Brown, of San Francisco, for appellant.

Gavin McNab and Nat Schmulowitz, both of San Francisco, for respondent.

LANGDON, P. J. This is an action to recover damages from the defendant because of the death of the husband of plaintiff, alleged to have been caused by injuries sus-

tained by him while in the employ of the defendant, and due to the negligence of the defendant. The defendant demurred to the complaint upon a number of grounds. The demurrer was sustained upon three grounds, and judgment entered for defendant, from which the plaintiff appeals.

Under our conclusion, it is only necessary for us to consider one point upon the appeal, and that is whether or not the action was barred by the provisions of section 340, Code of Civil Procedure, providing that an action for the wrongful death of another must be brought within one year. The facts of the case, pertinent to this inquiry, are briefly as follows: John A. Anderson, the husband of plaintiff, was injured on July 22, 1916, by falling through an elevator shaft at the place of business of the defendant company. He died from such injuries on August 10, 1916. In October, 1916, his widow commenced proceedings before the Industrial Accident Commission, which proceedings culminated in an award for the plaintiff. This award was annulled by the Supreme Court upon a writ of certiorari on November 22, 1917. Casualty Co. of America v. Industrial Accident Commission et al., 176 Cal. 534, 169 Pac. 76. Thereafter, on April 15, 1918, more than one year after the death of John A. Anderson, the present action was commenced in the superior court.

The appellant urges that section 355, Code of Civil Procedure, is applicable to the case, which section provides that where judgment is reversed on appeal, the plaintiff may commence a new action within one year after reversal. Appellant contends that the action of the Supreme Court in annulling the award of the Accident Commission was a reversal on appeal within the meaning of this section. In this matter we feel bound by the decision in the case of Fay v. Costa, 2 Cal. App. 241, 83 Pac. 275. A petition for hearing by the Supreme Court was denied in that case, and it expressly decides that where an order is annulled upon a writ of review, the annulment thereof cannot be deemed the reversal of a judgment upon appeal within the provisions of section 355 of the Code, allowing a new action to be commenced within one year after the reversal, and does not operate to extend the time for commencing an action.

We have given great consideration to appellant's argument that while the Workmen's Compensation Act provides only for a writ of review and for no other method of appeal, yet it specifies the matters to be determined upon the review, and such review embodies more than the ordinary features of a proceeding known as certiorari, because it is provided that the decision of the Industrial Commission may be reviewed to determine whether it has been procured by fraud or whether it is unreasonable, and that there-

fore this proceeding is more in the nature of an appeal, and is different from the ordinary proceeding upon certiorari in which merely the question of jurisdiction may be examined. However, we are of the opinion that the language and reasoning of the case of *Fay v. Costa*, supra, covers these objections, and that we are not at liberty to consider the question an open one.

Furthermore, we call attention to the fact, pointed out by respondent in his brief, that section 355, Code of Civil Procedure, and the decision in the case of *Fay v. Costa*, were both in full force and effect at the time of the adoption of the Workmen's Compensation Act, and at the time of its amendment, and we must assume that the Legislature, in passing this law and therein limiting the rights of the parties after proceedings before the Industrial Accident Commission to a review only by writ of certiorari, had in mind the construction placed upon such Code section by the above-named case. *Baker v. Hamilton*, 55 Cal. 302; *Estate of Healy*, 122 Cal. 162, 54 Pac. 736. Indeed, the act itself provides that the sections of the Code of Civil Procedure of this state, relating to writs of review, shall, so far as applicable, apply to proceedings in the courts under the provisions of the act.

Under the authority of *Fay v. Costa*, supra, we are constrained to hold that the annulment upon writ of review of the award of the commission did not operate to extend the time for commencing the action, and that the plaintiff's action was barred by the provisions of section 340, Code of Civil Procedure.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

HUDSON et al. v. BARNESON. (Civ. 2902.)

(District Court of Appeal, First District, Division 2, California. June 17, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. EVIDENCE §442(1)—WRITTEN CONTRACT — COMPLETENESS—PAROL EVIDENCE.

The test of whether parol evidence is admissible as an exception to the rule that where terms of an agreement have been reduced to writing no evidence of other negotiations or terms is admissible, under Civ. Code, § 1625, and Code Civ. Proc. § 1856, is the completeness or incompleteness of the written contract, and whether it contains all the terms of the agreement which is to be determined from an inspection of the contract itself.

2. EVIDENCE §442(5)—WRITTEN CONTRACT — PAROL EVIDENCE — INCOMPLETENESS OF CONTRACT.

Written contract between owner and architect giving architect, as compensation for his

services, 7 per cent. of the entire cost of the construction of house and garage without stating or limiting the cost of the construction, was incomplete, entitling owner to introduce parol evidence as to limit of cost of construction.

3. APPEAL AND ERROR §1071(3)—REVIEW — HARMLESS ERROR—FINDING.

In architect's action against owner on contract giving architect stipulated percentage of cost of residence and garage, finding that owner directed architects to construct garage, not to exceed certain amount, if error, as not being supported by evidence, was harmless, where it was found that architects were not entitled to compensation in connection with construction of residence, and the payment actually made to architect was more than sufficient to compensate architects for their services in connection with the construction of garage.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Frank D. Hudson and another, copartners doing business under the firm name and style of Hudson & Munsell, against John Barneson. Judgment for defendant, and plaintiffs appeal. Affirmed.

Sheldon Borden and George H. Moore, both of Los Angeles, for appellants.

A. L. Weil and H. F. Shaw, both of San Francisco, for respondent.

HAVEN, J. Appellants contend that the trial court erred in admitting, over their objection, certain parol evidence, which they claimed varied the terms of a written agreement between the parties. The defendant employed the plaintiffs as architects to prepare plans and specifications for, and to superintend the construction of, a dwelling house and garage. Upon their completion, plaintiffs sent the plans and specifications to the defendant, and rendered him a bill reading as follows:

"To architectural work on residence & garage at San Mateo, agreement five per cent. on cost of buildings for plans, specifications and details now completed. Payment now due on account, \$1,500.00."

Upon the receipt of such bill defendant wrote plaintiffs, acknowledging the same, remitting one-half of the amount thereof, and raising questions as to the basis of plaintiffs' compensation. A few days thereafter one of the plaintiffs called upon the defendant, at which time a discussion was had concerning the terms of the employment. Four days after such interview plaintiffs wrote the defendant the following letter:

"September 28, 1916. Captain John Barneson, 310 Sansome Street, San Francisco, Cal.—Dear Sir: In confirmation of our conversation of last Saturday, in regard to the architectural work on your proposed residence and garage in San Mateo, we agree to prepare all plans, specifications and details and also to superintend the

erection of the buildings for a sum equal to seven per cent (7%) of the entire cost of the same. Necessary traveling expenses to be paid by you. Yours very truly, Hudson & Munsell, Per Frank D. Hudson."

Shortly thereafter the defendant wrote the plaintiffs as follows:

"October 7, 1916. Messrs. Hudson & Munsell, 415 Stimson Block, Los Angeles, Cal.—Gentlemen: I acknowledge receipt of your favor of September 28th and confirm same. Yours very truly, John Barneson."

Upon the trial oral evidence was admitted on behalf of defendant, the effect of which was to prove that the defendant had instructed plaintiffs when they were first employed, and subsequently during the time when the plans were in process of preparation, that the limit of cost of the proposed dwelling house was to be \$25,000. Plaintiffs objected to this evidence upon the ground that it was an attempt to vary by parol evidence the terms of the agreement, which they claimed were entirely contained in the writings above referred to. The objection was overruled, the evidence admitted, and judgment rendered in favor of the defendant, from which plaintiffs appeal.

Plaintiffs alleged in their complaint that the defendant had constructed the garage at a cost of \$5,448, and had refused to proceed with the construction of the dwelling house and abandoned the construction of it; and "that it would have cost \$55,000 to have constructed said dwelling house." The court found, in conformity with the defendant's testimony, that the reason he refused to proceed with the construction of the dwelling house was the excessive cost thereof. The evidence of the defendant and members of his family supports the judgment of the trial court. The question involved in this appeal is whether such evidence was admissible. Appellants rely upon the familiar rule that, when the terms of an agreement have been reduced to writing, no evidence of other negotiations or terms is admissible. Civ. Code, § 1625; Code Civ. Proc. § 1856. Respondent, on the other hand, claims that the facts bring the case within the well-established exception to the above rule to the effect that, "Where a writing, although embodying an agreement, is manifestly incomplete, and is not intended by the parties to exhibit the whole agreement, * * * such parts of the actual contract as are not embraced within its scope may be established by parol." 3 Jones Comm. on Evidence, § 440; *Sivers v. Sivers*, 97 Cal. 518, 521, 32 Pac. 571; *Kreuzberger v. Wingfield*, 96 Cal. 251, 255, 31 Pac. 109; *Williams v. Ashurst Oil, etc., Co.*, 144 Cal. 619, 624, 78 Pac. 28.

[1] The test of the application of the general rule or its exception to a given case is the completeness or incompleteness of the written contract; or, in other words, whether

such contract contains all the terms of the agreement. With few exceptions, this question is to be determined from an inspection of the contract itself. In the leading case of *Harrison v. McCormick*, 89 Cal. 327, 330, 26 Pac. 830, 831 (23 Am. St. Rep. 469), which has been approved in many subsequent cases, it is said:

"If it [the writing] imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed."

[2] The question for determination is therefore whether the contract evidenced by the writings above referred to appears upon its face to embrace all the agreements of the parties and this is to be determined from the language of the letter of September 26th from plaintiffs to defendant. Appellants contend that the confirmation of that letter by the defendant bound him to pay to the plaintiffs the agreed percentage upon whatever might be the entire estimated cost of any residence and garage which plaintiffs might plan. Respondent, on the other hand, insists that the amount to be paid plaintiffs could not be determined without a prior determination of the cost of the buildings, and as that cost was nowhere stated in the writings, it was an element of the contract omitted therefrom. In our opinion, the trial court did not err in construing the contract in accordance with respondent's contention. Disregarding the improvident nature of such a contract as appellants' construction would make of the one here involved, it is manifest that the plaintiffs' commissions could not be computed from the terms of the written contract alone. This shows its incompleteness. A necessary element of plaintiffs' cause of action was the cost of the buildings. Plaintiffs could not object to evidence on the part of defendant as to the amount of such cost upon the ground that the entire contract was included in the writings, while the necessities of their own case compelled them to adopt a like course to supply the same omitted portion of the contract. It cannot be held, therefore, that the letter imports on its face to be a complete expression of the whole agreement.

[3] It is further contended by appellants that the court erred in finding that the defendant directed the plaintiffs to prepare plans and specifications for a garage to cost not to exceed \$3,500 to \$4,000, as that finding is entirely unsupported by the evidence and is contrary thereto. Conceding the correctness of this contention, it appears that the plaintiffs have been paid by the defendant

the sum of \$1,500, which was more than sufficient to compensate them for their entire services in connection with the garage. The contract evidenced by the letter of September 28, 1916, covered services in connection with both the residence and garage. As the court found plaintiffs were not entitled to any compensation in connection with the residence, the payment made must be applied to the services rendered upon the garage, if plaintiffs were entitled to payment therefor. It does not appear, therefore, that appellants were prejudiced by this finding.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRIT-TAIN, J.

HUTTON v. NEWHOUSE et al. (Civ. 2926.)

(District Court of Appeal, First District, Division 1, California. June 21, 1919. Re-hearing Denied by Supreme Court, Aug. 18, 1919.)

1. PLEADING \Leftrightarrow 406(5)—OBJECTION TO PLEADING—WAIVER.

In an action to foreclose a lien for improvement of a street intersection, objection to the complaint that the improvement ordinance was pleaded as to its passage, approval, and existence by recital, instead of directly, should have been made by special demurrer, and, not having been so made, was waived.

2. APPEAL AND ERROR \Leftrightarrow 931(9)—PRESUMPTION AS TO FINDINGS—BURDEN TO OVERTHROW.

When the record presents a judgment without findings, the presumption in its favor is that findings were waived, which presumption appellant must overthrow by embracing in his record on appeal an affirmative showing by bill of exceptions, statement, or other appropriate method that findings were not made.

3. MUNICIPAL CORPORATIONS \Leftrightarrow 294(4) — STREET IMPROVEMENT—SUFFICIENCY OF NOTICE.

Posted notice of a street improvement in the city of San Francisco held sufficient in form, in view of the improvement ordinance which merely required the notice should state briefly the improvement proposed and refer to the resolution of intention for further particulars.

4. MUNICIPAL CORPORATIONS \Leftrightarrow 530—STREET IMPROVEMENT—ACTION TO FORECLOSE LIEN—TIME.

Where property owners in the city of San Francisco did not avail themselves of the privilege of paying the assessment for a street improvement in installments, and did not execute the bond thereon required by the city's improvement ordinance, they were subject to suit for foreclosure of the lien on their property at any time after it had become perfected and within two years after proper recordation.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Thomas S. Hutton against Arthur A. Newhouse and others. From judgment for plaintiff, defendants appeal. Affirmed.

Hugo D. Newhouse and Jesse A. Mueller, both of San Francisco, for appellants.

Chas. A. Gray, of San Francisco, for respondent.

RICHARDS, J. [1] This is an appeal from a judgment in the plaintiff's favor in an action to foreclose a lien for the improvement of a street intersection in the city and county of San Francisco, under the provisions of the ordinance providing for such improvements, pursuant to the terms of section 33, chapter 2, article 6, of the charter of said municipality. The appellant urges several points upon appeal. The first of these is that the complaint was fatally defective in the respect that the street improvement ordinance relied upon was not sufficiently pleaded. No demurrer was presented to said complaint; no objection was made to the admission in evidence of the ordinance in question. The objection to the sufficiency of the pleading in respect to the passage and approval of said ordinance is for the first time made upon appeal. The belated objection is that the ordinance is pleaded as to its passage, approval, and existence by recital instead of directly. The objection comes too late. It should have been made by special demurrer, and, not having been so made, must be held to have been waived. City of Santa Barbara v. Eldred, 108 Cal. 294, 41 Pac. 410; Wells Fargo & Co. v. McCarthy, 5 Cal. App. 312, 90 Pac. 203.

[2] The appellant's next contention is that the judgment must be reversed, because there are no findings in the record, and because the record fails to show that findings were waived. The statement of this point embraces its own answer. When the record presents a judgment without findings the presumption in its favor is that findings were waived. This presumption the appellant must overthrow by embracing in his record on appeal an affirmative showing by bill of exceptions, statement, or other appropriate method, that findings were not waived. Smith v. Lawrence, 53 Cal. 34; Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; Baker v. Baker, 139 Cal. 626, 73 Pac. 469.

The next contention of the appellant is that the implied findings necessary to support the judgment are not justified by the evidence in the case. Under this head the appellant makes several points which we do not consider it necessary to review in detail,

for the reason that we think appellants' objections to the sufficiency of the evidence, which is wholly documentary, are all answered either by the terms and requirements of the ordinance providing for this improvement, or by the decision of the Supreme Court in the cases of *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023, and *Remillard v. Blake & Bilger Co.*, 169 Cal. 277, 146 Pac. 634, Ann. Cas. 1916D, 451, in which the cases are reviewed and the scope, purpose, and sufficiency of resolutions of intention are fully expounded. We think that these cases furnish a sufficient answer to the appellants' several contentions in respect to the insufficiency of the evidence as justifying the implied findings of the court.

[3] The next point urged by the appellants is that the posted notice of improvement was insufficient in form, and that the same was not posted in all of the places specified in the street improvement ordinance. As to the objection that the posted notice of improvement was insufficient in form, we think that the appellants' objections to it are sufficiently met by a reference to the terms of the ordinance, which only requires that the notice of improvement shall state "briefly the improvement proposed, and refer to the said resolution of intention for further particulars." We think also that the case of *Perine v. Erzgraber*, 102 Cal. 234, 36 Pac. 585, furnishes a sufficient answer to the appellants' objections in this regard and to the authorities which are cited in support of said objection.

As to the other point under this head urged by the appellants with respect to the insufficiency of the places of posting, we are not directed to the specific evidence or want of evidence as to the insufficiency in this respect.

The appellants' next contention is that the demand of payment was insufficient. This point was fully considered and disposed of against the appellants' contention in the recent case of *Blenfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225.

[4] The final contention of the appellants is that the action was prematurely brought. The authorities which the appellants cite in support of this contention in our opinion fail to sustain it, for the reason that they deal with considerations other than those which are specified in the terms of the street improvement ordinance itself. By section 19 of said ordinance, it is provided that the warrant, assessment, and diagram shall be recorded in the office of the secretary of the board of supervisors, and that "when so recorded the several amounts assessed shall be a lien upon the land, lots or portions of lots assessed respectively for the period of two years from the date of said recording unless sooner discharged." It is true that in the

street improvement ordinance provision is made for the payment of these assessments in installments by such property owners as elect to bring themselves and their property within the terms of this privilege by indicating such election in the manner, and by executing a bond in the form, fully set out in the ordinance, in which event the payment of the assessment is postponed according to the terms of the ordinance permitting such installment payments, and providing for such bond. But it is not contended that the appellants in this case availed themselves of the privilege of paying the assessment in installments, nor that they executed the required bond. They were therefore subject to suit for the foreclosure of the lien upon their property at any time after such lien had become perfected and within two years after the proper recordation thereof. This action, having been begun between these dates as shown by the record, cannot be held to have been prematurely brought without doing violence to the express terms of sections 19 and 22 of the ordinance in question.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

W. J. WHITE CO. v. WINTON. (Civ. 2873.)

(District Court of Appeal, First District, Division 1, California. June 23, 1919.)

APPEAL AND ERROR \S 428(1) — NOTICE OF APPEAL—"FILING" WITH CLERK.

Where the person who desired to serve defendant's notice of appeal proceeded to the office of the clerk of the court, and arrived there about the time the office closes, and after searching for a deputy returned to find the office closed, so that she slipped the notice under the door, there was no legal filing of the notice as of that day, the deputy clerk having placed the filing mark on the notice the next day; delivery being essential to "filing."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, File.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the W. J. White Company, a corporation, against Mrs. Hally Winton. From an order granting defendant's motion to correct the record by changing the file mark on her notice of appeal, plaintiff appeals. Order reversed.

C. W. Eastin, of San Francisco, for appellant.

Milton S. Hamilton, of San Francisco, for respondent.

WASTE, P. J. This is an appeal from an order granting defendant's motion to correct the record by changing the file mark upon her notice of appeal from January 17 to January 16, 1918.

It is conceded, as of course it must be, that in the taking of an appeal the notice thereof must be both served and filed within the time permitted by law. Neither alone is sufficient. In the present proceeding it appears that the plaintiff had obtained a judgment against the defendant, and that the last day upon which the latter might take an appeal was January 16, 1918. On that day she served a notice of appeal, and the question here presented is, Was the notice also filed on that day or, as indicated by the filing mark thereon, upon the day following?

According to the affidavit in support of the motion the person who served the notice, desiring to file the same, proceeded to the office of the clerk of the court, and arrived there at about 5 o'clock in the afternoon, which is the hour the office closes. In searching for a deputy to whom she might hand the notice for the purpose of filing she wandered out of the office, and when she shortly thereafter tried to re-enter she found the office closed. A person at that moment coming out of the office, upon learning from her her purpose there, informed her that she could effect her object by passing the notice through the door and leaving it, which she did. On the other hand, the attorney upon whom the notice had been served on the afternoon of that day, at the time of the service thereof noticed the lateness of the hour, and expressed the opinion to the person serving the notice that she would not have time to reach the clerk's office in order to file it. This statement of the attorney is not denied. An affidavit of the deputy clerk who placed the filing mark upon the notice is in part as follows:

"On the 17th day of January, 1918, as such deputy clerk I filed in the above entitled action the notice of appeal of the defendant in the action. * * * Said notice of appeal was not filed nor delivered to the office of the county clerk for filing on the 16th day of January, 1918, nor until the 17th day of January, 1918. There is no mistake in the date of filing thereof which is indorsed on said notice of appeal. It is practically impossible to make a mistake in the date of filing any paper [then describing the method of avoiding mistakes], and positively no mistake was made in the date of the actual filing of the notice of appeal above mentioned."

In this state of the record we are constrained to hold that the appeal was not seasonably taken, for the reason that it cannot be held that merely leaving or depositing the notice thereof in the clerk's office on January 16th, under the circumstances narrated, constituted a legal filing. A paper is filed when it is delivered, at the place where it

is to be filed, to the proper officer, and by him received to be kept on file. "If the filing can be proved by parole, the proof must show actual delivery of the paper to the clerk or one of his deputies, and the proof should be clear and positive. It is not enough to show the paper in the office of the clerk. It must be delivered to him for the purpose of filing." *Boyd v. Desmond*, 79 Cal. 254, 21 Pac. 756. "Delivering an instrument to the proper officer at a place other than the office where it is required to be filed is not sufficient, even though the officer indorse it as properly filed." *Edwards v. Grand*, 121 Cal. 256, 53 Pac. 797. A notice of appeal delivered to a deputy clerk after hours, and actually indorsed filed as of that date, was held not filed until he delivered it at the office next day. *Hoyt v. Stark*, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246. It follows that the order should be reversed; and it is so ordered.

We concur: **RICHARDS, J.**; **NOURSE**, Judge pro tem.

NADEAU v. LYNCH et al. (Civ. 2892.)

(District Court of Appeal, First District, Division 2, California. June 26, 1919. Rehearing Denied by Supreme Court Aug. 25, 1919.)

1. APPEAL AND ERROR \S 110—ORDERS APPEALABLE—DENIAL OF NEW TRIAL.

An order denying motion for new trial is not appealable.

2. APPEAL AND ERROR \S 553(1) — TRANSCRIPT—CERTIFICATE.

Where an appeal is taken on typewritten transcript pursuant to Code Civ. Proc. \S 953a, the trial court's certificate that certain notices and affidavits in transcript are correct and were considered in connection with "other testimony" held insufficient to present such other testimony for appellate court's consideration.

3. APPEAL AND ERROR \S 684(2), 700—RESERVING GROUNDS FOR REVIEW—RECORD.

Refusal of trial court to grant plaintiff's motion for jury trial in forma pauperis and denial of his motion for a continuance cannot be declared erroneous, where entire evidence on which the trial court acted is not presented to appellate court.

4. APPEAL AND ERROR \S 1011(1)—DISCRETION OF COURT—SETTING ASIDE JUDGMENT.

Action of trial court in refusing to set aside judgment on ground of mistake, inadvertence, surprise, and excusable neglect cannot be disturbed, when based upon conflicting evidence.

5. APPEAL AND ERROR \S 981—NEW TRIAL \S 99—DISCRETION OF COURT—NEWLY DISCOVERED EVIDENCE.

Denial of a motion for new trial for newly discovered evidence is left largely to discretion of court below and its judgment is rarely interfered with by an appellate tribunal.

Appeal from Superior Court, City and County of San Francisco; John Hunt and Jas. M. Troutt, Judges.

Action by Joseph V. Nadeau against John C. Lynch, receiver of Pacific Coast Casualty Company, Casualty Company of America, and Emil Leydet. From judgment for defendants, and from order denying plaintiff's motion for new trial, plaintiff appeals. Affirmed.

Jay Monroe Latimer and A. A. Cailleaud, both of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for appellant.

Hiram W. Johnson, Jr., and A. A. De Ligne, both of San Francisco, for respondent Lynch.

A. B. Weiler, of San Francisco, for respondent Casualty Co. of America.

HAVEN, J. [1, 2] Plaintiff appeals from a judgment rendered against him in an action tried before the court without a jury, for recovery of damages resulting from personal injuries, and also from an order denying his motion, made under section 473 of the Code of Civil Procedure, to vacate and set aside the judgment. He further attempts an appeal from an order denying his motion for a new trial, which latter order is not appealable. The appeal is prosecuted under the method prescribed by section 953a of the Code of Civil Procedure. The typewritten transcript which was filed in attempted compliance with the above section, contains no certificate of the judge who presided at the trial to the truth and correctness of such transcript as containing the matters required by the above referred to section of the Code. In lieu thereof appears a certificate of said judge to the effect that certain notices, stipulation, and affidavits set forth in said transcript "are correct and were before me and considered by me in connection with other testimony" upon the various rulings of which appellant complains. This certificate is manifestly insufficient. The "other testimony" which was considered by the judge of the trial court in making the rulings complained of is in no manner presented for our consideration. All presumptions are in favor of the action of the lower court. In the absence of all the testimony considered upon its rulings, its action cannot be disturbed on appeal.

[3] The motions of the appellant for a new trial and for the vacation of the judgment upon the ground of inadvertence, surprise, and excusable neglect were heard by a different judge of the trial court than the one before whom the trial was had and by whom judg-

ment was rendered. The certificate of the latter judge is attached to the typewritten record, and is to the effect that the same "contains a true and correct transcript of the papers filed and proceedings had, action taken, and order made by me, the undersigned, upon and in connection with the plaintiff's motions for a new trial and to vacate and set aside the judgment entered in this case." As the record so certified is the same as was considered by the trial judge "in connection with other testimony" not therein set forth, the second judge was in no better position than this court to pass upon any alleged errors occurring during the course of the trial. Two of the errors complained of are the refusal of the trial judge to grant plaintiff's motion for a jury trial in forma pauperis without the payment of jury fees; and the denial of plaintiff's motion for a continuance of the time of trial. As the entire evidence which was before the trial judge in passing on these motions is not contained in the transcript, and presumably was not before the second judge, it cannot be held that the refusal to set aside the judgment or to grant a new trial on these grounds was erroneous.

[4] The next error complained of is the denial by the second judge of plaintiff's motion to vacate and set aside the judgment upon the ground of mistake, inadvertence, surprise, or excusable neglect. The evidence submitted in support of, and in opposition to, this motion was conflicting. In view of such conflict, the action of the judge of the lower court cannot be disturbed.

[5] The final contention of appellant is that his motion for a new trial upon the ground of newly discovered evidence should have been granted. This matter is left largely to the discretion of the judge who passes upon the motion, and the exercise of his discretion is rarely interfered with by an appellate tribunal. The affidavits submitted in support of this motion contain no sufficient showing of reasonable diligence to have discovered and produced this testimony at the time of the trial. Appellant's principal complaint in this regard is that his surprise at the refusal of the trial court to grant a continuance prevented the offering of this evidence. As stated above, upon the record, as submitted to us, we must presume that the motion for a continuance was properly denied.

The judgment and order appealed from are affirmed.

We concur: LANGDON, P. J.; BRIT-
TAIN, J.

HALE v. PACIFIC TELEPHONE & TELEGRAPH CO. (Civ. 2852.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919. Rehearing Denied by Supreme Court Aug. 28, 1919.)

1. NEGLIGENCE ⇨56(1)—PROXIMATE CAUSE.

A defendant is not liable for damages from an injury, unless it is made to appear that its negligence was the proximate cause.

2. NEGLIGENCE ⇨62(3)—PROXIMATE CAUSE—INTERVENING ACT.

Where the original negligence of a defendant is followed by an independent act of a third person, which results in direct injury to plaintiff, defendant's negligence may constitute the proximate cause of the injury, if defendant should have known the intervening act was likely to happen; otherwise, if the act was one which defendant should not have reasonably anticipated.

3. EXPLOSIVES ⇨7—INJURIES—LIABILITY.

Where a boy surreptitiously entered the storehouse of a telephone company and took dynamite caps, knowing the turpitude of his act, and gave such caps to another boy, who exploded one in a toy pistol and was injured, the telephone company was not liable; the independent act of the boy who took the caps having been the proximate cause of the injury.

4. EXPLOSIVES ⇨7—INJURIES—SUFFICIENCY OF COMPLAINT.

In an action against a telephone company for injuries to a boy, caused by his explosion in a toy pistol of a dynamite cap stolen from the company's storehouse by another boy, complaint alleging that both plaintiff and the other boy, by reason of their extreme youth, were ignorant of the dangerous character of such caps, etc., held sufficient as against general demurrer.

5. EXPLOSIVES ⇨7—PERMISSION TO CHILD.

If a telephone company knowingly permitted a child to take dangerous dynamite caps from its premises, it was charged with the duty to anticipate the probable result that they would be exploded by himself or his playmates, causing injury.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Robert Hale, a minor, by Lawrence L. Hale, his guardian ad litem, against the Pacific Telephone & Telegraph Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Wright, Winnek & McKee, of San Diego, for appellant.

Wade Garfield and Claude L. Chambers, both of San Diego, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained as a result of defendant's negligence. The jury rendered a verdict in favor of plaintiff, upon which judgment was entered, and from which de-

fendant has appealed upon the judgment roll, accompanied by a bill of exceptions.

The facts out of which the accident grew, and concerning which there is little controversy in the evidence, are as follows: At the time when plaintiff sustained the injury, defendant was engaged in constructing and operating a telephone system in the city of San Diego. For its use as a storeroom for supplies and material required in its construction work, it occupied an uninclosed cottage in the rear of which was a lattice porch, with an open space of some 4 or 5 feet for entry. Upon this porch was a shelf platform 2½ to 3 feet above the floor, and on Saturday, the day preceding the accident, defendant's employes placed upon this shelf a wooden box wherein, underneath some excelsior packing, was deposited a tin box containing dynamite caps of a high explosive character and dangerous to persons unacquainted with the care and handling thereof. The top of this wooden box was covered by a board, one end of which was flush nailed and the other lightly tacked. Walter Hadley, a boy 8 years of age, lived with his parents in a house adjoining defendant's said storehouse, and between which and the Hadley cottage there was no fence. At times Walter and other boys played in a driveway entering the lot along the side of the storehouse, but none of them had ever gone upon the porch. On Sunday, June 9th, all of defendant's employes being absent therefrom, Walter Hadley entered upon this porch, and, seeing the wooden box upon the shelf, pried off the cover, raised up the excelsior packing, and, finding the tin box, opened it and took therefrom about 20 of the dynamite caps, of the character and danger in handling which he was wholly ignorant, but thought they could be used in a toy cap pistol which one of his playmates had. On the same day he gave some of these caps to the plaintiff, a boy of the age of 7 years, who likewise, by reason of his age and inexperience, was unacquainted with the character thereof, and who placed one of them in a toy pistol and caused it to explode, as a result of which he was seriously and permanently injured. It conclusively appears that Walter knew the nature of his act and the moral turpitude thereof, namely, that he was engaged in the surreptitious taking of property which did not belong to him; in short, that he was engaged in the theft of defendant's property, which he knew was wrong; and hence his connection with the matter, in so far as it affects plaintiff, must be deemed that of an adult and sui juris.

No purpose could be served in a review of the many authorities cited by counsel from other jurisdictions wherein similar questions have been involved. Suffice it to say that most of them involved features clearly dis-

tinguishing them from the instant case and were decided upon principles not applicable to the facts here presented.

[1, 2] In order to recover damages for an injury alleged to be due to negligence of a defendant, it must be made to appear that such negligence was the proximate cause of the injury sustained. Conceding that defendant was culpably guilty in the care of the dynamite, such want of care was not the direct and immediate cause of plaintiff's injury, since, notwithstanding defendant's negligence, the accident would not have occurred, except for the intermediate wrongful acts of Walter Hadley in unlawfully breaking open and taking the caps from the wooden box in which they were deposited and giving them to plaintiff. Upon the admitted facts, was defendant's negligence the proximate cause of plaintiff's injury, or must it be attributable to the intervening unlawful act of a responsible third person? The rule, as we understand it, applicable to such cases, is that, where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury. Thus, if A. negligently leaves his horse attached to a buggy unhitched in the street, and, due to the wrongful act of B. in frightening the horse, it runs away, causing injury to another by a collision, A. is liable to the person so injured, for the reason that he as a reasonably prudent man should have foreseen that the horse might be frightened as a result of which it, in accordance with the instinctive nature of such animals, would run away and cause damage. But, on the other hand, if B. steals the unhitched horse and, in escaping with it collides with another to the latter's damage, no recovery therefor can be had against A., for the reason that the wrongful theft of the horse was not a consequence which A. as a reasonably prudent man should be deemed to have anticipated as a result of leaving his horse in the street unhitched. So, in the instant case, notwithstanding the alleged negligence of defendant, no injury in consequence thereof would have resulted to plaintiff, except for the act of Walter Hadley, who testifies that he knew that it was both morally and legally wrong to take the caps from the box. He had never before been upon the porch, and,

so far as appears, nothing had ever prior to the time been stolen from the yard, the porch, or the house, in which defendant stored various kinds of supplies and kept a quantity of material used in its construction work. The facts disclose no element of allurement whereby Hadley was attracted to the porch or induced to break open the box. It cannot, under the circumstances, be said that defendant was bound to anticipate the act committed, and guard against consequences which might follow in case one who, as here, admittedly knew the wrongful nature of his acts, should steal the caps and use them in a manner which would cause injury to another.

[3] The proximate cause of plaintiff's injury was Hadley's wrongful act, without which, notwithstanding defendant's negligence, the accident would not have occurred. And since it was the wrongful act of an independent third person and not intended by defendant, and by reason of its nature one as to which it was, under the circumstances, not charged with the duty of anticipating as a natural and ordinary consequence of its negligence, it is not liable for the injury. In support of these views reference may be had to the following, among other cases: *Chicago, etc., Ry. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *Cole v. German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Berry v. San Francisco & N. P. R. Co.*, 50 Cal. 435; *The Santa Rita*, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210; *Schwartz v. California Gas, etc., Co.*, 163 Cal. 398, 125 Pac. 1044; *Hullinger v. Worrell*, 83 Ill. 220; *Burt v. Advertiser, etc., Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Horan v. Town of Watertown*, 217 Mass. 185, 104 N. E. 464; *Stone v. Boston & Albany R. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Jacobs v. New York, N. H. & H. R. Co.*, 212 Mass. 96, 98 N. E. 688, 40 L. R. A. (N. S.) 41; *Nicolosi v. Clark*, 169 Cal. 746, 147 Pac. 971, L. R. A. 1915F, 638; *Luehrmann v. Laclede Gaslight Co.*, 127 Mo. App. 213, 104 S. W. 1128; *Loftus v. Dehall*, 133 Cal. 214, 65 Pac. 379; *Hartford v. All Night & Day Bank*, 170 Cal. 538, 150 Pac. 356, L. R. A. 1916A, 1220.

[4, 5] Our view of the case as herein expressed renders it unnecessary to consider the error predicated upon the action of the court in overruling defendant's general demurrer to the complaint. We may say, however, that in our opinion the allegation that both plaintiff and Walter Hadley, by reason of their extreme youth, were ignorant of the dangerous character of the dynamite caps, coupled with the allegation that defendant permitted Walter Hadley to go upon the premises and carry therefrom a large number of said dynamite caps, when measured by what is said upon a similar question in *Cahill v. Stone & Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, renders the complaint sufficient as against the demurrer in-

terposed. If defendant knowingly permitted a child to take such dangerous instrumentalities from its premises, it would be charged with the duty of anticipating the probable result that they would be exploded by himself or playmates, thus causing injury.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

DOUBLE EAGLE MINING CO. et al. v. HUBBARD et al. (Civ. 1909.)

(District Court of Appeal, Third District, California. July 1, 1919.)

1. MINES AND MINERALS ¶9 — CANCELLATION OF PATENTS—MINING CLAIMS.

When a patent of public lands to a railroad was canceled by decree of court, the land was restored to the public domain as of the date of the decree, and it was immediately open to the location of a mining claim, and a location then made was valid, and the claim could be held thereunder indefinitely, where the railroad did not appeal from the decree.

2. MINES AND MINERALS ¶14(1)—MINING CLAIMS—LOCATION.

The rules of the land department, Nos. 51, 52, and 53, providing that upon the termination of a contest the register and receiver will render a joint report, etc., and the local officers will thereafter take no further action toward affecting the disposal of the land until instructed by the commissioner, have no application to mining claims, which take their origin under authority of the United States statutes, under regulations prescribed by law and according to local customs (Rev. St. § 2319 [U. S. Comp. St. § 4614]).

3. MINES AND MINERALS ¶29(1)—MINING CLAIMS.

By the performance of the necessary amount of work annually on his claim, a locator of a mining claim can hold it and work it against the whole world, and for an indefinite period, without obtaining or applying for a patent.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Double Eagle Mining Company and another against J. D. Hubbard and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lon Bond and Deirup & Deirup, all of Chico, for appellants.

Niles E. Wretman, of San Jose, for respondents.

CHIPMAN, P. J. The action arises over conflicting claims to mining property. Plaintiffs had judgment that they were entitled to the possession of the premises in controversy,

and the appeal is by defendants from said judgment.

The points urged by appellants for a reversal of the judgment are: That respondents failed to do their assessment work for the years 1913 and 1914, and "that at the time of location by the predecessors of respondents said land was not open to location."

1. The court found that plaintiffs and their predecessors have in all respects complied with the laws "relating to the performance of assessment work upon said claims." While there was a conflict in the evidence upon this point there was, in our opinion, sufficient justification for said finding, and, under the well-known rule, we must decline to enter upon a discussion of this point.

2. The contention that the land was not open for location is based upon the following facts:

On March 17, 1875, a patent was issued to the Central Pacific Railroad Company to land which included the mining claims in controversy. Said patent was canceled by a decree entered in the circuit court of the United States on January 11, 1898.

On July 23, 1898, the predecessors of plaintiffs posted a notice of location of a placer mining claim upon the land now claimed by them, and said notice was recorded on August 20, 1898.

On September 24, 1900, the commissioner of the general land office wrote to the register and receiver at Marysville, reciting the fact of the entry of said decree, stating that said decision had never been appealed from, and directing said register and receiver "to make proper notation on your records as to the cancellation of the patent as to said tract."

Defendants located a portion of said land on November 11, 1914, and another portion on May 3, 1915.

The contention of appellants is that the making of said decree by the circuit court "did not have the effect of restoring the land to the public domain, but that the effect of the decree was merely to return the land to the proper executive officers * * * for such disposition as they should make of it according to law," and, consequently, that the location by plaintiffs' predecessors was premature, and therefore invalid.

[1] The effect of the patent to the railroad company was to withdraw the land from public entry. When the patent was canceled by decree of the court the land was restored to the public domain as of the date of the decree. The railroad company had under the statute one year within which to appeal, but, as it did not avail itself of that right, the decree remained unaffected and became final as of its date.

The position of appellant is that the land

was not open to a mineral location after the patent was canceled until the land department at Washington, by some formal proclamation or order, had so declared, and notice thereof had been given to the local land office at Marysville. The only action of the land department in the matter, so far as appears, took the form of the letter of the commissioner of the general land office above stated nearly three years after the patent was canceled. It did not purport to restore the land to entry nor did it in any wise affect the status of the land. It simply found it and left it as the effect of the decree left it, namely, as part of the public domain subject to disposition under congressional enactments pertaining to the mineral land in the several states. Appellant's contention that preceding any location of a mining claim after the decree it was necessary that some proclamation that the land was open to entry should have been given, would mean that the land to this day is reserved from location, for no such proclamation has ever been made. It would seem to us that leaving the land to the operation of the decree and the general land laws without further action by the government justifies the inference that in the opinion of the land department no further action after the decree was entered was necessary to open the land to location as mineral land. As tending to refute this view of the case appellant cites an act of Congress restoring part of an Indian reservation to the public domain. *Kendall v. San Juan Milling Co.*, 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583, is cited where it was held that the restored portion of the reservation was not open to mineral location in advance of the proclamation of the president, any more than to any other kind of entry. But, by the very terms of the act, it was provided that "the same shall be open to settlement and entry by the proclamation of the President of the United States."

The following are the only rules of the land department called to our attention:

"Rule 51. Upon the termination of a contest the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.

"Rule 52. The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the commissioner of the general land office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

"Rule 53. The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner."

[2, 3] These rules clearly refer only to contests arising out of entries of land initiated in a local land office and in which the

contest also originated in that office. These rules have no application to mining claims, for the reason that mining locations are not initiated in any local land office of the government, but take their origin under authority of the United States Statutes "under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States." Rev. Stats. § 2319 (U. S. Comp. St. § 4614). This act provides "that all valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States." And this has been the law since the acts of July 26, 1866, c. 262, 14 Stat. 251, and May 10, 1872, c. 152, 17 Stat. 91. Under this invitation and authority, the prospector may go onto any of the public lands of the United States and make his explorations, and upon the discovery of valuable minerals, and in order to secure his title to the same, he need only to post his notice, stake out his claim, and file his notice in the office of the recorder of the mineral district, or in the office of the county recorder, "according to the local customs or rules of miners in the several mining districts." He has nothing to do with the local land office in perfecting his claim or in working it. He may never apply for a patent to his claim, and until he does so apply no notice to the general government is required of him that he has made a claim. By the performance of \$100 worth of work annually on his claim he can hold it and work it against the claim of the whole world and for an indefinite period. It is common knowledge that many valuable mines are worked out under such locations for which patents are never applied. In this respect the locator of a mining claim stands on a wholly different footing from the homesteader or pre-emptor of public land.

Under the location claimed by plaintiffs this mining land has been occupied and worked ever since 1898, and many thousands of dollars have been expended in its exploration and development. Defendants in 1914, 16 years after this location was made in good faith and kept alive with equal good faith, entered upon the claim, dispossessed plaintiffs, and seek to maintain their right upon what, we think, is an erroneous construction to be given the effect of the decree canceling the railroad company's patent, and upon regulations of the general land office, which we think wholly inapplicable.

Respondents call attention to the fact that the land department at Washington has issued a patent to a mining claim, being a part of the section in question, and located under circumstances similar to those under which

respondents are claiming. And it is urged by respondents that this is virtually an admission by the government that such locations were regular and authorized. As to this appellants say: "We do not agree that the issuance of patents to other parties, particularly without contest, can be taken as an adjudication on any point whatever." Appellants are, no doubt, right in holding that the action of the land department in the case mentioned is not at all conclusive in the present case. But it must be admitted that the land department would not have been likely to pass to patent a claim which on its face would show that it was prematurely made, and therefore void, even if there was no contest. However this may be, we do not base our conclusion in any degree upon the action taken in the case mentioned. Both parties concede that no case has been found in which the question now here has been decided by any court, and we have found none. We are satisfied that the location under which plaintiffs claim title and right of possession was authorized and legal, though initiated before time for appeal from the decree of the federal court had expired.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

NOYES v. HUFFMAN et al. (Civ. 2803.)

(District Court of Appeal, First District, Division 2, California. June 20, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. APPEAL AND ERROR §757(1) — BRIEFS — SUFFICIENCY.

Where a case is appealed on a typewritten transcript under Code Civ. Proc. § 953c, the brief must accurately present those portions of the record necessary for a decision.

2. QUIETING TITLE §6—ADVERSE CLAIM.

The holder of the legal title may maintain an action to quiet title against any one claiming an adverse interest.

3. QUIETING TITLE §51—RELIEF TO DEFENDANT.

If a defendant in an action to quiet title shows an equitable right to have the legal title conveyed to him the court may, in the exercise of its chancery powers, grant the proper relief, under Code Civ. Proc. § 738, providing that all questions not exclusively of probate jurisdiction shall be finally determined in such actions.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit to quiet title by B. S. Noyes against George W. Huffman, A. J. Coll, and others.

Decree for plaintiff, and the last-named defendant appeals. Affirmed.

W. P. Thompson and A. W. Carlson, both of Fresno, for appellants.

A. M. Drew, of Fresno, for respondent.

BRITAIN, J. A. J. Coll, one of the defendants, appeals by the alternative method from a decree quieting the plaintiff's title to land in Fresno county. The suit was against one Huffman, Josephine E. Warner, formerly Rybka, Coll, and fictitious defendants. Huffman and Mrs. Warner defaulted, and the suit was dismissed as to the fictitious defendants leaving Coll as the only active defendant. Apparently he admitted the legal title of the plaintiff, and claimed a right of conveyance from the plaintiff under a series of contracts, of which none are printed in the briefs. Neither was there printed in the appellant's brief nor in an appendix Coll's answer, the findings, or the decree. A portion of the findings and a skeletonized statement of certain oral testimony are printed in the appellant's brief, and there are general statements of fact referring to pages of the typewritten record. From this unsatisfactory presentation of facts it is gleaned that the plaintiff entered into a contract to sell to Huffman on time the land in controversy, that Huffman assigned to Mrs. Warner his interest in the contract, and that Mrs. Warner entered into a contract with Coll in which, representing herself as the owner of the land, she obligated herself to convey an undivided half interest to Coll upon his doing certain planting and other work on the land and cultivating it for a period of years; also, that this contract was modified by a later contract regarding the work to be done by Coll and the time within which it was to be done. It is further gathered from the briefs that default in payments of both interest and principal under the plaintiff's original contract had continued for several years.

The oral testimony printed in the brief of the appellant appears to have been introduced to overcome contrary evidence, apparently produced by the plaintiff, to the effect that there was no foundation for a claim of Coll that the plaintiff had agreed with him about a year before the suit was brought that conveyance would be made to Coll if he would pay the unpaid balance under the original contract. It is stated that in his answer Coll offered to make the payment, and it is claimed both that there was such an agreement and a good tender on the part of Coll. The character of the only testimony presented for consideration here leads to the conclusion that the nonexistence of the claimed agreement on the part of the plaintiff to convey to Coll was determined upon conflicting evidence.

It is claimed that Coll had performed the

work required of him by his contracts with Mrs. Warner, and was entitled to a half interest in her contract, but it does not appear that any evidence was introduced upon the subject of his performance, neither does it appear that under his contract he could have acquired any claim against the plaintiff. No evidence is presented upon which the appellant's claim of subrogation may be based. From the meager statement in the appellant's brief there does not appear to be merit in the appeal.

[1] The case is clearly within the rule which "exists in the statute, for the very purpose of compelling counsel to select from the record, and accurately present for convenient reference, those portions of the record which are necessary to a decision. The time which judges might consume in searching through the original transcript of a case is time taken from other cases that wait for attention." *Tobey v. Randall*, 182 Pac. 771; Code Civ. Proc. § 953c; *Scott v. Hollywood Park Co.*, 176 Cal. 681, 169 Pac. 379.

[2, 3] There is nothing in the contention that the plaintiff should have pursued some other remedy. The holder of the legal title to land may sue any one claiming an interest adverse to him, and if the defendant in such a suit shows by proper pleading and proof an equitable right to conveyance of the legal title, in the exercise of its chancery powers, the court may grant the proper relief. Code Civ. Proc. § 738; *United Land Ass'n v. Pacific Imp. Co.*, 139 Cal. 371, 69 Pac. 1064, 72 Pac. 988; *Mills v. Rossiter Eureka Mfg. Co.*, 156 Cal. 167, 103 Pac. 896. Upon this appeal it does not appear that the defendant proved any equity in himself.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

GLOBE GRAIN & MILLING CO. v. DRENTH, Constable. (Civ. 2872.)

(District Court of Appeal, First District, Division 1, California. June 16, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. APPEAL AND ERROR §1195(3)—LAW OF CASE—PRIOR APPEAL.

Statement in opinion on appeal that in view of admissions by defendant plaintiff had established prima facie case, being a statement concerning the facts of the case as disclosed by the record then under review, was not the law of the case upon subsequent trial.

2. PLEADING §376 — ISSUES AND PROOF—ACTION FOR CONVERSION — ADMISSIONS BY DEFENDANT.

In action against constable for conversion of property sold under execution against third persons after claim made by plaintiff, allega-

tions in constable's second and separate defense that a verified claim of ownership had been served upon him did not relieve plaintiff of necessity of proving service of such claim in order to establish its case under Code Civ. Proc. § 689, since such allegation, being new matter constituting a defense, was deemed controverted.

3. PLEADING §36(3) — ADMISSIONS — ANSWER—NEW MATTER.

New matter in answer, constituting a defense, will be deemed to be controverted, and may not be regarded as evidence in favor of plaintiff.

4. NEW TRIAL §159 — INSUFFICIENCY OF EVIDENCE—PROPERLY ADMITTED EVIDENCE.

On plaintiff's motion for new trial on ground of insufficiency of evidence to sustain judgment for defendant, the latter is not entitled to have evidence disregarded, though it was improperly admitted.

5. APPEAL AND ERROR §877(1) — PARTIES ENTITLED TO ALLEGE ERROR—MOTION FOR NEW TRIAL.

Defendant, appealing from order granting plaintiff a new trial for insufficiency of evidence to sustain judgment in favor of defendant, cannot object that evidence was improperly admitted in favor of plaintiff.

3. APPEAL AND ERROR §837(11)—REVIEW—MOTION FOR NEW TRIAL—EVIDENCE.

On appeal from order granting plaintiff new trial on ground of insufficiency of evidence to sustain judgment for defendant, court will consider all the evidence, including that improperly admitted over defendant's objection.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Globe Grain & Milling Company against Ben Drenth, Constable, etc. Judgment for defendant, and from order granting plaintiff a new trial, defendant appeals. Affirmed.

See, also, 171 Pac. 821.

Barnard & Watters and S. L. Strother, all of Fresno, for appellant.

Short & Sutherland, of Fresno, for respondent.

KERRIGAN, J. This is an appeal from an order granting the plaintiff a new trial in an action for the conversion of certain personal property.

It appears that S. C. Robertson and Geo. R. Harrison in the month of June, 1916, had undertaken to sell to plaintiff approximately two carloads of barley and to deliver the same when harvested at a certain nearby railroad station. During the course of the harvesting and before the completion thereof, the defendant took the barley into his possession as constable under a writ of attachment, and subsequently sold it under execution. In a former trial of this action a motion for nonsuit was granted upon the

grounds that plaintiff's evidence failed to show a sale to it of the barley, or a sufficient change of possession thereof, if sold, to satisfy the requirements of section 3440 of the Civil Code. From the judgment entered upon the order granting the nonsuit plaintiff appealed, and upon that appeal this court held that growing crops did not come within the meaning of said section of the Civil Code. In reviewing the facts at that time we also said that the testimony introduced by plaintiff tended to show that an actual sale of the barley had been made to the plaintiff, and that, as the defendant admitted that plaintiff at the time of the attachment had served upon him a verified claim of ownership, and did not deny that he had refused to deliver the barley to the plaintiff, it was clear that the latter had established a prima facie case. Accordingly, the judgment entered upon the nonsuit was reversed.

Upon the second trial the jury brought in a verdict in favor of the defendant, upon which, as before stated, judgment was entered. Subsequently the court granted plaintiff's motion for a new trial, basing its order upon three grounds, but which can be supported only upon the ground of the insufficiency of the evidence to sustain the judgment. The pleadings and evidence were the same on both trials, the only difference being that the first trial, as did the appeal therein, proceeded on the theory that an allegation in the defendant's second and special defense, to the effect that plaintiff had served him with a verified claim of ownership, was an admission in favor of plaintiff to that extent; whereas upon the present trial the ruling and instruction of the court that such statement in the special defense should be so considered by the jury must, we think, be deemed to have been made and given over the objection of the defendant. The plaintiff in no other way attempted to prove its demand upon defendant, who now insists that no competent evidence was before the jury of service of the verified claim of ownership of the barley, and hence that the plaintiff, having thus failed to establish its case (Code Civ. Proc. § 689), it cannot be held that the evidence was insufficient to sustain the judgment in the defendant's favor.

[1, 2] We agree with defendant that plaintiff was not relieved of the necessity of proving such demand on the theory that the state-

ment in the former opinion that the plaintiff's evidence as there reviewed made out a prima facie case constituted the law of the case. What was there said on the subject was said concerning the facts of the case as assumed to be disclosed by the record then under review. A statement of facts set forth in an opinion as the ground upon which an appellate court bases its decision of a point of law does not constitute the law of the case. *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000; *Moore v. Trott*, 162 Cal. 272, 122 Pac. 462; *Cowell v. Snyder*, 171 Cal. 297, 152 Pac. 920.

[3-8] Nor do we think, as argued by the plaintiff, that the allegations in defendant's second and separate defense, that a verified claim of ownership had been served upon him, relieved the plaintiff of the necessity of proving that fact in order to establish its case. The allegation in the answer was new matter constituting a defense, which must, under the rule prevailing in this state, be deemed controverted, and may not be regarded as evidence in favor of plaintiff. *Tustin Packing Co. v. Pac. Coast F. A. Co.*, 21 Cal. App. 274, 131 Pac. 338. But, having been so regarded upon the trial, the defendant, upon a motion by plaintiff for a new trial, is not entitled to have this evidence disregarded. As before stated, the only ground upon which the order in this case granting a new trial can be supported is that the evidence is insufficient to sustain the judgment in favor of the defendant, and the established rule is that on an appeal by defendant from such order he cannot be heard to complain that evidence was improperly admitted in favor of plaintiff. The case upon appeal, therefore, must be considered in the light of all the evidence embraced within the record, including that improperly admitted over the defendant's objection. *McCloud v. O'Neill*, 16 Cal. 392; *In re Olmsted's Estate*, 122 Cal. 224, 54 Pac. 745; *Pierce v. Jackson*, 21 Cal. 636; 1 Hayne on N. T. & App. § 98. It follows that the allegation of defendant's separate defense above referred to, having been presented to the jury as an admission in favor of the plaintiff, although over defendant's valid objection, was properly regarded as evidence in the case by the trial court in its decision on the motion for a new trial.

For the reasons given the order is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

**PACIFIC WESTERN COMMERCIAL CO.
v. WESTERN WHOLESALE DRUG CO.**
(Civ. 2774.)

(District Court of Appeal, First District, Division 2, California. June 23, 1919.)

1. SALES — 441(1) — BREACH OF WARRANTY — REJECTION OF GOODS.

Correspondence held to establish that defendant buyer gave plaintiff seller prompt and definite notice that potassium carbonate was defective in not meeting the percentage of purity guaranteed by the seller's warranty.

2. SALES — 441(1) — BREACH OF WARRANTY — WAIVER.

Evidence regarding defendant buyer's attempts to resell certain goods and its offer to make an equitable adjustment of the situation held not to show that it waived plaintiff seller's breach of warranty in furnishing impure potassium carbonate.

3. SALES — 287(1) — REJECTION — EFFECT.

Where plaintiff seller did not deliver the character of goods it had agreed to sell, defendant buyer was justified in rejecting them, and no obligation rested upon it to tender their return, etc.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Pacific Western Commercial Company against the Western Wholesale Drug Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Alfred B. Weller, of San Francisco, for appellant.

Lloyd W. Moultrie, of Los Angeles, and Corbet & Selby, of San Francisco, for respondent.

HAVEN, J. In this action plaintiff sued as the assignee of one C. R. Haley to recover from defendant the purchase price of certain potassium carbonate alleged in the first count of the complaint to have been sold and delivered to defendant, and in the second count to have been bargained and sold to said defendant. The cause was tried upon an agreed statement of facts. The trial court sustained the defense of a breach by the plaintiff's assignor of an express warranty that the material sold should be at least 95 per cent. pure. The essential facts upon which the judgment for defendant was based appear in the following findings of the trial court, which are supported by the admitted facts and justifiable inferences therefrom:

"That by and in said contract of sale, and as a condition thereof, it was expressly warranted by said C. R. Haley that said potassium carbonate was in quality of 95 per cent., or over, pure; that it was agreed and intended by the said parties that such warranty should be, and the same was, a condition to the purchase there-

of by the defendant; that by and in said contract it was further warranted, as a condition thereof, that said five tons of potassium carbonate would be shipped to and ready for delivery by the defendant to its customers during the months of April and May, 1916; that in purported accordance with the terms and conditions of said contract aforesaid, said C. R. Haley, on or about May 5, 1916, shipped to the order of defendant five tons of potassium carbonate; that said five tons of potassium carbonate, so shipped by said C. R. Haley, contrary to and in breach of the warranty of said C. R. Haley, and the condition aforesaid, was not of the quality of 95 per cent., or over, pure, but was of a quality of less than 95 per cent. pure, being only 93 per cent. pure, and no more; that immediately upon discovering that said goods were not of the quality so warranted, as aforesaid, said defendant rejected said goods, and rescinded said contract of sale, and notified said C. R. Haley of such rejection, and rescission, and said goods were held subject to the order of C. R. Haley, as rejected, until said goods were disposed of; that said goods were never accepted by defendant, and said goods were not 95 per cent. pure potassium carbonate."

Appellant admits the breach of warranty as found by the court, but contends that such breach was not a complete defense to the action, for the reason that respondent elected not to reject the goods, but to rely on a set-off for damages as its sole defense, as to the amount of which damages no evidence was offered. This election is alleged to have resulted from (1) the failure of the defendant to give prompt notice of the defect in the goods; (2) the making of objections to the quality of the goods upon grounds other than the breach of warranty; (3) the use of the goods by the defendant; (4) the offer of the defendant to make an equitable and proper adjustment of the dispute between the parties; and (5) an attempt to rescind the contract, which was ineffectual by reason of failure to make a tender of a return of the goods.

[1] The evidence upon which the case was submitted consists of a voluminous correspondence between the parties covering the terms of the contract between them and the positions taken on each side with regard to the breach of the warranty and the consequences thereof. An attempt to summarize such correspondence would extend this opinion beyond reasonable limits. It is sufficient to state that the following facts were established: After purchase of the goods, and before delivery of a sample or any other portion thereof, defendant contracted to sell the bulk of its purchase to parties in Philadelphia. In its contract of resale, defendant warranted that the chemical sold should not contain over 2 per cent. potassium chloride or over one-tenth per cent. of insoluble matter. Under instructions of defendant, the bulk of the material purchased was shipped

to its purchasers in Philadelphia, and 100 pounds to the defendant itself, at Los Angeles. Upon receipt of this last shipment the defendant promptly notified plaintiff's assignor that it found that the quality of the goods did not correspond with the sample and analysis previously sent. During the next month an extensive correspondence was carried on between the defendant and plaintiff's assignor with regard to the quality of the chemical shipped, it appearing that different analyses made thereon did not agree. During this correspondence plaintiff's assignor attempted to collect the purchase price upon a draft drawn against defendant. Defendant refused to pay said draft, and the delivery of the goods to its purchaser was held up. Upon defendant's suggestion, it was subsequently agreed that the chemical should be delivered to its purchasers in Philadelphia for the purpose of examination by them. In making this suggestion defendant wrote:

"It appears to us that it would be better to have the goods delivered, and then make the proper adjustment after they have been received and tested by our parties. You can appreciate that we are not invoicing this lot until we have their report on the goods."

Upon examination by the Philadelphia purchasers, they refused to accept the shipment upon the ground that the material contained a larger quantity of insoluble matter than warranted by defendant.

Appellant claims that the warranty by defendant to its purchasers was a different one than made by plaintiff's assignor to the defendant. It appears, however, that, while the rejection in Philadelphia was based upon an analysis which showed that the insoluble matter and other foreign contents were so large as to constitute a breach of defendant's warranty to its customers upon resale, they were also sufficient to reduce the pure potassium carbonate below 95 per cent. as warranted by plaintiff's assignor. Defendant's final rejection of the goods followed promptly after this test of the material in Philadelphia. Until that time the matter had been held in abeyance by consent of both parties. Taken as a whole, the correspondence proves that defendant gave plaintiff prompt notice of the defect in the material purchased; that the objections made by it were sufficiently definite to cause plaintiff's assignor to believe that the basis of objection was the failure to meet the required percentage of purity as covered by his warranty; and that the subsequent acts of defendant did not indicate a waiver by defendant of the breach thereof.

[2] The contention that defendant waived the breach of the warranty by reason of the use of the goods is based upon the admitted fact that it contracted to resell the same to its Philadelphia customers. It is argued that that fact was an exercise of ownership and

implied that the buyer had assumed title to the property. It appears, however, that such contract of resale was made prior to any opportunity being afforded to defendant to inspect the goods; that the whole arrangement was contingent upon the fulfillment by plaintiff's assignor of his warranty of purity to the extent, at least, of enabling defendant to meet its warranty to its customers; and, further, that the proposed resale was not consummated on account of breach of such warranty. Under these circumstances, it cannot be said that the defendant exercised such dominion over the property as to evidence acceptance thereof. Some contention is also made that an attempt to sell the property, made by the defendant at a later time, indicated an acceptance. This effort to sell was made by defendant after it had notified plaintiff's assignor of its rejection of the goods, and immediate notice thereof was communicated to Mr. Haley, said assignor. In acknowledging receipt of such notice, he thanked the defendant for its kindness in the matter. The reasonable construction of the letters upon this subject is that this sale was attempted by defendant for the benefit of plaintiff and in order to minimize its loss.

The offer of defendant to make an equitable and proper adjustment of the misunderstanding between the parties, relied upon by appellant as an additional circumstance proving the election by the defendant, does not appear to have been a consideration for the delivery of the goods, nor to have been relied upon by Haley. Throughout the correspondence, the question in dispute was the purity of the goods. The suggestion of an equitable adjustment was not made in such a manner as to indicate a waiver by defendant of its right to stand upon the warranty.

[3] The further contention as to the attempted rescission of the contract and the failure to make a tender of the return of the goods need not be discussed for the reason that it clearly appears that the sale was never consummated. Hence there was no completed contract to be rescinded. Plaintiff did not deliver the character of goods which it agreed to sell. Defendant was justified in refusing to accept the goods, and, having done so, no further obligation rested upon it. *Mechem on Sales*, § 1402. A buyer cannot "be required to accept and pay for a thing different from that which he contracted to receive." *Mechem on Sales*, § 1155. "If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to recover the price as money had and received for his use." *Benjamin on Sales*, § 600. The conclusion of the trial court that the breach of warranty by plaintiff's assignor was a com-

plete defense to the action was fully warranted.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRIT-TAIN, J.

PEOPLE et al. v. MAGEE. (Civ. 2788.)

(District Court of Appeal, First District, Division 2, California. June 25, 1919.)

1. LIMITATION OF ACTIONS \S 65(1) — PERFORMANCE OF PRELIMINARY ACT—DELAY BY PLAINTIFF.

Where plaintiff's right of action depends upon some act to be performed by him preliminarily to commencing suit, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act.

2. LIMITATION OF ACTIONS \S 110 — APPOINTMENT OF RECEIVER.

The appointment of a receiver does not affect the running of the statute of limitations.

3. EQUITY \S 87(1) — LACHES — PERIOD OF LIMITATIONS.

The defense of laches is available whenever a demand or other preliminary action is necessary on the part of plaintiff, and such action is not taken within the period of limitations.

4. LIMITATION OF ACTIONS \S 69—RECEIVERS—PERMISSION TO BRING ACTION.

Action to recover installments due under written contract was barred for failure to bring action within four years after installments became due, under Code Civ. Proc. \S 337, subd. 1, though defendant was in hands of a receiver, and permission from court to bring action was obtained within the four-year period.

5. CONTRACTS \S 310—AGREEMENT BETWEEN LATER AND FORMER LESSEE—TERMINATION OF LEASE—RIGHTS OF FORMER LESSEE.

Where later lessee's agreement with former lessee, in consideration of former lessee's surrender of his lease so that the later lessee could lease the premises, provided for installment payments by later lessee to former during existence of later lessee's lease and during period of renewal, upon later lessee's election to renew its lease, and provided for assignment to former lessee of right of renewal upon later lessee's failure to exercise option, former lessee was not entitled to payments during period of renewal, notwithstanding later lessee's failure to assign or exercise option to renew, where later lessee's lease was cancelled by court before time of renewal by reason of its insolvency.

6. LIMITATION OF ACTIONS \S 51(2) — RUNNING OF PERIOD — MEMORANDUM OF AMOUNTS DUE UNDER CONTRACT.

Where installments were due under written contract, and creditor charged amounts accruing under contract and credited payments in memorandum, period of limitations ran from date installment was due under contract, and

not from date of last entry in memorandum; the action being based upon the contract and not upon the memorandum account.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceedings by the People of the State of California, etc., for appointment of a receiver for the California Safe Deposit & Trust Company, in which George S. Smith files petition in intervention against E. De Los Magee, who was appointed receiver. Judgment for receiver, and intervener appeals. Affirmed.

Crane & Crane, of Chicago, Ill., and Leon A. Blum, of San Francisco, for appellant. De Laveaga & Magee, of San Francisco, for respondent.

HAVEN, J. The above-entitled proceeding was commenced on December 7, 1907, in the name of the people of the state of California, upon complaint of the bank commissioners of the state, under the provisions of the Bank Act of March 24, 1903, as amended in 1905, for the purpose of obtaining the appointment of a receiver for the liquidation of the affairs of the California Safe Deposit & Trust Company (hereinafter referred to as the bank). The respondent, E. De Los Magee, is the present receiver in said proceeding. On July 28, 1917, by leave of court first had and obtained, the appellant, George S. Smith, filed his petition in intervention in said action, wherein he prayed for judgment in the sum of \$19,000, with interest, alleged to be due to said appellant upon certain contracts executed by the bank prior to the commencement of this proceeding. The facts upon which said claim is based are briefly these:

On July 31, 1906, appellant, George S. Smith, was the lessee of certain premises on Fillmore street, in San Francisco. The bank desired to secure a lease of said property, and entered into negotiations with the owner thereof for that purpose. As a result of such negotiations the lease between the owner of the property and the appellant was canceled, a new lease was executed by the owner to the bank, and an agreement was entered into between the bank and appellant, upon which latter agreement the rights sought to be enforced herein are based. Under such agreement the bank agreed to pay the appellant \$2,000 in cash and \$200 a month for a period of five years from July 31, 1906; and further agreed that, under certain conditions, it would continue said payments of \$200 a month to appellant for a second period of five years from and after July 31, 1911. The amount demanded by appellant in his present petition in intervention

covered the monthly payments for the period extending from March 31, 1909, to July 31, 1911, and also the entire payments for the second period of five years from August 1, 1911, to July 31, 1916. The lease between the owner and the bank contained a clause giving the former the option to terminate the lease upon the insolvency of the lessee. After the appointment of the receiver, the owner demanded the termination of the lease under said clause, which was refused by the receiver. Litigation followed, in which a decree was made canceling the lease. In accordance with such decree the premises were delivered by the receiver to the owner on March 1, 1909. In a former suit the appellant recovered from the receiver the monthly payments of \$200 up to the time of such cancellation of the lease.

One of the defenses pleaded by the respondent is that the cause of action set forth in appellant's petition in intervention was barred by subdivision 1 of section 337 of the Code of Civil Procedure, and by the laches of said petitioner. The trial court found in favor of the respondent upon this defense. As the first period, during which monthly payments are claimed by appellant to have matured, terminated on July 31, 1911, it is manifest that the plea of the statute of limitations as to that cause of action was good, unless the running of the statute was suspended by reason of the receivership proceeding. Appellant contends that the statute did not run, for the reason that his present proceeding could have been maintained only by leave of court first had and obtained, and in support of that contention cites *Union Collection Co. v. Soule*, 141 Cal. 99, 74 Pac. 549, which follows *Hoff v. Funkenstein*, 54 Cal. 233, 235. In both of these cases it is said:

"The theory of our statute of limitations is that a creditor has four years (or other time, as the case may be) on any day of which he may, of his own volition, commence an action."

The first case above cited was an action upon a promissory note against the maker, who had been adjudged insolvent under the provisions of the Insolvency Law of 1895 (St. 1895, p. 152). That act contained a provision to the effect that "no statute of limitations of this state shall run against a claim which in its nature is provable against the estate of the debtor." Section 62. In the earlier case the action was also upon promissory notes against the maker, who had been adjudged bankrupt under the provisions of the United States Bankruptcy Law then in effect. The decision is based upon a section of such act prohibiting the maintenance of any suit by a creditor proving his claim in the bankruptcy proceeding. The act under which the present proceeding against the California Safe Deposit & Trust Company is

pending contains no provision suspending the running of the statute of limitations or staying the commencement of an action. It is necessary, however, for a claimant to obtain permission of the court before filing an action or petition in intervention against the receiver. It is this necessity upon which appellant bases his claim that the suit upon the present demand could not have been brought by the appellant of his own volition, for the reason that permission to sue might not have been granted him.

[1-4] It is well settled that where plaintiff's right of action depends upon some act to be performed by him preliminarily to commencing suit, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act. This for the reason that he has it within his power at all times to do the act which fixes his right of action. 25 Cyc. 1198. This rule applies to the preliminary necessity of obtaining permission of court to file a suit. The obtaining of such permission is no part of the plaintiff's cause of action, but simply a step in his remedy. "His cause of action (if any he has) accrues independent of and prior to the application for leave, and is the very basis upon which the application rests; and hence a statute of limitation commencing to run from the date when his cause of action accrues, commences to run from the same time that it would commence if no such leave were required; that is to say, in a case like this at bar, the statute commences to run from the time when the wrong complained of was done, and not from the time of obtaining leave to sue." *Litchfield v. McDonald*, 35 Minn. 167, 168, 28 N. W. 191. See, also, *Ganser v. Ganser*, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461. In *Williams v. Bergin*, 116 Cal. 56, 60, 47 Pac. 877, this principle is applied to the failure of a plaintiff to demand an assessment and warrant from a superintendent of streets, upon the issuance of which his right of action upon a street assessment depended. In *County of San Luis Obispo v. Gage*, 139 Cal. 398, 73 Pac. 174, it is held that the running of the statute of limitations against the demand of a county against the state was not suspended by reason of the necessity under the law of the presentation of a claim by the county to the state board of examiners, which presentation was a necessary prerequisite to the maintenance of an action upon such demand. It is also the general rule that the appointment of a receiver does not affect the running of the statute of limitations. *High on Receivers*, § 135; *Alderson on Receivers*, § 195; *White v. Meadowcroft*, 91 Ill. App. 293. Furthermore, the defense of laches is available whenever a demand or other preliminary action is necessary on the part of the plaintiff and such action is not taken within the period of the

statute of limitations. *Harrigan v. Home Life Ins. Co.*, 123 Cal. 531, 548, 58 Pac. 180, 61 Pac. 99. Under the principles announced by the above authorities, the right of action of appellant for the recovery of all installments which became due more than four years prior to the filing of his petition in intervention was barred both by the statute of limitations and by his own laches.

[5, 6] Part of the payments claimed to be due during the second five years matured, if at all, within the statutory limitation. The facts with regard to this second period are these: The agreement between the bank and appellant provided that the monthly payments should continue during the second period of five years, if the bank itself renewed the lease for that period. This it did not do. The agreement further provided that if the bank did not wish to renew the lease, its right to renew was to be assigned to appellant, and failure by the bank to so assign would obligate the bank to make further payments; and also that the bank was obliged to notify the appellant 30 days prior to June 1, 1910, that it would either exercise its option or abandon its right thereto, and the failure to give such notice was to be deemed to be the exercise by the bank of its option to renew the lease. The bank did not and could not exercise its option to renew the lease, nor assign the same to appellant, for the reason that, prior to the time when such option was to be exercised or such assignment to be made, the lease had been canceled by decree of court, based upon a provision of the lease itself, to the effect that the insolvency of the bank should terminate the tenancy. There was therefore no lease in existence to be renewed or assigned at the time the second tenancy was to have begun. The conditions under which appellant was to be entitled to the monthly payments during the second tenancy never arose, and no right ever vested in appellant to such payments.

Appellant further contends that his cause of action is based upon a book account, in which the last entry was made on July 7, 1917, and therefore his cause of action is not barred. The alleged book account was a memorandum kept by appellant, in which he charged the amounts accruing under the contract and credited the several payments made, including that collected by him as the result of the judgment in the former suit above referred to. Appellant's alleged cause of action is based upon his contract and not upon this account. The writing is a mere memorandum of debts accruing from an entirely independent source. In *Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 253, 146 Pac. 692, a number of definitions of a book account, as applied to the statute of

limitations, are given, among which is the following:

"In 1 Ruling Case Law, p. 207, it is said: 'The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes.'"

Under the facts of this case, the alleged book account is not such a one as fixes a new date for the running of the statute of limitations.

Respondent presents other reasons why the appellant's cause of action fails, the consideration of which is unnecessary in view of the conclusions above set forth.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

WIBLE v. CITY OF BAKERSFIELD et al.
(Civ. 2812.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1918.)

1. TAXATION \S 611(6) — FRAUDULENT ASSESSMENT—SUFFICIENCY OF EVIDENCE.

Evidence that assessed value of plaintiff's property was increased 60 per cent. for purpose of school taxation, that such increased assessed value did not exceed the property's real value, and that assessor considered the valuation fair, etc., held not to establish a fraudulent assessment.

2. TAXATION \S 453 — REVIEW — APPLICATION TO BOARD OF EQUALIZATION—NECESSITY.

A landowner who failed to make complaint to the board of equalization regarding a tax assessment cannot attack the tax lien in court.

3. SCHOOLS AND SCHOOL DISTRICTS \S 102—TAXATION—POWER OF CITY.

A city may levy a school tax upon lands lying without the municipal limits but within a city school district.

4. SCHOOLS AND SCHOOL DISTRICTS \S 102—TAXATION—PROPERTY LIABLE.

An ordinance requiring a tax to be levied for school purposes on all taxable property within the city, etc., includes land within a city school district but outside the city limits, in view of Pol. Code, \S 1576, providing that territory outside the city shall be deemed a part of the city for purpose of levying school taxes, etc.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action to quiet title by S. P. Wible against the City of Bakersfield and others. From an adverse judgment, plaintiff appeals. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant.

Walter Osborn, City Atty., W. W. Kaye, and Rowen Irwin, all of Bakersfield, for respondent.

JAMES, J. An adverse judgment was entered against the plaintiff in this suit, and an appeal is taken therefrom.

The action was to quiet title to certain real property, some of it lying within and some without the corporate limits of the city of Bakersfield. The city of Bakersfield by answer alleged that certain liens in its favor existed against the property for municipal taxes which had not been paid by the plaintiff. On the lands lying without the city limits, the liens represented a levy for school purposes only. It appears that the city school district included, as is permitted by law, certain territory lying without the corporate limits of the municipality, and that the land of the plaintiff was all included within the limits of the municipal school district. It is claimed on behalf of appellant: (1) That the assessment was void because the assessor did not, as required by the ordinance of the city, assess the property at its proper value, or that the assessment represented at all the judgment of the assessor in the matter, but that the same was arbitrary and discriminatory; (2) that the ordinance levying the tax for school purposes designated the territory affected as being that within the municipal limits only, and that therefore no legal levy was ever made upon the property lying without the municipal limits. These are the main contentions and those which have been principally discussed in the briefs.

[1, 2] 1. The evidence showed that pursuant to the ordinance of the city which provided that the assessor might use the county assessment roll for the purpose of making up the assessment, the city assessor having that roll before her, and at the suggestion of certain members of the city council and the city manager, for the purpose of producing a sufficient amount of revenue, fixed values upon all the property within the municipality 60 per cent. above the value fixed by the county assessor on his roll; in other words, a horizontal raise of 60 per cent. was made upon all property within the city proper. The property within the school district which lay without the municipal limits was not raised. As to the making of this assessment, the city assessor testified that she was satisfied to make the raise as suggested, and that when so made the valuations placed did

not exceed the cash value of the property affected. In effect, her testimony was that the assessment when completed represented a fair valuation, in her judgment. What the character of the outside property was, and whether the same proportionate increase in valuation was fairly applicable to that, does not appear from the testimony. The plaintiff, however, did testify that in no case was the valuation fixed in excess of the market value of this property. It was admitted that all of the property within the city and all of that lying without but within the school district, was assessed alike, except that the county assessor's valuations controlled as to the outside property, and that the valuations were made up on the property inside the city as indicated by making the 60 per cent. raise. It was also admitted that no application was made to the board of equalization on behalf of the plaintiff to have a reduction made, or that any complaint was made to said board as to the inequality of the assessment as entered. To our minds, the evidence was not sufficient to show a fraudulent assessment, as is claimed by the appellant. Even if we concede that such fraud is impliedly to be deduced from the use of the method of assessment indicated, still the plaintiff, having failed to make any complaint before the board which was authorized to correct the assessment, cannot now attack the lien of the tax as having been created in an unauthorized way. There are a number of cases which hold that the taxpayer's only recourse in such cases is to apply to the board of equalization, a leading one among which is *Los Angeles Gas & Electric Co. v. County of Los Angeles*, reported in 162 Cal. at page 164, 121 Pac. 384. The opinion in that case goes further than it is necessary to go on this appeal, for it is there held that even where the application is made to the board of equalization and upon the ground of discrimination amounting to fraud in the assessment, the taxpayer will have no recourse without showing, in addition to the acts of fraud on the part of the assessing officer, the fact also that the board of equalization acted improperly and not upon a reasonable discretion.

[3, 4] 2. The right of a city to levy a tax upon lands lying without the municipal limits for school purposes, where such lands are included within the city school district is clear. *Visalia Savings Bank v. City of Visalia*, 153 Cal. 206, 94 Pac. 888. But, appellant argues, the ordinance levying the tax was not appropriate in its terms to include this outside territory, because it was ordered that the levy for school purposes be made upon "all taxable property within the city of Bakersfield for the support and maintenance of public schools." The item levying the tax for school purposes was distinct and separate from the other items in the ordinance. In determining as to what territory was included for that purpose, section 1576 of the Politi-

cal Code is important for consideration. That section deals with the annexation of territory to municipalities for school purposes, and contains the following declaration:

"And such outside territory shall be deemed to be a part of said city or incorporated town for all matters connected with the school department thereof, for the annual levying and collecting of the property tax for the school funds of said city or incorporated town; * * * provided, however, that the last assessment roll made by the county assessor shall be the only basis of taxation for such school district on the property outside the corporate limits so annexed for school purposes."

Therefore, it would follow that for school purposes, including the levying and collection of taxes, the municipal lines and the school district lines are deemed to be coincident. In our opinion, the language used in the ordinance, construed in connection with the provisions of the section just quoted from, is sufficient to sustain the assessment on the outside property.

No other points are suggested which seem to merit particular discussion. We think that the court was correct in determining the title to the real property to be in the plaintiff, except that the city of Bakersfield was possessed of the tax liens the amounts of which are set forth in the findings.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

M. H. HOFFMAN, Inc., v. BERNSTEIN FILM PRODUCTIONS. (Civ. 2805.)

(District Court of Appeal, First District, Division 2, California. June 28, 1919.)

1. CORPORATIONS ⇨422(3)—DEALINGS WITH OFFICER—BINDING FORCE.

In the absence of any showing to the contrary, a corporation is bound by the statements of its president and general manager, with whom another company dealt, relying on his personal responsibility and control.

2. MONEY RECEIVED ⇨18(3) — RECEIPT OF AMOUNT—EVIDENCE.

A motion picture film producing company's receipt from a distributing company of \$6,500 held to have covered both a \$1,000 and a \$5,500 payment made to the producing company by its distributor in three states, whose contract had been assumed by the distributing company, so that the producing company received the \$6,500 from the distributor in three states for the use and benefit of the distributing company.

3. APPEAL AND ERROR ⇨1170(3) — HARM- LESS ERROR—REVERSAL—CONSTITUTION.

In an action on the common counts for money had and received, judgment for plaintiff

will not be reversed on defendant's contention that, since the written contract between it and plaintiff was executory, judgment on the common counts cannot be sustained; a technical defense involving no change in result by sending the case back for retrial being no cause for reversal, under Const. art. 6, § 4½.

4. ASSUMPSIT, ACTION OF ⇨6(1) — CAUSE OF ACTION.

Assumpsit is the proper remedy to recover money which defendant has admitted belongs to plaintiff and has promised to pay.

5. MONEY RECEIVED ⇨1 — CAUSE OF AC- TION.

The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to plaintiff.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by M. H. Hoffman, Incorporated, against the Bernstein Film Productions. From judgment for plaintiff, defendant appeals. Affirmed.

Leon E. Morris, of San Francisco, for appellant.

Harry A. Levinson, of San Francisco, for respondent.

BRITAIN, J. The defendant appeals from a judgment for \$6,500, with interest and costs, rendered on the common count for money had and received. On behalf of the appellant, it is contended that the findings are not supported by the evidence, and that recovery on the common count could not be had under the facts disclosed.

The defendant, a producer of motion pictures, in April, 1917, had in course of production a picture play entitled "Who Knows." It had in contemplation the production of a series of other motion picture plays. On April 6, 1917, the defendant contracted with one Zierler to deliver to him for exclusive distribution in the states of New York, New Jersey, and Connecticut the film of "Who Knows," and to give him the option on later plays for distribution in those states. The contract price of "Who Knows" for the three states was \$6,500, of which Zierler paid \$1,000 on the signing of the contract and promised to pay the remaining \$5,500 on delivery of the film. The film was shipped to Zierler after May 1, 1917, and he paid to the defendant on its delivery the \$5,500. The suit is to recover these two sums claimed by the plaintiff to be due to it by reason of dealings between the parties to the action subsequent in date to the Zierler contract.

On April 24, 1917, the defendant entered into a written contract with the plaintiff, under which, for the period of five years, the defendant agreed to produce and deliver to

the plaintiff, for exclusive distribution throughout the world, all its picture plays, under an arrangement by which they were to share in net profits. The cost of production was to be paid by the distributor to the producer, but until September 1, 1917, one-half of this cost was to be paid on delivery of the negative to the distributor and the remaining half out of the first receipts of the distributor as each film was delivered and marketed. At that time the play "Who Knows" had not been completed. In the contract with the plaintiff the Zierler contract was briefly described, and the fact that he had already paid \$1,000 was recited. The particular clause of the contract then continued:

"With this understanding, it is understood by the producer and the distributor that this agreement is made subject to said contract with said Zierler, which contract the distributor agrees to assume, and with the contents of which he is familiar."

It will be noted that, while under the terms of the second contract there was no sum of money payable at that time from the plaintiff to the defendant, the former then paid the defendant \$6,500. On May 8th the defendant shipped the positive copies of "Who Knows" C. O. D. to Zierler, and collected \$5,500. The plaintiff immediately protested against this collection and demanded that the money be paid to it. The negative of "Who Knows" was never delivered to the plaintiff, and therefore the defendant never became entitled to the first half of the cost of its production. It was entitled to \$6,500 on the Zierler account. It received \$6,500 from the plaintiff upon the understanding of the parties of the meaning of the assumption clause of their contract, and it received from Zierler and was holding \$6,500, which should have been paid to the plaintiff on its demand. In other words, being entitled to \$6,500 on the Zierler account, it had received \$13,000, one half from Zierler on his direct obligation and one half from the plaintiff on its assumption of Zierler's contract. In the correspondence and oral negotiations between the president of the plaintiff and Isidore Bernstein, the president of the defendant, the latter not only admitted that the money was advanced by and was due to the plaintiff, but, representing that his company was in financial straits, he asked for time, promising to make the payment.

[1, 2] On the trial no objection was made to the proof of the facts above set forth and no evidence was introduced on behalf of the defendant. In the appellant's brief there is

no suggestion that the defendant is not indebted to the plaintiff. It is claimed that the evidence does not support the finding that the defendant received \$6,500 from Zierler for the use and benefit of the plaintiff. This attack is on two grounds, namely, that it was not shown that Bernstein had power to contract for the defendant, and that as to the first \$1,000 it was paid before the plaintiff came into the transaction. The first of these contentions is answered by the contract, which expressly describes Isidore Bernstein as the president and general manager, and the life of the contract is made to depend upon his continuing to act in those two capacities. The plaintiff dealt with the defendant upon the personal responsibility and control of Bernstein. In the absence of any showing to the contrary, the corporation is bound by the statements of its president and general manager. *Lowe v. Yolo County, etc., Water Co.*, 157 Cal. 512, 108 Pac. 297. In regard to the second contention, so far as the plaintiff is concerned, the payment of the first \$1,000 was as of the date of the contract in which its receipt was admitted by the defendant when the defendant received of the plaintiff the \$6,500, which covered the \$1,000 as well as the \$5,500 payment.

[3-5] On behalf of the appellant, it is contended that since the written contract between the plaintiff and the defendant is executory, a judgment on the common count cannot be sustained. The defense is technical and the result would not be changed by sending the case back for retrial on other pleadings. *Const. Cal. art. 6, § 4½; Poak v. Pacific Electric Ry. Co.*, 177 Cal. 192, 170 Pac. 159; *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413. The action was not on the written contract, but upon oral negotiations in which the parties placed their own construction on its terms. Bernstein admitted the money belonged to the plaintiff and promised to pay it. *Assumpsit* is the proper remedy in such a case. *Ehrman v. Rosenthal*, 117 Cal. 496, 49 Pac. 460. It is urged that recovery on the common count cannot stand as to the first \$1,000. This has been discussed from another point of view. Considered as a matter of pleading, it appears that the money ought to have been paid and was being withheld at the time suit was brought. "The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to the plaintiff." *Fox v. Monahan*, 8 Cal. App. 709, 97 Pac. 765.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

GOUSSE v. LOWE. (Civ. 2789.)

(District Court of Appeal, First District, Division 2, California. June 24, 1919. Re-hearing Denied by Supreme Court Aug. 18, 1919.)

1. APPEAL AND ERROR \Leftarrow 1002—REVIEW—VERDICT.

A jury's finding on conflicting evidence is conclusive.

2. MASTER AND SERVANT \Leftarrow 302(8)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—PERSONAL ERRAND.

Where a chauffeur, instead of proceeding from the garage to his master's house, disobeyed instructions by driving several miles in the opposite direction on a personal errand, and negligently collided with plaintiff on the return trip, he was not acting within the scope of his employment so as to render his master liable.

3. MASTER AND SERVANT \Leftarrow 332(2)—SCOPE OF EMPLOYMENT—QUESTION OF FACT OR LAW.

Whether an act was within the scope of a servant's employment should be submitted to the jury only where reasonable men may differ in regard to the facts; and if the facts are admitted, or capable of but one meaning, the court should declare the law upon the admitted facts.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Arthur Gousse against L. P. Lowe. Judgment for plaintiff, and defendant appeals. Reversed.

Cooley & Lachmund and Winfield Dorn, all of San Francisco, for appellant.

John Ralph Wilson, Fred L. Berry, and Chas. B. Morris, all of San Francisco, for respondent.

BRITTAIN, J. The defendant appeals from a judgment for \$1,250 damages for injuries to the plaintiff, found by a jury to have been caused by the negligent operation of an automobile, owned by the defendant and driven by his chauffeur:

[1] The appellant argues that the physical facts are such as to demonstrate the contributory negligence of the plaintiff, but as there is evidence to the contrary, the finding of the jury is conclusive. Error is claimed in rulings of the court concerning certain questions asked of jurors and of the plaintiff, the purpose of which, it is argued, was to suggest that the suit was being defended by an insurance carrier of the defendant. The particular questions do not appear to have been objectionable. The jury was instructed to disregard the answers, and if error were committed it was of such a character as not to warrant the reversal of the judgment.

[2] Objection is made to the giving and re-

fusal to give certain instructions upon the rule of respondent superior. The attack upon them is the same as that upon the ruling of the court in denying nonsuit and in refusing to instruct the jury to find for the defendant. The judgment must be reversed, because under the admitted facts the case is within the rule announced by Chief Justice Holt:

"No master is chargeable with the acts of his servant but when he acts in execution of the authority given by his master." *Middleton v. Fowler*, 1 Salk. 282; *Baker v. Kinsey*, 38 Cal. 634, 99 Am. Dec. 438.

Stated most strongly for the plaintiff and respondent, the facts in regard to agency are as follows:

When the chauffeur was employed he was instructed never to use the car for any purpose of his own. The car was kept at his employer's residence, on Washington street, in San Francisco, four or five blocks westerly from a public garage, near Presidio avenue and Sacramento street, where the defendant's gasoline and supplies were ordinarily purchased. The chauffeur did not board at the employer's house, and got luncheon near the public garage. Ordinarily when supplies were needed he asked his employer's wife for permission to take the car to the public garage for the supplies when he went to his luncheon. He was under general instructions to report at the house after luncheon at 2 o'clock. On the day of the accident the chauffeur did not ask permission to take the car to the public garage, but, needing gasoline, he took it there at the noon hour. He left the car at the public garage while he took his midday meal and on his return purchased gasoline and filled the tires with air. Under his general instructions it was then his duty to drive the car four or five blocks westwardly to his employer's house to report there for duty at 2 o'clock. This duty he did not perform.

The chauffeur was having an overcoat altered at a tailor shop at Sutter and Montgomery streets, some $2\frac{1}{2}$ miles east of the garage. Wholly for his own purposes he desired to go to the tailor's. He looked at his watch and concluded that if he went down town on the street car he could not get back to the garage in time to take the motorcar to his master's house by 2 o'clock. In disobedience of his instruction never to use the car for his own purposes he abandoned his duty to drive the car west four blocks and drove it easterly about $2\frac{1}{2}$ miles. At the tailor shop he attended to his business and started westerly. He picked up a friend, intending to leave him near the public garage, and on the way out, while still more than a mile east of the garage, at Bush and Taylor streets, the car he was driving collided with

the plaintiff's machine under circumstances which the jury found were caused by the chauffeur's negligence. Upon these facts it is contended on behalf of the respondent that there was a mere temporary deviation from the line of the servant's employment; that after his visit to the tailor shop it was his duty to take the car to his master's house by 2 o'clock; that he was performing that duty; and, in either case, that the question of whether or not he was acting within the scope of his agency at the moment of the accident was one of fact to be determined by the jury.

In the opinion in a case which, in the respondent's brief, is not sought to be differentiated in principle from this, the court quoted at length from a note in 35 Am. Dec. 192 the general rules that govern the master's liability. Upon the question presented here the quotation was that—

"If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to his master."

Continuing, the writer of the opinion said:

"With these rules no one quarrels. The difficulty has been to determine whether they are applicable to a given state of facts, and upon a question of this kind opinions will always differ. To take the case in hand, it would be easy to cite decisions that hold the master to be liable under similar or analogous facts, and it would be just as easy to cite cases * * * in which his liability has been denied."

The court ordered judgment for the defendant notwithstanding the verdict for the plaintiff. *Patterson v. Kates* (C. C.) 152 Fed. 481. So, in this case quotations are made in the respective briefs from decisions and text-books which seem applicable on one side or the other to the facts now under consideration. No amount of legal reasoning and no multiplication of comments upon other facts can change the facts in this case. Upon an errand of his own the man left the garage and had not returned to within a mile of it when the collision occurred. He took his master's automobile, not in furtherance of any business of the master, but solely because it was a quicker means of conveyance than a street car, because without using it he would not have had time to attend to his private business. The facts are not unlike those in *Patterson v. Kates*, supra, and the rule of law declared in that case is not only applicable but is controlling. This is not the case of a mere slight deviation from

the line of duty, but a departure for the purposes of the servant.

In a very few cases in other states when the tort occurred on the homeward journey of the disobedient servant the master has been held liable, but the great current of authority, in this country and in England, is against those isolated cases. *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; *Colwell v. Aetna, etc., Co.*, 33 R. I. 531, 82 Atl. 388; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Riley v. Roach*, 168 Mich. 294, 134 N. W. 14, 37 L. R. A. (N. S.), 834; *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165; *Chicago, etc., Ry. Co. v. Bryant*, 65 Fed. 969, 13 C. C. A. 249; *St. Louis Ry. Co. v. Harvey*, 144 Fed. 806, 75 C. C. A. 536; *Hartnett v. Gryzmish*, 218 Mass. 258, 105 N. E. 988; *Solomon v. Commonwealth Trust Co.*, 256 Pa. 55, 100 Atl. 534; *Mitchell v. Crassweller*, 13 Com. Bench 237; *Storey v. Ashton*, L. R. 4 Q. B. 476. They cannot be supported upon any sound reason. If the servant takes his master's machine for a junketing or a business trip of his own, the trip is not complete when he reaches a point miles away from the place where the machine ought to be. The servant is upon his own trip until his return to the point of departure, or to a point where in the performance of his duty he should be. No clearer statement of the rule and the reasons upon which it is based has been made than in the opinion written by Mr. Justice Mitchell of the Supreme Court of Minnesota:

"The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master pro tempore, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities." *Morier v. St. Paul, etc., Ry.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

[3] While ordinarily the question of whether or not the act was within the scope of the servant's employment should be submitted to the jury, in this case the only evidence was that at the time of the injury the servant was upon a trip for his own purposes contrary to his master's orders. It is only where reasonable men may differ in regard to the facts that a case should go to the jury. If the facts are admitted or are susceptible of but one meaning, it becomes the duty of the judge to declare the law upon the admitted facts. Under the facts in this case, the motion for a directed verdict should have been granted. There was no dispute of fact to be submitted to the jury.

Judgment is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

SUBSIDIARY HIGH COURT OF ANCIENT ORDER OF FORESTERS v. PESTARINO et al. (Civ. 2811.)

(District Court of Appeal, First District, Division 1, California. June 24, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. INSURANCE §697 — FRATERNAL ASSOCIATIONS—"DISSOLUTION."

Under a fraternal association's constitution and by-laws, providing that local courts or lodges could not voluntarily surrender their charters except under certain conditions, and that upon dissolution all funds should be delivered to the permanent secretary, etc., held, that funds must be surrendered upon the voluntary disbanding of a court as well as upon its involuntary dissolution, since "dissolution" means surrendering the charter and disbanding.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dissolution.]

2. INSURANCE §697 — FRATERNAL ASSOCIATIONS—CONSTITUTION AND BY-LAWS.

The constitution and by-laws of a fraternal association constitute a contract between the parent order and a subsidiary court or lodge and the members thereof.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Subsidiary High Court of the Ancient Order of Foresters against A. Pestarino and others. Judgment for defendants, and plaintiff appeals. Reversed.

J. W. Sullivan and Geo. W. Waldorf, both of San José, for appellant.

H. A. Gabriel, of San José, for respondents.

NOURSE, Judge pro tem. The Corte Christoforo Colombo, No. 8229, A. O. F., was granted a charter by appellant in 1894, was

organized and continued to act as such until July 1, 1916, when, by unanimous vote of its members, it terminated its existence as a court of the Ancient Order of Foresters. It thereupon surrendered its charter and returned to appellant its books, regalia, and paraphernalia. The funds in its treasury were transferred to a corporation organized by members of the former court and designated "Corte Christoforo Colombo, No. 1, Universale Ordine dei Foresters." This corporation, however, has no connection with the Ancient Order of Foresters, and its organization was not sanctioned by that order. Demand was made by appellant upon the officers and members of the disbanded court for the payment of these funds into the sick and funeral fund of the High Court, and when this was not done the present action was commenced against the officers and members of the court No. 8229 and the new corporation for an accounting and the recovery of the moneys found to be held by defendants. Judgment went for defendants, and plaintiff brings this appeal.

Appellant relies upon the provisions of article 16, section 19, paragraph 5, of the constitution and by-laws of the order, which reads as follows:

"No court shall voluntarily surrender its charter so long as nine members in good standing object to its surrender, nor shall the funds of said court ever be divided among its members, but on its dissolution all funds, books and other property shall be immediately delivered to the permanent secretary and applied to the High Court sick and funeral fund."

This section was in full force and effect for several years before the court disbanded, and all of the officers and members of the court had theretofore promised and agreed to abide by its terms. Respondents now seek to evade the penalty of the section on the claim that they did not dissolve, but merely disbanded, and, having unanimous consent, could dispose of the funds of the court as they saw fit.

[1, 2] There are only two questions involved on the appeal which require consideration. First, whether the court was dissolved within the meaning of this section of the by-laws; and, second, whether, if so dissolved, the High Court is entitled to the funds remaining in the subsidiary court's treasury.

To dissolve means to disorganize; to break up; to separate. When applied to a fraternal order of this nature it means to surrender the charter; to disband. The section quoted prohibits the voluntary surrender of a charter so long as nine members in good standing object. Thus, if nine members do not object, a subordinate court may surrender its charter and thereby be-

come dissolved, disbanded, or disorganized. It is the voluntary surrender of the charter that the section quoted refers to, and it is such a voluntary dissolution that is contemplated in the latter part of the section which prohibits the distribution of the funds among the members of the court, and requires the delivery to the High Court of all funds, books, and other property.

Respondents contend that it is only in case of an involuntary dissolution that the funds of a subsidiary court are to be turned over to the High Court. But the opening words of the section refer to the voluntary surrender of the charter, and the word "dissolution" clearly relates back to the opening sentence. Again, the section requires the delivery of the "funds, books, and other property." Certainly it could not be seriously argued that upon a voluntary dissolution of a subsidiary court the members of the court could keep or deliver to persons outside the order any of the books, seals, or secret regalia of the order.

The purpose of the section seems clearly to be that these funds, books, and other property should be delivered to the High Court upon the dissolution of the subsidiary court, whether voluntary or involuntary.

This being so, the question remains whether, upon dissolution, the High Court is entitled to the funds remaining in the treasury of the subsidiary court. The constitution and by-laws of a fraternal order of this nature constitute a contract between the parent order and the subsidiary court and the members thereof. *Grand Grove v. Ducheln*, 105 Cal. 219, 224, 38 Pac. 947. The particular section involved in this appeal was subscribed to by the subsidiary court through its duly authorized representatives at the session of the High Court when the section was adopted. It thus became binding upon the subsidiary court and all of its members. Those who became members subsequent to its adoption subscribed to the by-laws and thereby became bound by the provisions of this section.

The dissolution was purely voluntary and made in view of the express terms of this section. There is therefore no question of taking property without due process of law. It is a case of forfeiture by contract. The funds were raised in full contemplation of every privilege and penalty of the constitution and by-laws of the order, and the penalty of forfeiture was effected by the voluntary act of the members of the subsidiary court.

Such being the case, the appellant is entitled to the funds, books, and other property of the subsidiary court; and the judgment is therefore reversed.

We concur: WASTE, P. J.; RICHARDS, J.

BEAZLEY v. EMBREE et al. (Civ. 2177.)

(District Court of Appeal, Second District, Division 1, California. June 23, 1919.)

1. VENUE \S 41 — CHANGE — RESIDENCE OF DEFENDANTS.

Where a personal action was brought in county where two material defendants resided, the trial court was justified in refusing to change place of trial to residence of third defendant.

2. VENDOR AND PURCHASER \S 214(6) — ASSIGNEE'S CONTRACT—ASSIGNEE'S LIABILITY.

Instrument by which purchasers transferred their interest in a land sale contract and assignee agreed to accept same did not impose a personal liability upon assignee to pay purchase-price installments, despite Civ. Code, \S 1589, providing that a voluntary acceptance of benefits involves an assumption of all obligations.

3. VENDOR AND PURCHASER \S 219—DEFECT IN TITLE—SUFFICIENCY OF EVIDENCE.

Evidence that plaintiff vendor had transferred a right of way across his property held insufficient to show that he would not be able to deliver such title as he had contracted to furnish.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by E. E. Beazley against O. H. Embree, Rachel M. Embree, and Philip L. Wilson. Judgment for plaintiff, and the last-named defendant appeals. Reversed.

A. W. Ashburn, of Los Angeles, for appellant.

E. E. Keech, of Santa Ana, and Head & Marks, of Fullerton, for respondents.

JAMES, J. Defendant Wilson appeals from a judgment entered in this action against him, and also from an order made prior to judgment, denying his application for a change of place of trial from the county of Orange to the county of Los Angeles.

This action was brought to recover the sum of \$1,000 and certain interest money alleged to be due from the defendants on account of conditions stated in a certain contract for the sale of realty. The real property was located in the county of Los Angeles. Plaintiff alleged that in 1911, as vendor, he made a contract for the sale of the real estate with the two defendants Embree as vendees; that in November, 1912, the vendees assigned their interest in the contract to the defendant Wilson, the assignment being in the following form:

"We hereby transfer all our right, title, and interest in this contract to Philip L. Wilson, and he agrees to accept the same. O. H. Embree, Rachel M. Embree, Philip L. Wilson."

This allegation followed:

"That at the time of receiving and accepting said transfer, all of the facts concerning said transaction were known to the defendant Philip L. Wilson, and he thereby consented to and assumed all of the obligations arising from it, and all of the obligations of the defendant O. H. Embree and Rachel M. Embree contained in said written agreement for purchase and sale."

In the contract of sale, copy of which was attached to the complaint, it was shown that the total purchase price of the property was to be the sum of \$8,000, which, after the first two payments of \$500 each, was to be paid in installments of \$1,000 annually, with interest. The plaintiff alleged that \$4,000 had been paid, but that the payment of \$1,000, due December 1, 1915, with interest, was unpaid. This action was brought February 16, 1916. It appeared without dispute in the evidence that defendant Wilson received the assignment of the Embrees immediately after the first two payments of \$500 each had been made, and that he took possession of the land and made the additional payments of \$3,000 and interest which in the complaint it was admitted had been credited on the account. In this action the Embrees were permitted to file a cross-complaint as against defendant Wilson, in which they alleged in general substance the same facts respecting the assumption by Wilson of their obligation under the contract, and prayed that they have judgment against Wilson for any amount for which the court might render judgment in favor of plaintiff against them, and that Wilson be declared the principal debtor. The court's judgment awarded nothing to defendants Embree, but did direct, in accordance with the prayer of the complaint, that judgment be against the three defendants, and "that execution first issue upon said judgment against the defendant Philip L. Wilson, and that upon a return of the same unsatisfied as to the whole or any part thereof, execution then issue against the defendants O. H. Embree and Rachel M. Embree for the balance then due."

[1] We think that the motion for change of place of trial was properly denied. The action was for the recovery of money upon the contract, and was not for foreclosure of a lien against the real property. Of the three defendants the two Embrees were residents of Orange county, and they were proper parties defendant, and from what will be said hereinafter it will appear that they are the real parties chargeable to the plaintiff under the contract. While at the time the notice was given for change of place of trial the two Embrees had not appeared in the action, they did appear before the motion was heard. The action being in form a personal one, and as two material defendants resided in the county where it was

brought, the court was justified in refusing to change the place of trial to the county of the residence of the third. *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8.

[2] The main contention of appellant as going to the merits of the case is that under the assignment of the contract as made, appellant assumed no personal liability to the vendor; hence there was no right of recovery of the judgment as made. By the terms of the written assignment it would appear that the Embrees assigned only their "right, title and interest" in the contract. No words appear in the instrument of assignment by which appellant agreed to assume the obligations of the Embrees. In other words, the assignment was a naked assignment and similar to that referred to in the case of *Lisenby v. Newton*, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203. In that case *Newton*, the vendee, under an executory contract for the sale of real estate, "assigned all his right, title, and interest in and to the contract, and the premises which were the subject thereof, to *Sharples*." In the opinion it is said that *Sharples* took possession of the land and made certain payments to the vendor of principal and interest on account of the purchase price. Default being made as to some of the payments, the vendor brought suit on the contract against the vendee and his assignee; the superior court holding, however, that the assignee was not liable to the vendor. *Lisenby*, as the administrator of the vendor's estate, prosecuted the appeal. In determining the case against the vendor's contention, the Supreme Court said:

"Of course, no assignee of the purchaser in an executory contract for the sale of real estate can require the vendor to convey unless the purchase money be paid, but this conditional right to a conveyance is quite a different thing from personal liability to compulsory payment at the suit of the vendor; such liability can result only from some express or implied contract of the assignee, and is not implied from the mere assignment of the original contract, although followed by possession of the land. * * * By the assignment from *Newton* to *Sharples* it may be that as between them *Sharples* became impliedly bound to protect his assignor against the demands of the vendor on the contract; * * * but that is no concern of the plaintiff; such an obligation (if it arose) did not spring from a contract expressly made for the vendor's benefit, and he cannot take advantage of it."

The case, to our minds, is not governed by the provisions of section 1589, Civil Code, which are that—

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

In *Canale v. Copello*, 137 Cal. 22, 69 Pac. 698, it is said that the provisions of that section apply only where the person accepting the benefit of the transaction is a party to it, citing *Stone v. Owens*, 105 Cal. 292, 38 Pac. 726. Even assuming that the section might be made to apply to a case where an assignee of a contract to convey real estate was sought to be charged, it would seem that it could only then apply where the executory contract had been fully performed on the part of the vendor, and the assignee had accepted the benefits thereof. Such appears to be the holding in *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 268, and *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979. These latter cases, for that reason, do not disturb the rule announced in *Lisenby v. Newton*, supra. In the case of *Jones et al. v. Allert et al.*, 161 Cal. 234, 118 Pac. 794, the assignee was held bound because it was the real party in interest; it was a corporation which had been organized expressly for the purpose of taking over the particular land described in the contract.

In the endeavor to show liability of appellant to the vendor on the contract, one of the vendees was allowed, over the objection of appellant, to testify as to what was discussed and understood at the time the assignment was made. In this connection respondent O. H. Embree testified as follows:

"When Wilson and I closed up our deal at the time of the assignment of the contract to him, he paid me what I had already paid Mr. Beazley on account of the contract, and I got back from Wilson whatever I had paid to Beazley. That was the payment to me of my equity. I had nothing to sell but my equity. I was selling the contract. At the time of the assignment I got from Mr. Wilson a little less than \$1,500 in money. When the assignment was indorsed on the contract my wife and I signed it, and Mr. Wilson signed it right there with us at that time, right there in the house. * * * The discussion was that he was to take the contract the same as I had—the thousand dollars a year, interest and taxes."

Conceding that this oral testimony was competent to enlarge the terms expressed in the written assignment, we do not think,

under the decisions cited, particularly under the language used in the concluding portion of the opinion in *Lisenby v. Newton*, supra, that any agreement was shown which would operate further than to create a liability against appellant in favor of his assignors. The case of *Lisenby v. Newton* was cited with approval in *Southern Pacific Co. v. Butterfield*, 39 Nev. 177, 154 Pac. 932. In the latter decision other cases are referred to holding to the same effect. Among these, and as very much in point on the general subject, is *Bimrose v. Matthews et al.*, 78 Wash. 32, 138 Pac. 319. See, also, *Ruling Case Law*, vol. 2, p. 625.

[3] We do not agree with appellant in the further point he makes, to wit, that the written instrument sued upon was a mere option; it contained terms which were appropriate to create reciprocal obligations. Neither do we agree with the contention that there could be in the case no judgment against either defendant because plaintiff had, prior to the making of the contract, created an incumbrance against the property which was not thereafter removed. In our opinion the evidence, which consisted only of the showing of the transfer of a right of way to the Standard Oil Company, was insufficient to warrant a conclusion that the plaintiff, upon proper tender and demand, would not be able to deliver such a title as he contracted to furnish. *Brimmer v. Salisbury et al.*, 167 Cal. 522, 140 Pac. 30.

That judgment of reversal should be entered on this appeal is evident from the conclusions which we have expressed. Plaintiff here was not without a remedy against this appellant, but that the remedy was to foreclose the interest of appellant upon default being made in the installment payment. However, he preferred to sue directly for money payments under the contract. Appellant had made no contract obligating himself to pay the plaintiff—no privity existed; hence no right to recover.

The order denying defendant's application for change of place of trial is affirmed.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

WILLIAMSON v. WILLIAMSON.
(Civ. 2847.)

(District Court of Appeal, Second District, Division 1, California. June 24, 1919. Rehearing Denied by Supreme Court Aug. 21, 1919.)

1. DEEDS \Leftrightarrow 195, 196(3) — CONVEYANCE BY HUSBAND TO WIFE—PRESUMPTION.

Under Civ. Code, §§ 158, 2224, 2231, 2235, conveyance by husband to wife, in view of their confidential relations, is presumed to be not only without sufficient consideration, but the result of undue influence.

2. APPEAL AND ERROR \Leftrightarrow 1011(1)—CONFLICTING EVIDENCE—PROVINCE OF COURT.

It was the province of the court to weigh and determine the value of the conflicting evidence.

3. DEEDS \Leftrightarrow 211(4)—CONVEYANCE TO WIFE—VALIDITY.

Evidence held to show that defendant husband, uninfluenced other than by a situation due to his own wrongful acts, and prompted by a desire to secure a dismissal of the action wherein his wife was declared entitled to a divorce, conveyed the property in question to her as her sole and separate estate.

4. TRIAL \Leftrightarrow 163 — MOTION FOR NONSUIT — SUFFICIENCY.

A motion for nonsuit should specify the ground upon which it is made.

5. JUDGMENT \Leftrightarrow 850—ADMISSIBILITY IN EVIDENCE—UNEXPIRED TIME FOR APPEAL.

Where the time for appeal had not expired, the judgment had not become final, and was properly excluded as incompetent.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Jessie Ray Williamson against Andrew Williamson. From judgment quieting plaintiff's title and from an order denying motion for new trial, defendant appeals. Affirmed.

Will D. Gould, of Los Angeles, for appellant.

Charles M. Ackerman, of Los Angeles, for respondent.

SHAW, J. Defendant appeals from a judgment quieting plaintiff's title to certain real estate described in the complaint, and from an order of court denying his motion for a new trial.

The errors complained of are: First, insufficiency of evidence to support the findings; second that the court erred in denying defendant's motion for a nonsuit made at the close of plaintiff's evidence; third, that the court erred in sustaining plaintiff's objection to the introduction in evidence of a judgment rendered by the superior court

of Los Angeles county in an action wherein each of the parties sought a decree of divorce against the other, in which action neither party obtained relief.

The conclusions of the court as to the facts are embodied in 14 findings, each and every one of which is attacked by appellant as being without support. The substance of the material findings made in response to the issues is that the parties, who were husband and wife, were living separate and apart from each other; that in an action brought by plaintiff against her husband for divorce an order of court was made on June 12th, granting her an interlocutory decree therein; that before the signing and entry of the decree defendant sought a reconciliation with plaintiff, who, in response to his overtures, had an interview with him wherein he expressed great remorse for his conduct and sought her forgiveness, promising that if she would return to him he would treat her with kindness and consideration, and as an atonement for his past misdeeds and as a guaranty of his future good conduct, he would give her the property in question; that the result of defendant's solicitations was a reconciliation between the parties. Upon stipulation the action was dismissed without the entry of the interlocutory decree, and defendant, voluntarily and in accordance with his suggestion, without any representations made or acts committed by plaintiff calculated to deceive or with the intention on the part of plaintiff to deceive, executed and delivered to plaintiff a grant deed to the property; that plaintiff returned to defendant's home, where she conducted herself as a good and faithful wife until some eight months afterward, when, in February, 1914, by reason of his harsh and cruel treatment of her, she, fearing for her safety and to protect herself from the cruel and inhuman treatment to which she was subjected by her husband, again left him and went home to her parents; that said property was conveyed to plaintiff by defendant as a gift and as her own separate estate, and free from any claim or interest therein of her said husband, and that it was not the intent of the parties that said property so conveyed to plaintiff by defendant should be held by her other than as her sole and separate estate; that when plaintiff returned to her husband she did so with the full intent of granting defendant condonation of his past acts, and stated to defendant that all she desired was his love and tenderness to herself and child, rather than any property that he might bestow upon her.

The allegation as to fraud made by defendant is that plaintiff sought the reconciliation with her husband and promised, in consideration of the execution of the deed, that she would resume marital relations with

him and faithfully keep her marriage vows and perform her duties as a wife and never again desert him without his knowledge and consent, and that defendant, believing she was acting in good faith, and relying upon her promises and representations so made to him, conveyed the property to her; that the promises so made were false and untrue, and so known to the plaintiff to be false and untrue, and made to mislead, deceive, and defraud him, and without any intention of performing the same as to all of which the court properly found adversely to defendant.

[1] At the time when defendant made the deed conveying the property to plaintiff the parties were husband and wife; hence, as declared in section 158, Civil Code, the transaction was subject to the general rules applicable to dealings in property between a trustee and his beneficiary. Among these rules are the following: All transactions entered into between a trustee and cestui que trust by which the former secures any benefit are presumed to be without sufficient consideration and under undue influence. Section 2235, Civ. Code. A trustee may not use the influence which his position gives him to obtain any advantage of the beneficiaries. Section 2231, Civ. Code. And if he does, it constitutes fraud for which a court of equity will grant relief. Section 2224, Civ. Code; *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957. By virtue of these provisions of the law the position of plaintiff at the time the conveyance was made to her must be deemed that of a trustee for her husband, and since she as a result of the transaction obtained title to the property from one whose relation to her was that of cestui que trust, the transfer is presumed, not only to have been made without sufficient consideration, but as a result of undue influence. It, therefore, devolved upon plaintiff, not only to show the execution of the grant, but also to produce evidence showing a sufficient consideration, and that it was not obtained by undue influence. As to these controverted issues, plaintiff's testimony, as to which in part there is corroboration, clearly tended to prove that after the interlocutory decree of divorce was ordered, defendant, on January 14th, anxiously sought her, begging that she return to him and resume relations with him as his wife, stating that they could have the decree of divorce annulled; in response to which she said: "No; you have hit me and kicked me and abused me, and I am afraid of you. You'd do it all again; it would be the same thing." He insisted that she give him another chance, saying: "I want to give you the property; it is for you, anyway, and the baby, and I don't want it. All I have got is for you and the baby, anyway, and I'll give it to you. Won't you come back?" to which she replied: "No, I won't come back; I am afraid to trust

you." He returned the following day, but, not seeing the plaintiff, he came back the next day and again interceded with her to return to him; and, upon plaintiff repeating her refusal to return to him, he left, but shortly again returned and repeated his promises to never abuse her again, nor curse nor strike nor kick her, and said, "Come on up town and I'll give you a deed to the property," to which plaintiff replied: "I don't want the property; I want to be happy. I can't be happy with you; you have caused me so much misery." Thereupon he induced plaintiff to join in a visit to a mutual friend, a Mrs. Pahl, for advice, but before reaching the house of this friend plaintiff refused to go further, whereupon defendant got down on his knees in the street and begged her to accompany him, to which entreaties she finally yielded. Mrs. Pahl assured her that if she would return, defendant would treat her right, and said to defendant: "One of the things that little girl has been afraid of, you always told her you were going to sell the property and take the baby and leave her stranded. Now, Mr. Williamson, to make the little girl secure and give her a home, why don't you deed her part of that property, * * * so that if you get on one of your tantrums and go off, she will have a shelter." Defendant replied: "Well, I'll do better than that; I'll give it all to her. I want to give it all to her." Plaintiff replied: "I don't want the property, Mrs. Pahl; I want happiness. I haven't been happy with him, and if I can live by myself with the boy and be happy, I would rather do it than go back and subject myself to any more trouble." Upon leaving, defendant said to Mrs. Pahl that he was going to give plaintiff a deed to the property, which deed he had drawn and executed, and gave it to plaintiff saying: "Here, wife, here's a gift. I want this as a proof of my sincerity, and that it is a pledge of my good future conduct to you; and I will always be kind and loving and true to you in the future." Plaintiff says she believed that he was sincere in what he said, and told him that she would forgive him, and a reconciliation took place. On the 17th of June, upon stipulation of the parties, the divorce action was dismissed, and plaintiff returned to the home of her husband, resuming marital relations with him, which continued until the following February, when, as shown by her testimony she was, on account of his mistreatment and abuse, compelled to leave him.

[2, 3] It was the province of the trial court to weigh and determine the value of the conflicting evidence. The testimony of plaintiff, the truth of which the court believed as against that of defendant, clearly tends to prove that he, uninfluenced other than by a situation due to his own wrongful acts, and prompted by a desire to secure a dismissal of the action wherein his wife was declar-

ed entitled to a divorce and have her return to him and being fully cognizant of the effect thereof, conveyed the property to her as her sole and separate estate. Whether deemed a gift or for a good consideration, the transfer is valid, and the transaction unaccompanied by undue influence exerted by the grantee.

[4] As to the second contention, appellant makes no argument in support thereof other than claiming that the transaction must be considered from the standpoint that the parties occupied confidential relations towards each other, from which, basing his argument upon the entire testimony adduced, he insists the wife was to take and hold the property as community property for the benefit of both. No reasons are pointed out showing that the court committed error in the ruling. Moreover, it is the settled rule that a motion for nonsuit should specify the grounds upon which it is made (*Daley v. Russ*, 86 Cal. 114, 24 Pac. 867); the reason therefor being that upon the defect being pointed out plaintiff might overcome the objection by additional evidence permitted by the court (*Warner v. Warner*, 144 Cal. 615, 78 Pac. 24). The motion was made "on the ground that they [the plaintiff] have failed to make out a prima facie case; and on the further ground that they have failed to make out such a case, if the case were tried before a jury, as would warrant them in returning a verdict for the plaintiff." There is nothing in this to indicate wherein the evidence was insufficient to make out a prima facie case, or wherein the grant deed from defendant to plaintiff, offered in evidence and her testimony in connection therewith, failed to show that she was entitled to the relief sought. If defendant's theory was that, it having been admitted that the parties were husband and wife, by reason of which fact, under section 158, Civil Code, there existed a confidential relation on account of which it devolved upon plaintiff, in addition to proving the execution and delivery of the deed, to also show that the act of the husband was not influenced by fraud or undue influence, then he should have so stated in his motion, in order that his opponent and the court might understand the ground thereof and thus, by specifically pointing out his objection, give his opponent an opportunity to introduce evidence to meet the same, subject to the ruling of the court upon an application so to do. *Warner v. Warner*, supra.

[5] The third alleged error is predicated upon the ruling of the court in not permitting the introduction of the judgment, unaccompanied by the judgment roll, in a second action brought by plaintiff against defendant for a divorce and wherein he also asked for a divorce and an adjudication of property rights. As to the subject-matter of the instant case, the judgment contained a finding "that by reason of lack of jurisdic-

tion in the premises, the court expressly withholds any order, judgment, or decree affecting the property mentioned in said defendant's cross-complaint, and leaves said parties to their appropriate action at law or otherwise for the settlement of any dispute between them as to said property." Hence, it appears that, in so far as the issues in this case are concerned, the judgment was immaterial. Moreover, it appears from the record that the time within which an appeal could have been taken from the judgment had not expired. As it had not become final, it was properly excluded as incompetent evidence.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

MAGUIRE et al. v. REARDON et al., Board of Public Works. (Civ. 2809.)

(District Court of Appeal, First District, Division 1, California. June 14, 1919. Rehearing Denied by Supreme Court Aug. 11, 1919.)

1. MUNICIPAL CORPORATIONS \S 628 — FIRE LIMITS—DESTRUCTION OF WOODEN BUILDING—NUISANCE—INJUNCTION.

Owner of wooden building constructed within fire limits of city in violation of San Francisco Ordinance No. 1198, passed pursuant to Charter of City and County of San Francisco, art. 2, c. 2, § 1, subd. 5, cannot restrain city from demolishing building under Building Law, Ordinance 4170, N. S., regardless of validity of latter ordinance, since such building constitutes a nuisance, and equity will refuse any relief designed to perpetuate its maintenance.

2. MUNICIPAL CORPORATIONS \S 626 — ORDINANCES — DISCRIMINATION — DEMOLISHING OF WOODEN BUILDINGS.

Building Law, Ordinance of City and County of San Francisco, No. 4170, N. S., authorizing board of public works to demolish wooden building within fire limits upon owner's failure to so do within specified period after notice, is not discriminatory in providing for the general demolishing and removal of wooden building, and not referring to building of other inflammatory material.

3. MUNICIPAL CORPORATIONS \S 120 — ORDINANCE—RETROACTIVE OPERATION.

Building Law of San Francisco, Ordinance No. 4170, N. S., providing for the demolition of wooden buildings within fire limits, by board of public works upon owner's failure to raise building within specified period after notice, is not retroactive with reference to building constructed in violation of Ordinance No. 1198, describing fire limits and prohibiting construction of wooden building therein.

4. CONSTITUTIONAL LAW \S 320—DUE PROCESS OF LAW — DEMOLITION OF WOODEN BUILDINGS.

Building Law of San Francisco, Ordinance No. 4170, N. S., providing for the demolition

of wooden buildings within fire limits by board of public works upon owner's failure to raze building within specified period after notice, does not deprive owner of building, erected in fire district in violation of Ordinance No. 1198, of any vested rights without due process of law.

5. MUNICIPAL CORPORATIONS ⇐628—ILLEGAL MAINTENANCE OF WOODEN BUILDING—RIGHTS OF TENANT.

Contracts made by owner of wooden building constructed within fire limits in violation of City and County of San Francisco Ordinance No. 1198, with tenants, must be deemed to have been made with knowledge that the building was illegally maintained, and subject to right of city to remove it at any time.

6. ESTOPPEL ⇐62(5) — MAINTENANCE OF WOODEN BUILDINGS IN FIRE LIMITS—DESTRUCTION BY CITY.

City was not estopped to destroy wooden building constructed and maintained within fire limits in violation of City and County of San Francisco Ordinance No. 1198, though building permit to construct building was issued by board of public works, the right to destroy building being an exercise of police power which cannot be bartered away.

7. MUNICIPAL CORPORATIONS ⇐593 — POLICE POWER—BARTER.

City's police power cannot be bartered away by express contract.

8. MUNICIPAL CORPORATIONS ⇐628 — POLICE POWER—REMOVAL OF WOODEN BUILDINGS IN FIRE LIMITS.

City's power to remove wooden buildings erected within fire limits is an exercise of the police power, since it immediately concerns the safety of persons and property.

9. MUNICIPAL CORPORATIONS ⇐192 — AUTHORITY OF BOARD OF SUPERVISORS—REMOVAL OF WOODEN BUILDING IN FIRE LIMITS.

Under City and County of San Francisco Charter, art. 2, c. 1, § 1, and article 6, c. 1, § 9, subd. 5, and article 9, c. 6, § 1, board of supervisors had power by adoption of ordinance, to confer upon board of public works full and complete authority to take and provide required steps to remove wooden building, constructed and maintained within fire limits in violation of Ordinance No. 1198.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Michael Maguire and others against Timothy A. Reardon and others, Board of Public Works of City and County of San Francisco. Judgment for defendants, and plaintiffs appeal. Affirmed.

Andrew G. Maguire and J. F. Riley, both of San Francisco, for appellants.

George Lull, City Atty., of San Francisco (Maurice T. Dooling, Jr., Asst. Dist. Atty., of San Francisco, of counsel), for respondents.

WASTE, P. J. Plaintiffs and appellants brought this action to enjoin respondents, the board of public works, and chief building inspector of the city and county of San Francisco from demolishing a certain wooden building erected and maintained within the fire limits of said city and county. The cause was submitted upon an agreed statement of facts, and this is an appeal from the judgment of the lower court denying the plaintiffs the relief asked for.

The building was erected in May, 1906, immediately following the great fire of that year, at a cost of \$12,000, and is a wooden building containing nine stores, producing a substantial rental, the tenants in the said nine stores using the same for lawful business purposes. At the time of its construction, by and with the consent of defendants, and under the written permit and supervision of the said board of public works, an oven was constructed and installed by the plaintiffs in said building, and as a part thereof at a cost of \$700. By its construction the oven became, and at the time of the filing of the complaint still was, a part of the building.

Acting under and by virtue of the authority and direction of an ordinance of the city and county of San Francisco, approved May 8, 1917 (Ord. No. 4170, N. S.), and known as the "Building Law," the board of public works adopted a resolution, directing plaintiffs to raze the buildings in question within five days of the date of the service of notice thereof. The adoption of this resolution was followed by notice served on plaintiffs, to the effect that the board would demolish and remove the buildings upon the failure of the plaintiffs to remove the same within five days of the date of the notification. Notice of the intention of the board of public works was also served on each of the tenants of the building. Application to the lower court for an injunction to prevent the board from carrying out its determination and the judgment of the lower court, refusing the same, followed.

The question thus clearly presented to this court for determination is whether or not wooden buildings, erected within the fire limits, may be summarily destroyed by duly authorized public officers of the municipality. Appellant maintains that the only ordinance in force covering the subject at the time of the erection of the building did not prohibit the erection of a one-story, wooden building such as the one in question, and that there is nothing in the charter of the city and county of San Francisco prohibiting such construction. These propositions must be determined adversely to the contention of the appellants.

The charter of the city and county of San Francisco now provides, and at all times mentioned in the agreed statement of facts

did provide, in subdivision 5 of section 1, chapter 2, article 2, as follows, to wit:

"Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the board of supervisors shall have power * * *

"5. To fix limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Pursuant to the power thus given by the charter, and long prior to the construction of the frame building herein referred to, the board of supervisors of the city and county of San Francisco duly and regularly adopted and enacted an ordinance, No. 1198. Said ordinance was approved on May 5, 1904, and was entitled: "Defining the fire limits of the city and county of San Francisco." This ordinance provides in section 1 thereof that "the fire limits shall be bounded by a line commencing, * * *" followed by an apt description of metes and bounds. The building in question here is situated within the described district. Section 2 of the ordinance provides a penalty for violating the provisions of the ordinance, but does not otherwise provide that wooden buildings or structures shall not be erected, placed, or maintained within the district described. The above provisions of the charter and this same ordinance were considered by this court in *Bancroft v. Goldberg, Bowen & Co.*, 16 Cal. App. Dec. 37, and it was there held that the effect of the ordinance and the charter provisions is to make the erection or maintenance of a wooden building within the fire limits, as defined in the ordinance, unlawful; that the function of the ordinance is to define the fire limits, and when these limits are thus defined the charter itself makes it unlawful to erect or maintain wooden buildings within such limits. The court said:

"No express prohibition in the ordinance is required. The charter makes the prohibition. * * * So when the board of supervisors adopted the ordinance defining the fire limits, it was exercising its power 'to fix the limits within which wooden buildings or structures shall not be erected, placed, or maintained.' It was thus unlawful to maintain the building in question upon the leased premises at the date of the lease and at all times subsequently."

The Supreme Court granted a rehearing in the above case and in *Bancroft v. Goldberg, Bowen & Co.*, 166 Cal. 416, 137 Pac. 18, sustained the decision of this court to the effect that the building there under consideration was erected in violation of the provisions of the building ordinance of the city and county of San Francisco.

The appellants argue that Ordinance No. 4170, N. S., under which the respondents, the board of public works, are proceeding to demolish this building is unconstitutional for

various reasons. The Supreme Court, in *Bancroft v. Goldberg, Bowen & Co.*, supra, further held that the ordinance, requiring the building which had been erected subsequently to April, 1906, in violation of the existing laws of the city and county, to be demolished or removed on or before a certain date, is a declaration of the policy of the board of supervisors that all temporary wooden buildings, erected in violation of law within the fire limits after the great conflagration of April 18, 1906, are a menace to the safety of the city, no longer finding any possible warrant in the necessities of the people, and that they constituted public nuisances which should be abated as soon as is reasonably possible.

[1] We see no distinction between the building under consideration in that case and the one which is the subject of this litigation. The building constitutes a public nuisance, and a court of equity will refuse any relief designed to perpetuate its maintenance, regardless of the validity of the ordinance. *Varney & Green v. Williams*, 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88. It would appear, therefore, that the appellants are not in position to attack said Ordinance No. 4170, for the reason that, having erected a wooden building in violation of law, and having continued in violation of law to maintain it to the present time, they cannot seek aid of a court of equity to maintain it. Civ. Code, § 3517.

[2] Assuming, however, that appellants might suggest the unconstitutionality of the ordinance, and for the reasons urged on this appeal, we are satisfied that there is no merit in any of the points made. The ordinance is not discriminatory in providing for the general demolition and removal of wooden buildings, and not referring to buildings of other inflammable material. *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830.

[3] The ordinance is not retroactive, for the building sought to be removed by the city was erected after the passage of the ordinance defining the fire limits. *Bancroft v. Goldberg, Bowen & Co.*, supra.

[4] The ordinance does not deprive appellants of any vested rights without due process of law. "In removing a building erected in violation of law * * * no private right is invaded, because none could grow out of the illegal act." *Baumgartner v. Hasty*, supra; *Brooklyn v. Furey*, 30 N. Y. Supp. 349. Such building erected in violation of an ordinance fixing the fire limits may be torn down and removed without any judicial proceeding whatever. *Eikenlaub v. City of St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; *Lemmon v. Guthrie Center*, 113 Iowa, 36, 84 N. W. 986, 86 Am. St. Rep. 361.

Appellants contend that because the city permitted them to erect a building, there was at least an implied contract upon its part that

they should be permitted to maintain it, including the right to enter into contracts with others for the use and enjoyment of it. This contention, like all the others made by the appellants, has been decided to the contrary.

"The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension.' Charter, c. II, § 5. So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits, the charter provision limiting their powers in this behalf. But they did not even purport to so do by ordinance, which even if there were no charter provisions would be essential to any change in existing ordinances on the subject. All that there was in this case in effect was the unofficial announcement of the municipal authorities that they would regard the law on the subject suspended for the time being, and would not attempt to enforce it, which was followed by the actual failure on the part of such authorities to enforce the same. The good faith both of the authorities and those erecting wooden buildings under the assurance thus given is not to be questioned in the slightest degree. It may freely be conceded that the emergency was such as to morally justify the authorities and those acting upon their assurance in doing as they did. But of course the law could not be changed in any such way. The ordinances on the subject continued in force unaffected by the unofficial announcement in the slightest degree, with the result that the construction of this building on this lot, which was expressly provided for in the lease, was 'contrary to an express provision of law,' and therefore 'not lawful' (Civ. Code, § 1667), on May 17, 1906, and at all times thenceforth. We regard this proposition as so elementary in its nature as to require no citation of authority to uphold it. Certainly no case cited by learned counsel for plaintiff tends to support a contrary law." *Howell v. City of Hamburg Co.*, 165 Cal. 175, 131 Pac. 130.

[5-8] Any contracts made by the appellants with their tenants must be deemed to have been made with the knowledge that the building was illegally maintained, and subject to the right of the city to remove it at any time. The city was not estopped to destroy the building. The police power cannot be bartered away even by express contract; and the

power to remove a wooden building erected within the fire limits is an exercise of the police power of the first importance, since it immediately concerns the safety of persons and property. *Fire Dept. v. Atlas Co.*, 106 N. Y. 566, 13 N. E. 329; *Boston Beer Co. v. Mass.*, 97 U. S. 25, 24 L. Ed. 989, 992; *Union Cemetery Association v. Kansas City*, 252 Mo. 466, 161 S. W. 261.

Appellants' last contention is that the board of supervisors has no power to authorize the board of public works to demolish buildings. As before pointed out, the board of supervisors has power under the charter "to fix the limitations within which wooden buildings or structures may not be erected, placed or maintained," and to prohibit the same within such limitations.

"The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors * * * of the supervision of any and all building construction in the city and county." Charter, subd. 5, § 9, c. 1, art. 6.

"The chief engineer, assistant chief engineers, battalion chiefs and the fire marshal shall constitute a board of fire wardens, with power to inspect, and report to the board of public works, as to the safety of buildings and other structures within the city and county." Sec. 1, c. 6, art. 9, of the charter.

"All the legislative power of the city is by the charter vested in the board of supervisors. Article 2, c. 1, § 1. By virtue of this clause, the constitutional grant of the police powers of the state to the city goes directly to and vests in the board, which thereby becomes possessed of the right to exercise within the city limits the entire police power of the state subject only to the control of general laws." *Odd Fellows Cemetery Ass'n v. San Francisco*, 140 Cal. 226, 230, 231, 73 Pac. 987; *In re Montgomery*, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130.

[9] It seems but logical to conclude, therefore, that the board of supervisors had ample power, by the adoption of the ordinance, to confer upon the board of public works full and complete authority to take and provide the required steps to remove the building in question, and thereby abate the nuisance arising from its erection and maintenance contrary to law.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

ARTHUR v. FETTERMAN. (Civ. 2898.)

(District Court of Appeal, Second District, Division 2, California. July 2, 1919.)

APPEAL AND ERROR 6-766—BRIEFS—RECORDED.

For failure to comply with Code Civ. Proc. § 953c, and court rule 8 (176 Pac. ix), as to setting out in briefs portions of record desired to be called to court's attention, with index thereof, brief should be disregarded.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by L. J. Arthur against George O. Fetterman. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Appeal from order dismissed. Judgment affirmed.

H. H. Appel and F. E. Davis, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

THOMAS, J. This is an action brought by the plaintiff, L. J. Arthur, against the defendant, George C. Fetterman, to recover damages alleged to have been sustained by reason of certain alleged fraudulent representations, alleged by plaintiff to have been made in connection with an exchange of real properties between himself and defendant, and as fully set forth in the complaint.

The defendant, by his answer, makes admission as to certain allegations of the complaint, but for our present purposes suffice it to say that, so far as material here, with the said exceptions, all the material allegations of the complaint are denied. No demurrer was interposed. There was a trial by jury, and the verdict was in favor of the plaintiff for the sum of \$20,000. Motion for a new trial was made and denied. From the judgment and order denying his motion for a new trial, defendant appeals.

Appellant relies upon and urges the following five "points" for a reversal here, viz.: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in not granting defendant's motion for nonsuit; (3) that the evidence is insufficient to support the verdict; (4) that the plaintiff is not a party in interest; and (5) that the court erred in its instructions to the jury.

No purpose of value could, we think, be served by quoting from any of the pleadings, or in attempting any formidable discussion of the points presented or the principles involved; for, as we understand it, all these have already been abundantly covered by the decisions in this state. At the very begin-

ning of the trial before the jury, and after the plaintiff—who was the first witness—had been sworn and had answered one question, defendant interposed an objection to the introduction of any evidence on the ground:

"That the facts alleged in the complaint do not constitute a cause of action; * * * and upon the further ground, upon the facts alleged in the complaint, it appears that the plaintiff in the action is not entitled to any relief whatsoever, either in law or in equity."

The objection was overruled by the court. This ruling, we think, was proper, as we are of the opinion that against this objection—which, in legal contemplation and for all practical purposes, is the same thing as a general demurrer—the complaint is good.

The appeal here is under the alternative method. We do not think that the provisions of section 953c of the Code of Civil Procedure, or of rule 8 of this court (176 Pac. ix), are ambiguous. Still, we are constantly confronted with the condition presented by the record here, to wit, a failure to "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." It is true that in this case appellant has brought up in the record, and caused to be printed in the briefs, portions of the evidence, as well as his own construction of the evidence, etc.; and, in the instances where he has done so, we are given the page of the transcript where such quoted portions may be found. But for our present purposes we call attention to "point 5," referred to above, in this case. Here we are not given a single citation as to line or page where the alleged erroneous instructions may be found. For the greater part of appellant's discussion of this point he simply states his conclusion as to what the court's instructions were; and in the few instances where there appeared what purported to be quotations from the instructions objected to, we are not given the help of even a citation to page, to say nothing of the lines on the page, where said "erroneous instructions" may be found.

The record in this case consists of 1,090 typewritten pages. From this it is obvious that ours was an arduous task to find within the record the portions objected to. A strict compliance with the statute and rule of court cited would bring this case within the rule laid down in *Welk v. Sorenson*, 178 Pac. 498. But notwithstanding this rule, adopted for the guidance of attorneys and to decrease the burden which we have voluntarily assumed in this case, we have gone through and have read the entire voluminous record here. We have therefore considered every point raised by appellant, and find in the record nothing to justify our supporting the position taken by him here.

The appeal from the order denying defendant's motion for a new trial is dismissed, and the judgment is affirmed.

We concur: FINLAYSON, P.J.; SLOANE, J.

SCALES v. HOLJE. (Civ. 2753.)

(District Court of Appeal, First District, Division 2, California. June 25, 1919. Rehearing Denied by Supreme Court Aug. 21, 1919.)

1. BANKRUPTCY — 185 — TRUSTEE IN BANKRUPTCY — FRAUDULENT TRANSFERS — RIGHT TO AVOID.

As to fraudulent or avoidable transfers by bankrupt, antedating the four-month period prior to bankruptcy, the trustee in bankruptcy is in no better legal position than the creditors whom he represents; his right to avoid the transfer being merely that of the creditor's common-law right.

2. BANKRUPTCY — 152 — PROPERTY NOT IN CUSTODY OF COURT — STATUS OF TRUSTEE — JUDGMENT CREDITOR.

Status of trustee in bankruptcy as judgment creditor as to property not in custody of the bankruptcy court, under Bankruptcy Act July 1, 1898, § 47a, cl. 2, as amended by Act Cong. June 25, 1910, § 8 (U. S. Comp. St. § 9631), attaches upon date of filing of petition in bankruptcy.

3. BANKRUPTCY — 303(1) — FRAUDULENT TRANSFERS OF ASSETS — AVOIDANCE BY TRUSTEE — PROOF.

Under Civ. Code, §§ 3431, 3439, 3442, trustee in bankruptcy cannot recover assets of corporation transferred by sole stockholder more than four months before bankruptcy, in absence of proof of fraud or a fraudulent conspiracy between stockholders and transferee, or of insolvency, or contemplated insolvency, at time of transfer, or that there were creditors of the corporation at such time.

4. CORPORATIONS — 240(1) — LIABILITY OF STOCKHOLDER — RIGHTS OF CREDITORS — TRANSFER OF ASSETS — RIGHT TO COMPLAIN.

Where sole stockholder drew checks on corporation payable to his personal creditor, only such creditors of the corporation as were creditors at time of transaction may complain; each payment being a separate transaction of which only such creditors as were creditors at the particular time thereof may complain.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by H. H. Scales, as trustee of the R. B. Moore Mill & Lumber Co., bankrupt, against Elizabeth M. Holje, as executrix of the last will and testament and estate of Martin Holje, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

James S. Spilman, of San Francisco, for appellant.

Wm. H. H. Hart and T. John Butler, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for the plaintiff for \$13,053.63. Plaintiff sues as trustee in bankruptcy of the R. B. Moore Mill & Lumber Company to recover the aggregate amount of 42 checks, drawn by R. B. Moore as president of the Moore Mill & Lumber Company and given by him to Martin Holje, defendant's testator, in payment of a personal indebtedness of Moore to Holje. The complaint is in two counts, one count for money had and received, and the other to recover the same funds as having been paid out of the corporation's treasury in fraud of creditors while it was insolvent and as the result of a conspiracy between Moore and Holje. The facts of the case are briefly: In November, 1906, Moore Mill & Lumber Company was organized, with a capital stock of \$100,000, divided into 1,000 shares of \$100 each. Three hundred thirty-three and one-third shares each were issued to Moore and Holje. At no time during the life of the corporation were there any other stockholders, except "dummy" directors holding one share each, for which they paid no consideration. On February 9, 1909, Moore individually purchased at par from Holje all of the shares owned by Holje, and for said shares Moore gave Holje his promissory note for \$33,333.33, secured by a pledge of shares then purchased by Moore. Thereafter Moore made payments on account of interest on said note by checks drawn on an account in the name of Moore Mill & Lumber Company. The first of these checks was dated April 29, 1909, and the last was dated October 1, 1913. The principal of the note given by Moore to Holje has never been paid in whole or in part. Holje died on January 16, 1914, and Moore died in the spring of 1914. In June, 1914, Moore Mill & Lumber Company was adjudicated a bankrupt and the plaintiff was appointed trustee in bankruptcy. In October, 1914, plaintiff, as trustee, presented to defendant a creditor's claim for the amount of the checks that had been paid to Holje. The claim was rejected by the executrix, and this action was brought.

[1-3] The plaintiff as trustee in bankruptcy is in no better legal position than the creditors whom he represents. There is no claim made that any of the money was paid to Holje within four months of the bankruptcy. "When * * * the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditor's common-law

right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided he may avoid. Such as no creditor could have avoided he cannot avoid." In re Gray, 47 App. Div. 554, 62 N. Y. Supp. 618, 3 Am. Bankr. Rep. 647. The Bankruptcy Act, as amended in 1910 (Act Cong. July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. § 9631]), provides that as to all property not in the custody of the bankruptcy court the trustee in bankruptcy shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. The time at which the trustee assumes such status is the date of the filing of the petition in bankruptcy—in this case June 11, 1914. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. The rights incident to such status are to be tested by the law of this state. In re Mullen (D. C.) 101 Fed. 413. The law of this state is that "in the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract." Section 3431, Civ. Code. Section 3439, Civil Code, provides that—

"Every transfer of property, * * * with intent to delay or defraud any creditor or other person, * * * is void against all creditors of the debtor. * * *

Section 3442, Civil Code, provides that no transfer or charge shall "be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or incumbrance of property made or given voluntarily, * * * by a party while insolvent or in contemplation of insolvency, shall be fraudulent and void as to existing creditors." By the second count of his complaint, the plaintiff seeks to state a cause of action under these two last-mentioned sections of the Code. He alleges a fraudulent conspiracy upon the part of Moore and Holje to defraud creditors of the corporation, and also alleges that the corporation was insolvent at the times the payments were made. But there is no evidence or finding regarding a fraudulent conspiracy and no finding as to fraud upon the part of Moore or Holje, nor of insolvency of the corporation, nor of contemplated insolvency at the time when the checks, or any of them were issued, nor that there were existing creditors at the times of the payments. There is a failure of proof of sufficient facts to support the second count of the complaint.

[4] The judgment must be supported then, if at all, upon the count for money had and received for the use of the corporation upon the theory that the payment of the personal

indebtedness of Moore was an improper application of corporate funds. It appears from the admitted facts that there were no stockholders except Moore interested in the corporation during the period when the checks were issued. It was what has been called a "one-man corporation." It has been repeatedly held that in such a case, the sole owner may do what he will with the assets and credit of the corporation and no one but creditors may complain. *First Nat. Bank v. Winchester*, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904; *Schilling & Schneider Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67. The matter has been considered by our own Supreme Court in the case of *Sargent v. Palace Café Co.*, 175 Cal. 737, 167 Pac. 146, which holds that a corporation may execute its note for the personal indebtedness of its sole stockholder, and no one but the creditors of the corporation may complain. And this brings us to a consideration of the question of what creditors of a corporation may complain. We think that only such creditors may complain as were creditors of the corporation at the time of the transaction of which complaint is made. It is said, in *Clark and Marshall on Private Corporations*, vol. 3, § 777c, that it is a well-settled rule of law that if an individual without any intent to defraud creditors, disposes of his property for an adequate consideration, or without any consideration at all, subsequent creditors cannot reach the property. They are not injured, for they have given credit to the debtor in the status which he had after the conveyance was made. This rule applies to creditors of a corporation, as well as to creditors of a natural person. The assets of a corporation are not held in trust for the benefit of its creditors in any such sense as to entitle a creditor to attack as fraudulent a voluntary conveyance made by the corporation before he became a creditor. *Graham v. Railroad Co.*, 102 U. S. 148, 153, 26 L. Ed. 106.

There is no evidence in the record that there were any creditors of the corporation at the various times that these checks were given.

There is no finding directly upon this point. The court did find that—

"The creditors of R. B. Moore Mill & Lumber Company were not given notice of the said transaction of February 9, 1909, and had no knowledge of the execution of said promissory note. * * *

The only evidence to sustain this is the evidence of former office employes of the corporation who testified that so far as they knew no notice was given to creditors of the transactions complained of. There is no evidence whatever as to who the creditors were at that time, or of the amount of their claims, or, in fact, that there were any creditors at all. The only pretense of evidence

upon the subject is the implication in the testimony of the office employes to the effect that there were some creditors of the corporation who might have been notified. There is nothing whatever in the testimony to indicate that the creditors at the time the checks were issued, if any there were, are the same creditors represented by the trustee. The mere general implication in the testimony and the findings that there were some creditors at the time the note was executed and the checks issued is not sufficient, for as such creditors could only recover the amount they had been injured, i. e., the amount of their respective claims, and as only such creditors could recover as were creditors at the time of the payments to Holje, specific findings upon these various matters are necessary to a proper judgment. Each payment to Holje was a separate and distinct transaction; only such creditors as were injured by the individual transactions may recover upon the theory of the case relied upon in the first count of the complaint.

As it is impossible for us to determine at this time which theory of the case plaintiff will attempt to sustain in the event of a retrial, we cannot determine the questions discussed as to which statute of limitation would be applicable and the admissibility of the counterclaim.

The judgment is reversed.

We concur: HAVEN, J., BRITTAIN, J.

Ex parte BRENNEN. (No. 2382.)

(Supreme Court of Nevada. Aug. 2, 1919.)

HUSBAND AND WIFE \Leftrightarrow 308 — DESERTION
— NONSUPPORT — PROSECUTION — VENUE.

Prosecution of husband for desertion and nonsupport of wife and child under Act Pa. March 13, 1903 (P. L. 26), need not be instituted at place of his residence, or county in which offense is alleged to have been committed, but may be instituted wherever relief may be needed; such statute, in view of section 2, and in view of Act April 13, 1867 (P. L. 78), to which it is supplementary, being remedial as well as penal, with purpose of affording relief to dependent wives and children.

In the matter of the application of William A. Brennen for a writ of habeas corpus. Petitioner directed to surrender himself to sheriff.

Wm. McKnight, of Carson City, Moore & McIntosh, of Reno, and Edna Covert Plummer, of Eureka, for petitioner.

L. B. Fowler, Atty. Gen., and Robert Richards, Deputy Atty. Gen., for respondent.

DUCKER, J. This is an original proceeding in habeas corpus. The return to the writ shows that petitioner was held in custody of the relators, Joseph Stern, sheriff of Ormsby county, state of Nevada, and A. M. Gorman, as agent of the state of Pennsylvania, under a warrant of arrest issued by the authority of the Governor of Nevada pursuant to a requisition from the Governor of the state of Pennsylvania, demanding the extradition of the petitioner as a fugitive from justice.

The crime charged is desertion and failure to support wife and child, alleged to have been committed by petitioner in the county of Clearfield, state of Pennsylvania, on or about the 1st day of July, 1917.

Upon the issuance of the writ petitioner was admitted to bail by this court.

It is conceded that the indictment found in said Clearfield county substantially charges an offense under the laws of Pennsylvania, and that petitioner was in that state at the time alleged. The evidence adduced upon the hearing of the return to the writ in this court was taken by deposition under stipulation, and petitioner testified in his own behalf at the hearing. He asserts that the evidence shows that he was never a resident of Clearfield county, but, on the contrary, shows that he was a resident of and domiciled in Jefferson county, and when the actual separation from his wife occurred he was residing in Indiana county, Pa. He insists, therefore, that as a matter of law the court of Clearfield county has no jurisdiction of the offense charged, and that he is entitled to his release. This is the sole question for determination.

We think the jurisdiction of the court of Clearfield county, under the laws of the state of Pennsylvania, to try petitioner for the offense charged and render judgment, does not rest upon ground of his residence or home in that county, but upon the fact that he was in that state at the time the offense is alleged to have been committed by him.

Petitioner was indicted in Clearfield county under a statute of the state of Pennsylvania which provides:

"If any husband or father, being within the limits of this commonwealth, shall hereafter separate himself from his wife or from his children, or from wife and children, without reasonable cause, and shall willfully neglect to maintain his wife or children, such wife or children being destitute, or being dependent wholly or in part on their earnings for adequate support, he shall be guilty of a misdemeanor; and on conviction thereof be sentenced to imprisonment not exceeding one year, and to pay a fine not exceeding \$100, or either, or both, at the discretion of the court; such fine, if any, to be paid or applied in whole or in part to the wife or children, as the court may direct." Act of March 13, 1903, P. L. 26.

This enactment is clearly supplementary to an act of the Legislature of the state of Pennsylvania passed in 1867 (P. L. 1867, p. 78), and was so considered by this court in *Ex parte Hose*, 34 Nev. 87, 116 Pac. 417. The act of 1867 provides:

"If any husband, or father, being within the limits of this commonwealth, has, or hereafter shall, separate himself from his wife, or from his children, or from wife and children, without reasonable cause, or shall neglect to maintain his wife, or children, it shall be lawful for any alderman, justice of the peace, or magistrate, of this commonwealth, upon information made before him under oath, or affirmation, by his wife, or children, or either of them, or by any other person, or persons, to issue his warrant to the sheriff, or to any constable, for the arrest of the person against whom the information shall be made, as aforesaid, and bind him over, with one sufficient surety, to appear at the next court of quarter sessions, there to answer said charge of desertion."

In subsequent sections of this act provisions are made authorizing the court of quarter sessions to make proper orders compelling the person against whom complaint is made to pay such sums as the court may deem reasonable and proper for the support of the wife and children, or either, and to commit him to prison until he comply with such order or give security therefor. It has been decided by the courts of last resort in Pennsylvania, construing the act of 1867, that any court of quarter sessions within the commonwealth has jurisdiction to try a person complained of under this act, without reference to where the original desertion may have been. *Barnes v. Commonwealth*, 2 Pennypacker (Pa.) 506; *Demott v. Commonwealth*, 64 Pa. 302; *Commonwealth v. Tragle*, 4 Pa. Super. Ct. 159.

Aside from its penal nature and the combination of the acts of desertion and failure to provide into one offense, the later act is a virtual re-enactment of the earlier act.

While there is no decision of the courts of Pennsylvania construing the act of 1903 as to the proper venue of an action instituted under it, still an examination of the two acts leads us to the conclusion that there was no intention in the later act to restrict the jurisdiction of the courts with reference to the residence of the offender within the state.

The purpose of the act of 1867 is not to punish criminals, but to relieve dependent wives and children by providing for their maintenance. *Commonwealth v. Tragle*, supra. But it is equally certain that while the act of 1903 makes desertion and nonsupport a misdemeanor and punishable, its purpose is also to relieve dependent wives and children by providing for their maintenance, both independently of the act of 1867, and in aid thereof.

This is apparent from that part of section 2 of the act of 1903 which provides:

"That upon conviction, the court may suspend sentence, upon and during compliance by the defendant with any order for support thereafter made against him, as already made or as may thereafter be modified, in the manner now provided by law; and if no such order shall have been made, then the court trying the defendant may make such order for the support by the defendant of his wife and children, or either of them, which order shall be subject to modification by the court on cause shown, and may suspend sentence, upon and during the compliance by defendant with such order then made or as thereafter modified and entry of bond by defendant, with surety approved by the court, conditioned on compliance with such order."

Provision is also made in this act empowering the court to order any fine that may be levied to be applied in whole or in part to the maintenance of the wife or children of the delinquent. It is plain that the act of 1903 was intended by the Legislature of Pennsylvania to be supplementary to the act of 1867 in its purpose, and to furnish an additional remedy for dependent wives and children against delinquent husbands and fathers by invoking the strong arm of the criminal law in their behalf. Such being its scope and purpose as revealed by the entire structure of the act, it would contravene the plain spirit of the statute to assume that the Legislature intended it to be less effective in its purpose than the act of 1867 by restricting the venue to the residence of the offending husband or father.

The statute of 1903 is both penal and remedial, and in our judgment constitutes an exception to the general rule of criminal procedure that the venue must be laid in the county where the offense is alleged to have been committed.

Counsel for petitioner cite the opinion of this court in the case of *In re Roberson*, 38 Nev. 326, 149 Pac. 182, L. R. A. 1915E, 691, and insist that it is ruling on the question of jurisdiction here presented. It is a sufficient answer to this contention to state that in that case the petitioner was indicted under a statute of the state of North Carolina substantially different in its structure and purpose from the statute before us in this case. The statute of the state of North Carolina, and which is a section of the Criminal Code, provides:

"If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor." Code, § 970.

The part of the opinion in which the jurisdictional power of the court of one county

to control the trial of a case where the desertion takes place in another county of the state is discussed in the case of *In re Roberson* is based upon a decision of the superior court of North Carolina holding that under the laws of that state the superior court of one county has no jurisdiction of criminal offenses committed in another county, and also rests upon the decisions of the courts of other states upon statutes different from the statute under consideration here.

Moreover, it appears that it was unnecessary to determine this question in the case of *In re Roberson*, for the reason that the court held that the petitioner was not within the state of North Carolina when he formed the intention to abandon his wife, and was therefore not a fugitive from justice subject to interstate extradition.

In *re Roberson* is not ruling in the case at bar. There are few questions more uncertain in the whole scope of the law than the question of fact as to the proper venue in cases of abandonment of wife and children. The books reveal a long and melancholy train of instances where justice has been defeated by misplaced venue, due to the transitory nature of the husband's abode, or to his action in causing his wife to live in places apart from his own residence. We are therefore not indulging an unfair inference to believe that the Legislature of the state of Pennsylvania was probably moved by these considerations, in the enactment of the statutes of 1867 and 1903, to give the courts of that state jurisdiction in this class of cases without reference to the residence or domicile of the parties within the state. The power of the Legislature to do this, in the absence of constitutional restrictions, is unquestioned.

The wisdom of the Legislature is apparent in this particular case. It appears from the evidence that the petitioner and his wife were married in Clearfield county, the home of the wife; that they went from there to Armstrong county and thence into Jefferson county, from whence, at the direction of petitioner, the wife returned to live in Clearfield county. He then moved into Indiana county, and finally went from that county to Eureka, Nev. It also satisfactorily appears that before leaving Pennsylvania he visited her at Clearfield county on several occasions, and they stopped together at a hotel in that county and cohabited as husband and wife. Having directed her to go into Clearfield county, and cohabiting with her there, it may be justly remarked, as was said in *Commonwealth v. Tragle*, *supra*, under a similar state of facts, that his argument here against the jurisdiction of the court of that county comes with bad grace, and well illustrates the wisdom of the statute in allowing the

proceedings to be instituted wherever the relief may be needed.

It is ordered that petitioner forthwith surrender himself to the sheriff of Ormsby county, state of Nevada, to be delivered into the custody of the duly appointed agent of the state of Pennsylvania for return to that state, and that upon compliance with this order his bail may be exonerated.

COLEMAN, C. J., and SANDERS, J., concur.

**DIXON v. SECOND JUDICIAL DIST.
COURT IN AND FOR WASHOE
COUNTY. (No. 2370.)**

(Supreme Court of Nevada. Aug. 2, 1919.)

1. CERTIORARI \S 60—DILIGENCE IN PROCURING RECORD.

Though Rev. Laws, § 5686, requires clerk of court to return transcript with writ of certiorari where writ is directed to the court, prosecutor of writ is required to use due diligence in having complete record made out, and on his failure to so do proceedings will be dismissed.

2. CERTIORARI \S 60—DILIGENCE BY PETITIONER—DISMISSAL OF PROCEEDINGS.

In certiorari proceedings in Supreme Court against lower court, where clerk refused to annex transcript to writ because of petitioner's failure to pay fees, court will not dismiss proceedings on ground that petitioner failed to exercise due diligence in having record made out, where petitioner acted in good faith, believing that his duty ended upon issuance of writ, and that it was then Supreme Court's duty to require lower court and clerk to return writ with transcript under Rev. Laws, §§ 5686, 5687.

3. CERTIORARI \S 43—TRANSCRIPT—COSTS.

Clerk of court is not required under Rev. Laws, § 5686, to annex transcript in returning writ of certiorari directed to the court, unless petitioner in serving writ upon clerk pays the fees prescribed by law for the making of the transcript.

4. CERTIORARI \S 1—NATURE OF PROCEEDINGS.

Proceedings on certiorari are of appellate nature, though not pursued in ordinary and technical form of appeal.

Original proceedings in certiorari by J. B. Dixon against the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. Petitioner's application for process compelling the making and certification of the transcript required without the payment of legal fees to clerk denied.

J. B. Dixon, of Reno, for petitioner.

Anthony M. Turano, of Reno, for respondent.

SANDERS, J. A writ of certiorari issued out of this court, directed to the Second judicial district court of the state of Nevada, in and for the county of Washoe, upon the verified petition, duly filed herein, of J. B. Dixon, the petitioner, commanding said district court to certify and annex to the said writ a transcript of the record and proceedings in that certain action therein pending, wherein Miller & Mashburn are plaintiffs, and J. B. Dixon is defendant, and to desist from further proceedings in said action until the further order of this court.

E. H. Beemer, the clerk of the respondent court, being the officer upon whom the law imposes the duty to return with the writ, the transcript required (section 5686, Rev. Laws), in response to the writ, filed his affidavit, from which it appears that at the time the petitioner served upon affiant the said writ he demanded of the petitioner certain fees prescribed by law for making the transcript; that the petitioner declined and refused to pay any fees, and for that reason alone the affiant states he did not return with the writ the transcript required. There is also appended to the writ the affidavit of Thomas F. Moran, judge of the respondent court, stating that he directed E. H. Beemer, the clerk of his court, to comply with the provisions of said writ upon the prepayment by the petitioner of the fees prescribed by law for making and certifying the transcript required. Thereafter, upon the application of the petitioner, supported by his affidavit setting forth the steps taken by him to have a full and complete return made to the writ, this court made an order, directed to the respondent court, to show cause, on a day certain, why the writ should not be returned as directed. The respondent has not complied with the order to show cause, but it appears that E. H. Beemer, clerk, on the day fixed for the return of the order to show cause, filed a supplemental affidavit, stating therein that the petitioner had refused, and continues to refuse, to pay the fees which he, the said clerk, claims he was compelled by law to charge and collect for the performance of the service required. Prior to the issuance of the said show cause order, the respondent and the plaintiffs in the action filed a motion to dismiss the writ, upon the ground that the petitioner had not used due diligence in having a transcript of the proceeding sought to be reviewed made out and returned with the writ.

[1] The statute requires that, when a writ of certiorari is directed to a tribunal, the clerk, if there be one, shall return the writ with the transcript required. Section 5686,

Rev. Laws. Such officer may be compelled summarily to make a return, yet it is incumbent upon the prosecutor of the writ to use due diligence in having a complete record made out, and that his proceeding will be dismissed if he fails to use due diligence in the prosecution thereof. *I. X. L. Lime Co. v. Superior Court*, 143 Cal. 170, 76 Pac. 973.

[2] We think the record shows satisfactorily that the petitioner in good faith was of the opinion that his duty ended when the writ issued, and that it then became a matter for this court to see that the respondent and the said clerk performed the express and unconditional duty enjoined upon them by the statute. Sections 5686, 5687, Rev. Laws. We therefore decline to dismiss the writ upon the grounds stated in the motion.

On the other theory of the case, it is the contention of the petitioner that the affidavits annexed to the writ are no answer to the writ, and that the respondent court, through its clerk, should be compelled by an order of this court to make return of the writ as required by law without prepayment of official fees or any charge demanded of him by the clerk for making the transcript required.

[3] The frequency of applications to this court to hear and correct all sorts of grievances held against inferior courts in the trial of civil actions through the instrumentality of extraordinary writs has grown burdensome. We now are asked to declare that on certiorari official fees for necessary services to be performed in connection with the remedy are entirely dispensed with, from the fact that the statute is silent as to the matter of fees, and to hold that the party invoking the remedy is exempt from the payment of fees for such services as must be performed in order that the record to be reviewed may be placed before the reviewing tribunal. We are of the opinion that a proceeding on certiorari occupies no different position in the system of remedies as provided by law in the matter of official fees from that of any other civil proceeding. Certiorari is designed for the benefit of the party or parties in interest in having the record of the action reviewed. By invoking the remedy such persons seek to maintain a private right or privilege in which the state, the county, the people, or their officials have no interest. Our Legislature has seen fit to provide for and to establish by general and special laws a system of fixed fees to be charged and collected by salaried officials for their services, and such officials are held accountable for their refusal or neglect to charge and collect such fees except where they are waived by statute. These fees are the property of the state, county or municipality, as the case may be, and must be paid into the public treasury. No reason is apparent why the charges imposed by law for the services of

state and county officers, rendered for the benefit of private parties on certiorari, should be waived, or such party be exempt from their prepayment. Had such been the intention of the Legislature, it should have been so expressed, and not left to favor. The fact that a court is the only real party respondent does not call for any different conclusion. Such court is not a party defendant to the writ, and is in no sense an adverse party to the action. It is not in accordance with our sense of "propriety or expediency" that a trial court acts under the peril of being charged with the prepayment of official fees if it errs in its judgment of the rules of law, and it would be unreasonable to say that to review an issue of law the party in interest is exempt from the payment of official fees because it is an issue of law that is to be reviewed.

[4] Proceedings upon certiorari are of appellate nature, though not pursued in ordinary and technical form of appeal (Peacock v. Leonard, 8 Nev. 250), and no cogent reason is suggested why a different rule as to costs should be applied.

The question here presented has been considered in all its phases in the case of *I. X. L. Lime Co. v. Superior Court*, supra. As the statute in California with reference to writs of certiorari is the same as that of ours, and as the case cited was decided upon identically the same state of facts and the same question involved, we adopt the reasoning of that decision and apply it to the case at bar. But the petitioner insists that case is not in point because of the proviso contained in section 2 of an act regulating the fees and compensation of the county clerk of Washoe county, wherein it is provided:

"That said clerk shall neither charge, nor collect any fees for services by him rendered to the state of Nevada or the county of Washoe, or any city or town within said * * * county, or any officer thereof, in his official capacity." Stats. 1917, c. 10.

It is argued that, as the respondent court is a part of the state government, and also a part of the government of Washoe county, the services to be performed by the clerk are for the benefit of said county. There is nothing in this contention.

We hold that the affidavits annexed to the writ show a legitimate excuse for the non-compliance with the writ, and that the application of the petitioner for process compelling the making and certification of the transcript required without the payment of legal fees of the clerk must be denied.

It is so ordered.

COLEMAN, C. J., and DUCKER, J., concur.

PERSHING COUNTY et al. v. SIXTH JUDICIAL DIST. COURT et al. STATE ex rel. PERSHING COUNTY v. EBERT et al. ODEN v. PETERSON et al. (Nos. 2396, 2397, 2401.)

(Supreme Court of Nevada. Aug. 6, 1919.)

1. APPEAL AND ERROR 830(1)—REHEARINGS.

Rehearings in the Supreme Court are not granted as a matter of right, and are not allowed for the purpose of reargument, unless there is reasonable probability that the court may have arrived at an erroneous conclusion.

2. COUNTIES 10 — CHANGE OF BOUNDARIES—CONSOLIDATION OR CREATION.

Unless a limitation exists in the Constitution, the power of the Legislature is absolute, by general or special statutes, to provide change of boundaries, division, addition, consolidation of existing counties, or the creation and organization of new counties.

3. CONSTITUTIONAL LAW 68(1)—DIVISION OR CREATION OF NEW COUNTY.

The whole matter of the division of counties and the creation of new ones is in its nature political, and not judicial, and belongs wholly to the legislative department of the government.

4. STATUTES 174, 175 — REFERENDUM — CONSTRUCTION.

In construing the referendum as applied to legislation for counties, the usual rules of construction are applicable; the thing to be sought being the thought expressed.

5. CONSTITUTIONAL LAW 92 — COUNTIES 2 — VESTED RIGHTS — BOUNDARIES OF COUNTIES—RIGHTS OF INHABITANTS.

The inhabitants of a county have no vested rights as far as the boundaries of the county or the extent of its territory are concerned, and the same may be changed without their consent.

On rehearing. Former opinion adhered to.

For former opinion, see 181 Pac. 960.

R. M. Hardy, of Lovelock, and Moore & McIntosh and Norcross, Thatcher & Woodburn, all of Reno, for petitioners.

Warren & Hawkins and Thomas A. Brandon, all of Winnemucca (Edward F. Treadwell, of San Francisco, Cal., of counsel), for respondents.

SANDERS, J. [1] Rehearings are not granted as a matter of right (Twaddle v. Winters, 29 Nev. 108, 85 Pac. 280, 89 Pac. 289), and are not allowed for the purpose of reargument, unless there is reasonable probability that the court may have arrived at an erroneous conclusion. State v. Woodbury, 17 Nev. 337, 30 Pac. 1006.

In this case we are satisfied that the opinion answers satisfactorily all the points raised in opposition to its conclusions, but, as some question of doubt is raised as to the extent to which the decision goes, we take the liberty of summarizing for the benefit of counsel what is actually decided:

First. A county is a political subdivision of a state, through which, for the most part, its sovereign powers are exercised.

Second. The law creating Pershing county out of a part of Humboldt county is, as a whole, constitutional.

Third. That the said law is not abridged, limited, or restricted by the initiative or referendum clause of our Constitution, and that the taking effect of the said law is not thereby suspended.

Fourth. That the completed law is not local, special, and municipal legislation within the meaning of the referendum clause of the Constitution that reserves to the qualified electors of a specified county the power to approve or reject at the polls legislation of every character in or for such specified county.

In arriving at these conclusions we applied long-established principles:

[2] First. Unless a limitation exists in the Constitution of a state, the power of the Legislature is absolute, by general or special statute, to provide the change of the boundaries, the division, addition, consolidation of existing counties, or the creation and organization of new counties. This doctrine finds its reason in the "essential nature of counties as political subdivisions of the state and as the creatures of its sovereign will."

[3] Second. The whole matter of the division of counties and the creation of new ones is in its nature political, and not judicial, and belongs wholly to the legislative department of the government. *Riverside Co. v. San Bernardino Co.*, 134 Cal. 520, 66 Pac. 788.

[4] Third. In construing the referendum as applied to legislation for counties, we applied the usual rules of construction applicable to the construction of laws enacted in the usual way, keeping in mind that "the thing to be sought is the thought expressed" (*State v. Doron*, 5 Nev. 399), and that it was the duty of this court, if possible, to give to the language of the measure such a construction as to make effective the reservation of power on the part of the people, and not to presume anything from its language that would negative the material inferences that may be drawn from "the people's law" (*McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145; *Hodges v. Dawdy*, 104 Ark. 583, 149 S. W. 656).

From the application of these principles and rules of construction we concluded that

the statute creating Pershing county out of the territory of Humboldt county was, as a whole, constitutional, and further held that such act was not of the class of legislation referred to and embraced by the referendum; hence the asserted right of the people of Humboldt county to veto the law creating Pershing county by their ballots became a political question, and this court was without authority to adjudge matters of this kind between the two counties.

Counsel insist that the broad and comprehensive language of the referendum reserves to the people of a county the right to determine whether the act creating a new out of the old should become operative. The principal argument so earnestly advanced in support of this proposition is that it is a "local law" within the meaning and contemplation of the provision of the referendum as applied to counties, and they further insist that the opinion so declared. We do not recede from the declaration that the law is "local" legislation, but not for Humboldt county within the meaning of the word "local" as used in the referendum. The act is "local" legislation, for the reason that a general law could not be made applicable to such cases. *Evans v. Job*, 8 Nev. 322.

"It is not denied that the Legislature has power to erect a county, that is, to define its territorial limits and boundaries by special act, and thereby to subdivide one or more old counties, because it is said such action is clearly a part of proper legislative power not prohibited, and no general law could in such case be made applicable." *State v. Irwin*, 5 Nev. 111.

[5] Neither do we recede from the declaration that the creation of a new county necessarily affects the territory out of which it is carved; but it does not follow that such a law affects the corporate existence of the old, its government, or its status as a political subdivision of the state. Neither does it destroy or impair its usefulness as a component part of the scheme of state government. It retains all its power, right, duties, and privileges, and remains subject to all its duties and obligations to the state, and is in no sense affected, injured, or damaged, except that its dominion and control is reduced to a less area of territory than that formerly occupied, to which its inhabitants, it is conceded, or must be conceded, have no vested right.

Neither do we recede from the declaration made in the opinion (though not material to the issue) that, if any one be entitled to vote on the proposition whether the completed act should become operative, it should be the people of Pershing county. On them especially rest the privileges, responsibilities, and burdens of the new county. *People v. Kennedy*, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914

C, 616. But counsel argue that this reasoning is illogical, because Pershing county at the time the officers of Humboldt county called an election had not been created. If this be so, then why do counsel importune us to protect the political rights of the people of Humboldt county to determine whether the law that created Pershing county should become operative? But they assert that, conceding it to be a completed law, it is a law for Humboldt county. If this be true, we apprehend that the people of Pershing county would be here protesting with equal earnestness and vigor against a judicial recognition of such a law.

We are impressed that the argument of the petitioner is but a play on words. The language of the referendum construes itself. "The thing to be sought is the thought expressed." The primary and culminating thought expressed in the referendum is to reserve to the people of a county the right of referendum of legislation of every character for a county; legislation for "each county of the state—that is, an established and existing county. Its language clearly shows that the people regarded counties and municipalities as being distinct and independent entities, each performing its duty in the scheme of government to the people it serves. The words "in or for" indicate two sources of legislation for the government of counties, that originating through a law-making body within the county, and that originating in a law-making body without the county. *Rose v. Port of Portland*, 82 Or. 541, 162 Pac. 498.

The word "for" defines and limits the character of such legislation, whether it emanates from within or without the county. Clearly it must in either case be legislation "for" the county; that is, "with respect to," with "regard to," legislation for its government and exercise. This limitation of power furnishes a strong argument of its existence, and involves necessarily the exclusion of things not expressed. The people themselves having limited their power to affirm or reject legislation "for" a county, it is impossible for us to extend its meaning to include legislation of a strictly political nature and character that concerns the status of the county as a political subdivision of the state, through which the state, for the most part, exercises its governmental powers; legislation of an entirely different character from that of "local" legislation as used in the referendum. It is fair to presume that the people adopted this particular measure, in its limited form, with full knowledge of the inherent power of the state over its territory and the recognized mode and manner followed and pursued by the state with reference to the division and creation of counties from the date of its organization. It

is also not unfair to presume that the people adopted the referendum as it relates to counties with full knowledge that the framers of the Constitution did not delegate to the Legislature or to the counties of the state its inherent power in the matter of the divisions and creation of new counties, and that the Legislature derives its power and control over territory of the state, not through the organized law, but from the character and nature of our form of government.

In the absence of clear, explicit, and unmistakable language to show that the people reserved to themselves the power to divide counties and establish new ones, together with the power to veto such laws when duly enacted by the Legislature, we decline to announce a principle that would tend to undermine what we consider to be a power inherent in a state.

In the case of *Gibson v. Mason*, 5 Nev. 283, there is an exhaustive and able discussion of the sovereignty of the state as against the sovereignty of the people. It is therein announced that an act of the Legislature made dependent upon the people's votes or approval is utterly void. This doctrine has been superseded by the referendum clause of the Constitution. It is now held, and the law is so familiar as to render any review unnecessary, that the Legislature may delegate to municipalities and restricted localities the right to determine whether they will act under or take advantage of statutes pertaining to such subjects as municipal government and excise. *People v. Kennedy*, supra.

As stated in the opinion, we are not concerned with the wisdom or policy of the legislative act in question. The Legislature had the power to give to electors of the entire county of Humboldt the right of referendum. And the people themselves, when they adopted the initiative and referendum, had they so desired, could have reserved to themselves the option to adopt or reject legislation of the character here in question. But these are matters for the Legislature and the people to deal with, and not courts.

The petition for rehearing is denied.

DUCKER, J., concurs.

COLEMAN, C. J. (concurring). I concur in the opinion of Mr. Justice SANDERS. Two purposes were sought to be accomplished by the act attacked in these proceedings. The first was to create Pershing county, and the second to provide the necessary organization for the government thereof. Had an independent act been passed creating Pershing county, which might have been done,

as was held in *Leake v. Blasdel*, 6 Nev. 40, and leaving to a separate and distinct bill the providing for its government, I am unable to see how it could be contended that such an act creating Pershing county would be such "local, special and municipal legislation * * * in and for" Humboldt county as was contemplated by the constitutional amendment in question. In fact, the very argument made by counsel for respondent is inconsistent with any other conclusion. They insist that the act creating Pershing county is within itself a dismemberment of Humboldt county. How, then, can it be said on the other hand that it is an act "in and for" Humboldt county? Their argument is not only inconsistent with the conclusions they seek to have us arrive at, but shows conclusively the weakness of their position. There is a great difference between the creation of a new county and legislating for one already in existence, and such is the chief distinction between the case before us and the one contended for by counsel for Humboldt county. This being true, the mere fact that the act in question contains provisions creating Pershing county, and also provisions incident to the creation of that county and providing for the government thereof, does not change the situation in the least.

HILTON v. SECOND JUDICIAL DISTRICT COURT IN AND FOR WASHOE COUNTY et al. (No. 2387.)*

(Supreme Court of Nevada. July 31, 1919.)

1. PLEADING §148 — CROSS-COMPLAINT — MATTERS ALLEGED IN COMPLAINT.

If an averment of marriage and residence are necessary and indispensable facts to be stated in a complaint for support and maintenance, they are equally so in a cross-complaint in a divorce action, regardless of the fact that the plaintiff has alleged that there was a marriage and that the parties resided in the state.

2. HUSBAND AND WIFE §285½ — SUPPORT AND MAINTENANCE.

A wife may maintain an action against her husband for support and maintenance without applying for divorce, under St. 1913, c. 97.

3. HUSBAND AND WIFE §297 — MAINTENANCE.

To entitle a wife to recover in an action under St. 1913, p. 120, for support and maintenance, without applying for divorce, it is incumbent upon her to make a showing of the marriage relation, her needs, and the ability of her husband, as in a suit for divorce.

4. HUSBAND AND WIFE §285½ — SUPPORT AND MAINTENANCE—STATUTE.

The object of St. 1913, c. 97, giving wife right of action against husband for support and

maintenance without applying for a divorce, is to give the wife a sure and speedy remedy through an independent action when she has any cause of action for divorce against her husband, or when he has deserted her for a period of ninety days, and, being remedial, must be liberally construed with a view to promote its object, the jurisdiction of the court being neither limited nor restricted.

5. HUSBAND AND WIFE §289 — SUPPORT AND MAINTENANCE—RESIDENCE.

The requirement as to residence in section 7 of St. 1913, c. 97, giving wife right of action against husband for support and maintenance without applying for a divorce, relates to the venue of the action and not to jurisdiction of the parties, and such residence need be such only that an ordinary action could be maintained by her according to the statute regulating the venue of civil action, so enlarged as to permit her to sue in the county where the husband may be found.

6. CERTIORARI §28(2) — GROUNDS — ERRORS.

A claim that a court erred in determining that a wife's cause of action for support and maintenance was brought within St. 1913, c. 97, was not a claim that the court exceeded its jurisdiction, so as to be reviewable on certiorari.

7. CERTIORARI §37, 46 — WHEN ISSUES — NECESSARY PARTIES.

In the exercise of its discretion the Supreme Court may issue, under Rev. Laws, § 5685, a writ of certiorari to review an action of a district court without notice to the adverse party, but the Supreme Court should not be asked, in such a proceeding, to annul a judgment granting support and maintenance to a wife, where the adverse party is not made a party to the application for the writ.

8. CERTIORARI §46 — ACTION OF COURT — DUTY TO AID APPELLATE COURT.

On certiorari to review the action of the district court, the latter should not place itself in the position of adverse party, as if it had some personal interest in sustaining its judgment, or throw obstacles in the way to prevent a review of its proceedings, as by failing to give notice to adverse party of proceedings.

Coleman, C. J., dissenting.

Application by Albert B. Hilton for certiorari to review an action of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and Thomas F. Moran, Judge thereof. Writ dismissed.

Platt & Sanford, of Carson City, for petitioner.

Norcross, Thatcher & Woodburn, of Reno, for respondent.

SANDERS, J. Upon the application of Albert B. Hilton, in the form of a verified petition, this court, without requiring notice of the application to be given the adverse party or an order to show cause, issued a writ of certiorari.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 8, 1919.

The facts in brief are as follows:

Albert B. Hilton commenced an action for an absolute divorce against his wife, Katherine C. Hilton, in the above-named respondent court, upon the grounds of cruelty and desertion. The defendant wife, after denying all the allegations of the complaint, except the averment of the residence of the plaintiff and the marriage relation of the parties, proceeded as follows: "For a further answer and defense and for a cross-complaint defendant alleges," and then proceeds to charge the plaintiff with specific acts of cruelty, in violation of his marital obligation, and that for a period of more than 12 months prior to the filing of her cross-complaint the plaintiff willfully and without cause and against the will of the defendant deserted the defendant, and that such desertion has ever since so willfully continued and is now continuing. It then goes on to state the plaintiff's ability, his spendthrift habits, and alleges that if the plaintiff is not compelled to make a reasonable settlement upon the defendant she will be left without adequate means of support, and particularly means of support in the way in which defendant has been accustomed, and concludes with the prayer that plaintiff take nothing by reason of his action for divorce; that defendant have a judgment and decree against plaintiff for her permanent support and maintenance, and other relief. Upon the trial of these issues before the court, and without objection to the pleadings on the part of either of the parties to their legal sufficiency, the court rendered its decree in favor of the defendant wife and against the plaintiff husband, and adjudged and ordered that he pay to the defendant, until the further order of the court, as and for her permanent support and maintenance, the sum of \$600 per month. No appeal was taken from this judgment and decree.

[1] The petitioner asks by this proceeding that the decree rendered against him be annulled, upon the ground that the court was without jurisdiction of the subject-matter and of the parties, in that the cross-complaint contains no averment of marriage or residence, or that the defendant was a resident within the county in which her cross-action was filed. Counsel for respondent, who are in fact attorneys for defendant, insist that as the defendant was brought within the jurisdiction of the court by the plaintiff's action for divorce, and having gone to trial upon the issues joined without objection to the pleading, he is in no position to complain or to say that the court was without jurisdiction of the subject-matter and of the parties. Ordinarily this is true, but if the averment of marriage and residence are necessary and indispensable facts to be stated in a complaint for support and maintenance, they are equally so in a cross-

complaint in a divorce action. The rule is elementary that a defendant claiming affirmative relief must plead as fully as if he were plaintiff. *Dixon v. Pruett*, 42 Nev. —, 177 Pac. 11; *Rose v. Treadway*, 4 Nev. 455, 97 Am. Dec. 546.

[2] Whatever be the rule, in the absence of a statute, district courts are, by statute in this state, given jurisdiction over the subject-matter and of the parties to an action brought by the wife against her husband for support and maintenance without her applying for a divorce. *Stats.* 1913, p. 120.

[3] There is no doubt that to entitle the plaintiff to recover in such action it is incumbent upon her to make a showing of the marriage relation, her needs, and the ability of her husband, as in a suit for divorce. *Nelson on Divorce*, § 1003.

The cross-complaint shows satisfactorily these facts without reference to the other pleadings in the case. Furthermore, it is obvious from the record that the objection to the pleading on this ground is more technical than real or meritorious, but the point—that the cross-complaint contains no averment of the residence of the parties within the jurisdiction of the court—is one of first impression and is worthy of further discussion.

Coulthurst v. Coulthurst, 58 Cal. 239, is cited by counsel for petitioner in support of the proposition that in this state the cross-complainant in a divorce suit must plead residence. The case is not in point. The defendant's case is not a cross-action for divorce, as in the case cited, but is a cross-action for support and maintenance without divorce.

In the case of *Hardy v. Hardy*, 97 Cal. 125, 31 Pac. 906, it is held that the right of the wife to maintain an action for support and maintenance is independent of the right to maintain an action for divorce, and, being based upon the obligation of the husband to support the wife, may be instituted at any time after his desertion of her when he fails to give such support. This is true of our statute.

Section 1 of the act provides:

"When the wife has any cause of action for divorce against her husband, or when she has been deserted by him and such desertion has continued for the space of ninety days, she may, without applying for a divorce, maintain in the district court, an action against her husband for permanent support and maintenance of herself or of herself and of her child or children."

[4] The object of the statute is to give to the wife a sure and speedy remedy through an independent action when she has any cause of action for divorce against her husband, or when he has deserted her for a period of 90 days. The jurisdiction of the court is neither limited nor restricted.

The statute is remedial, and must be liberally construed with a view to promote its object. It affords a remedy not heretofore given a wife to enforce the performance of a duty without resorting to a divorce action.

Section 7 of the act provides:

"In all cases commenced hereunder, the proceedings and practice shall be the same, as nearly as may be, as is now or hereafter may be provided in actions for divorce; and suit may be brought, at the option of the wife, either in the county in which the wife shall reside, at the time the suit is commenced, or in the county in which the husband may be found."

[5] If we clearly interpret the position taken by counsel for the petitioner, it is their contention that before the wife may exercise the option granted her by the statute she must allege in her complaint that she was a resident within the county in which her action was commenced. We are of the opinion that the requirement as to residence relates to the venue of the action, and not to jurisdiction of the parties. The section provides that she can bring her suit either in the county in which she shall reside or in the county in which the husband may be found. If the word "residence," as here used, be intended as a prerequisite condition to her right to maintain her action, we apprehend that the Legislature would have manifested its intent in more direct terms. It cannot be successfully urged, though it is strongly intimated by counsel for petitioner, that "residence," as employed in the section, must be extended to mean the period of residence as is required in divorce actions. If this be true, a derelict husband could defeat the object of the statute by placing himself and his property beyond the jurisdiction of the court before the statutory period of residence of six months had run. The statute places no such limitation upon the wife's right to maintain her suit. The statute was designed to incorporate such action into the system of remedies in use in this state. Her residence need be such only that an ordinary action could be maintained by her according to the statute regulating the venue of civil actions, so enlarged as to permit her to sue in the county where the husband may be found. The record shows affirmatively that the plaintiff husband was found within the jurisdiction of the court when her cross-action was filed, and that he was an actual bona fide resident in the county where found. This being true, the court acquired jurisdiction of the parties, and having jurisdiction of the subject-matter of the action, the judgment sought to be annulled by this proceeding will not be disturbed.

Whether or not a nonresident wife may maintain an action against a nonresident husband for support and maintenance under

the statute is a question concerning which we do not express an opinion.

[6] It is further insisted by counsel for petitioner that the court erred in determining that the defendant's cause of action for support and maintenance was brought within the statute. Stats. 1913, p. 120. If this be error, it was not an excess of jurisdiction, and may be corrected by the usual mode for the correction of errors. *Wilson v. Morse*, 25 Nev. 376, 60 Pac. 832.

[7] We do not commend the practice adopted in this case by either of the parties. The writ issued is irregular in form; it is directed to both the court and the judge thereof; the latter is commanded by the writ to show cause why the relief prayed for by the petitioner should not be granted. The relief demanded is that the judgment be annulled. The parties to the judgment are the only persons interested in the question of its validity. We concede that in this case the writ should not have issued without notice to the adverse party, for the reason, not as contended by counsel for respondent that she is a necessary party, but because should this court annul the judgment rendered by the respondent it would not bind the defendant unless she had her day in court on the hearing of the certiorari. *Wilson v. Morse*, supra; *Pollock v. Cummings*, 38 Cal. 685; *Fraser v. Freelon*, 53 Cal. 645. But the failure of the petitioner to make the defendant in the action a party to the application for the writ, or the failure of this court to give to her notice of the application, furnishes no ground under our statute for quashing the writ. The respondent tribunal is the real party respondent to a writ of certiorari (section 5686, Rev. Laws), although other parties might appear to maintain or object to the proceedings and be subject to costs (Bailey on Juris. § 434a). This, however, is a matter entirely within the discretion of the court. In the exercise of our discretion we are empowered to issue the writ even without notice to the adverse party. Section 5685, Rev. Laws.

[8] The procedure adopted by counsel for respondent places the respondent court in the position of an adverse party as if it had some personal interest in sustaining its judgment. It is commendable in respondent tribunals to at all times protect their jurisdiction, but in so doing they are not authorized to challenge the jurisdiction of their superior, or throw obstacles in the way to prevent a review of their proceedings. The respondent is truly interested in seeing that it may not be shorn of its power, if not by collusion, yet by the failure to have the question of its jurisdiction presented as forcibly as it might be presented. *Sharp v. Miller*, 54 Cal. 329 (concurring opinion). We welcome this practice, but do not sanction its being used to defeat the purpose of the writ.

Entertaining the views as hereinabove expressed, we conclude that the writ should be dismissed.

It is so ordered.

DUCKER, J., concurs.

COLEMAN, C. J. (dissenting). I dissent from the conclusion reached by my learned Associates as to the sufficiency of the cross-complaint. The only allusion in the cross-complaint to a marriage between plaintiff and defendant is found in a paragraph which reads:

"That since the marriage of plaintiff and defendant, plaintiff has treated defendant with extreme cruelty, and defendant cites the following specific instances of such cruelty. * * *

Whatever may be the practice in other states, section 110 of our Civil Practice Act (R. L. § 5052) provides for the filing of a cross-complaint. The facts must be stated in the cross-complaint as fully as in the complaint. The general rule as to the requirements of a cross-complaint is stated in 5 Ency. Pl. & Pr. at page 680, as follows:

"A cross-complaint, like an original complaint, must state facts sufficient to entitle the pleader to affirmative relief, and it cannot be helped out by the averments of any of the other pleadings in the action; it must itself contain all the required facts" (citing numerous authorities).

In *Collins v. Bartlett*, 44 Cal. 371, it is said:

"In considering the cross-complaint, we have accepted as true all its allegations, but the agreed statement of facts and the finding have not been considered in connection with the cross-complaint, for they cannot be regarded as adding thereto any further fact. The cross-complaint must fall unless it is sustainable on its own allegations of fact."

In *Conger v. Miller*, 104 Ind. 592, 4 N. E. 300, it is said:

"A cross-complaint, like a complaint, must be good within and of itself, without aid from other pleadings in the cause" (citing *Campbell v. Routt*, 42 Ind. 410; *Masters v. Beckett*, 83 Ind. 595; *Ewing v. Patterson*, 35 Ind. 326).

In *Coulthurst v. Coulthurst*, 58 Cal. 239, which was an action for a divorce, wherein the defendant filed a cross-complaint praying for divorce, in which there was no allegation of marriage or residence, the court said:

"It is claimed on this appeal that the defendant's cross-complaint was totally defective, for the reason that it contained no averment of marriage, or residence for the period of six months within the state. It is well settled that both of these facts are necessary and indispensable in a complaint for a divorce, and the only question is, are they equally essential in a cross-complaint? [The court here quotes as above from *Collins v. Bartlett*, 44 Cal. 371.] * * * And in the case of *Kreichbaum v. Melton*, 49 Cal. 55, the court holds that: 'A cross-complaint must state facts sufficient to entitle

the pleader to affirmative relief; and it cannot be helped out by the averments of any of the other pleadings in the action. Like a complaint, it must itself contain all the requisite facts.' See, also, *Haskell v. Haskell*, 54 Cal. 262.

"Applying the principles laid down in the above cases to the defendant's cross-complaint, it is very obvious that it was materially defective as a pleading, and did not entitle defendant to the relief granted by the court."

I am unable to find any case laying down a different rule, where the civil practice act of the state provides for a cross-complaint, as does ours. It matters not what the reason for such a rule may be, so long as it exists, and of its existence there can be no doubt. In the prevailing opinion, *Nelson on Divorce* is cited as sustaining the doctrine that the marriage relation must be shown in an action growing out of the relationship. If it must be shown it must also be pleaded. The allegation quoted from the cross-complaint is a statement based upon a mere assumption of marriage. It does not suffice.

I express no opinion as to the other questions discussed.

SMART v. OREGON SHORT LINE R. CO. (No. 3323.)

(Supreme Court of Utah. July 8, 1919.)

1. CARRIERS §215(2) — CARRIAGE OF LIVE STOCK—NEGLIGENCE—DELAY.

If at the time of unloading sheep there was an unreasonable delay by the acts of defendant carrier, it was liable if damage resulted from such negligence, when the sheep were unloaded too late in the day and so were chilled; it having been its duty to place the cars in proper position for unloading with reasonable promptness.

2. CARRIERS §228(1)—CARRIAGE OF LIVE STOCK—ACTION FOR INJURIES — BURDEN OF PROOF.

Sheep shipped over the line of defendant carrier having arrived at destination in good condition, and having been in good condition when unloaded, the burden of proof, on the charge that there was unreasonable delay in putting the cars in position for unloading, so that the sheep were unloaded too late in the day and were chilled, was on plaintiff shipper.

3. CARRIERS §228(1) — CARRIAGE OF LIVE STOCK — PROXIMATE CAUSE — BURDEN OF PROOF.

In an action against a carrier for damages to sheep from delay in placing cars in position for unloading, the burden was on shipper to prove the carrier's negligence in delaying the unloading too late in the day, so that the sheep were chilled, was the proximate cause of their loss.

4. CARRIERS §228(5) — CARRIAGE OF LIVE STOCK—NEGLIGENCE — PROXIMATE CAUSE—EVIDENCE.

In an action against a carrier of sheep for injuries from delay in placing the cars in posi-

tion for unloading, so that the sheep were chilled, evidence held insufficient to show negligence of the carrier, and to show that any negligence was the proximate cause of the damage.

Appeal from District Court, Cache County; J. D. Call, Judge.

Action by L. S. Smart against the Oregon Short Line Railroad Company, a corporation. From judgment of nonsuit, plaintiff appeals. Affirmed.

Walters & Harris, of Logan, for appellant. George H. Smith and J. V. Lyle, both of Salt Lake City, for respondent.

WEBER, J. On June 1, 1917, plaintiff arranged with defendant to ship a band of sheep from Pioneer, a station on one of defendant's branch lines in Idaho, to Cavinaugh, a station on the main line of defendant in that state. The sheep were loaded in 20 cars at Pioneer the next day, and the shipment of sheep, together with a carload of horses, left at about 5 p. m., arriving at the place of destination at noon on June 3, 1917, the distance being about 200 miles. At Cavinaugh there were no conveniences for unloading—nothing save a side track long enough to hold 4 or 5 cars at a time, and a temporary chute erected by the company. There was no switch engine or crew maintained at the station. Plaintiff had unloaded sheep there before, and knew all the conditions.

Upon arrival of the train at Cavinaugh 8 cars were unloaded without delay by the crew that brought the train. Later a second crew unloaded a car of sheep and the car of horses. The sheep from these cars were then taken to a pasture a quarter of a mile from the station by the plaintiff and seven men whom he had employed to assist in unloading. This took 30 or 40 minutes, during which time the engine and crew were idle. Shortly afterwards the second crew left for Montpelier, and no more unloading was done during the next 3 hours or until another freight train came along about sundown, when the engine was detached therefrom and the other cars of sheep were "spotted," taken to the chute, and unloaded. It was about 7:30 p. m. when they started to unload these 11 cars, and the work was completed about 9 p. m. All the sheep had arrived at Cavinaugh in good condition. After dark a cold wind arose. Plaintiff testified:

"It was real cold. There were no dead sheep in the cars unloaded at night."

According to plaintiff's testimony, referring to the sheep that were unloaded in the evening:

"Coming off the cars where it was warm they commenced to die as soon as they were taken off; some died on the right of way in 15 or 20 minutes; some died when they arrived at the pasture. More than 50 died."

He further testified that if all the sheep had been taken off the cars during the daytime and before the sun had set the loss would have been nominal only. On cross-examination he testified the delay was only 3 hours. It took about 10 hours to load the sheep at Pioneer, but whether the sheep first loaded were the ones first unloaded plaintiff did not know.

At the close of plaintiff's testimony defendant's motion for a nonsuit was granted by the court. From that judgment plaintiff appeals.

Plaintiff contends that there was evidence tending to prove defendant's negligence, and that its negligence in unreasonably delaying the placing of cars in position for unloading was the proximate cause of the death of the sheep.

[1-3] It was defendant's duty to place the cars in proper position at the chute with reasonable promptness, so that they could be unloaded without unreasonable delay. If the time of unloading was unreasonably delayed by the acts of defendant, its conduct constituted negligence for which it would be liable if damage resulted. If because of negligent delay the sheep were exposed to a cold wind that caused the death of some of them, such loss would be chargeable to defendant, but if without negligence on the part of defendant the sheep died from exposure to cold plaintiff would not be entitled to recover. There was a delay of not more than 3 hours. Whether want of diligence by defendant caused the delay does not appear. For some 2 or 3 hours no train was at Cavinaugh, and hence no engine could be obtained during that time for placing cars in position. There is no evidence showing that defendant could, without the abandonment of trains or without impeding transportation on its main line, have had an engine and crew at Cavinaugh during the period complained of. The mere fact of delay does not prove negligence, nor does the delay of two or three hours in the case at bar furnish any indication that the delay was unreasonable, or that there was any want of diligence on the part of defendant. The sheep having arrived at Cavinaugh in good condition, and being in good condition when taken off the cars, the burden of proof on the charge that there was unreasonable delay in putting the cars in position for unloading was upon plaintiff. The burden was also on plaintiff to prove that the defendant's negligence was the proximate cause of the loss of sheep. It took plaintiff 10 hours to load the sheep. He made no request to unload first the cars that were loaded first. He made no request of the engine crews to put cars in position for unloading while plaintiff and his men were driving sheep to the pasture. In the evening no complaint was made by him of delay. It is apparent from plaintiff's conduct that the complaint

about unreasonable delay by defendant was an afterthought only. Plaintiff had unloaded sheep at Cavinaugh before. He knew that no switch engine was kept there and that the work of switching and placing cars in position for unloading must be done with engines detached from passing trains. He knew that Cavinaugh was on the main track, and traffic could not be impeded that the unloading of his sheep might be expedited.

[4] Was any negligence proven? We think not. Is there even a scintilla of evidence tending to prove negligence? We think not. Is there any evidence whatever tending to prove that defendant's negligence was the proximate cause of the damage? We think not. A finding for plaintiff could have no basis save conjecture. If there were any doubt as to the inferences which should be drawn from the undisputed facts in this case, we would not approve the ruling of the district court. Being convinced that reasonable men exercising a fair judgment must arrive at the same conclusion from the facts in this case, and that such conclusion must be that there was no proof of defendant's negligence, we are constrained to hold that the judgment should be affirmed, with costs to respondent. It is so ordered.

CORFMAN, C. J., and GIDEON and THURMAN, JJ., concur.

FRICK, J. (concurring). I concur. I desire to add to what is said by Mr. Justice WEBER, however, that in this case the parties entered into a contract of shipment wherein the plaintiff agreed to load the sheep at the initial point of shipment and to unload them after their arrival at their destination. The sheep were agreed to be transported and unloaded at a way station on defendant's line where the facilities for unloading were as stated by Mr. Justice WEBER, and where the business of the defendant did not justify the maintenance of a separate switching engine and crew. These facts were all within the knowledge of the plaintiff when the contract of shipment was entered into. Moreover, the sheep were being transported for pasturage merely, and not to be delivered to market. In view of the foregoing conditions, the unloading of the sheep necessarily was largely under the direction and control of the plaintiff. If, therefore, he desired to have the crew of the second train referred to in Mr. Justice WEBER'S opinion remain to switch and spot the cars, it was his duty to so inform that crew at the time. He could not, under the circumstances, stand by and remain silent while the defendant's servants were carrying on its business in the regular and ordinary way, and then

complain that the cars were not promptly switched and spotted. For aught that appears in this record the plaintiff was satisfied with the manner in which the work was being done. At any rate, until he made complaint the train crew had a right to assume that the unloading was being done to suit him. If he was then satisfied, he should not afterwards be permitted to change his position to the detriment of the defendant. Had he complained then and the defendant had refused to switch and spot the cars with reasonable dispatch after he had made such complaint, or if he had requested that the cars be switched and spotted at once, or as soon as that could be done after their arrival, the case would be quite different. No well-considered case, in my judgment, can be found where, under conditions like those in this case, the courts have authorized a finding of negligence. See *Gilbert v. Railroad*, 132 Mo. App. 697, 112 S. W. 1002; *Rogers v. Texas P. Ry. Co.* (Tex. Civ. App.) 94 S. W. 159; *Cincinnati, etc., Ry. Co. v. Case*, 122 Ind. 310, 23 N. E. 797; *Sou. Pac. Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131; *Ecton v. C., B. & Q. Ry. Co.* 125 Mo. App. 223, 102 S. W. 575; *St. L. & S. F. Co. v. Vaughan*, 84 Ark. 311, 105 S. W. 573; *Houston & T. C. R. Co. v. Davis* (Tex. Civ. App.) 123 S. W. 1160; *Hunt v. Railway Co.*, 187 Mo. App. 639, 173 S. W. 61; *Gregory v. C., B. & Q. R. Co.*, 174 Mo. App. 550, 160 S. W. 830; *McDowel v. Mo. P. Ry. Co.*, 167 Mo. App. 576, 152 S. W. 435; *Ridgeway v. Missouri, K. & T. Ry. Co.*, 161 Mo. App. 260, 143 S. W. 532; *Sikes v. St. Louis & S. F. Ry. Co.*, 190 Mo. App. 181, 176 S. W. 255.

In *Southern Pac. Co. v. Arnett*, supra, it is said:

"Delays incident to ordinary transportation are the same as reasonable delays—as delays consistent with ordinary care."

In *Houston & T. C. R. Co. v. Davis*, supra, a delay of 3 hours in stopping a train at a station was held not sufficient to take the case to the jury on the question of negligence.

In *Sikes v. St. Louis & S. F. Ry. Co.*, supra, a delay of 5½ hours, 2¾ hours of which time was a delay in switching the cars to the unloading chute, it was held did not constitute an unreasonable delay, and hence was not negligence.

It is not necessary to quote further from the cases, since in those quoted from the live stock was being shipped to be sold on the market, and yet it was held that the delays referred to did not constitute unreasonable delays.

Under the circumstances I am clearly of the opinion that no culpable negligence is shown.

BOOTHE v. WYATT et al. (No. 3341.)

(Supreme Court of Utah. June 25, 1919.
Rehearing Denied Aug. 19, 1919.)1. COVENANTS \S 96(1) — AGAINST INCUMBRANCES—LIABILITY—"INCUMBRANCE."

Where the purchaser of land demanded a warranty deed to protect himself against incumbrances, in the absence of any exception from the covenants that such a deed imports under Comp. Laws 1917, \S 4881, the grantors must answer for damages sustained by the grantee by reason of the incumbrance of a materialman's lien existing at execution of the deed, "incumbrance," as used in a deed, meaning every right to or interest in the land which may subsist in third persons to the diminution of its value, but consistent with the passing of the fee, though the sale of the premises had not been directly from the grantors to the grantee, but there had been an intermediate sale; the conveyance being made directly to save expense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbrance.]

2. COVENANTS \S 121(2)—JUDGMENT AS EVIDENCE OF PARAMOUNT RIGHT.

In a grantee's action to recover from his grantors damages sustained by reason of the foreclosure of a materialman's lien, the deed having covenanted against incumbrances, finding of the trial court in the case of the materialman against the grantee and the parties from whom he had purchased, themselves purchasers from the grantors, held conclusive as to the fact that the materialman's lien was an incumbrance against the premises.

Appeal from District Court, Box Elder County; J. D. Call, Judge.

Action by Willis H. Boothe, wherein Willis H. Boothe, Jr., executor of the last will and testament of Willis H. Boothe, was substituted as plaintiff, against E. M. Wyatt and Olive Wyatt, his wife, and H. W. Wyatt and Mattie Wyatt, his wife. From judgment dismissing the complaint, plaintiff appeals. Case remanded, with directions to enter judgment in plaintiff's favor.

William Lowe, of Brigham, for appellant.
B. C. Call, of Brigham, for respondents.

CORFMAN, C. J. This action was begun in the district court for Box Elder county by Willis H. Boothe to recover from the defendants \$357.80 actual damages and \$1,000 special damages alleged to have been sustained by reason of the foreclosure of a materialman's lien on certain real property conveyed to him by the defendants by warranty deed. After the commencement of the action W. H. Boothe died. Thereupon W. H. Boothe, Jr., was substituted as plaintiff, and the case was thereafter prosecuted by him in his representative capacity.

It is in substance alleged by the complaint that on January 10, 1914, the defendants, for

the consideration of \$1 and other good and valuable consideration to them paid, granted to the plaintiff by deed certain premises (particularly described) situate at Tremonton, Box Elder county, Utah; that the deed, which was attached to and made a part of the complaint, contained the covenant on the part of the defendants that the premises were free from incumbrances, but, to the contrary, were incumbered for the value of certain materials furnished and used in the construction of improvements thereon for which the materialmen on or about June 18, 1914, filed a lien to secure payment; that said lien was duly foreclosed in said court by an action brought by the materialmen against the defendants and plaintiff herein, whereupon the plaintiff, on July 11, 1916, paid the judgment amounting to \$304.80 and costs, in all aggregating \$847.80, the actual damages sued for in this action.

The answer admits the execution of the deed, expressly denies any consideration therefor, denies generally the other allegations of the complaint, and for an affirmative defense alleges that on or about June 1, 1913, the defendants and D. S. Lohr and his wife, H. E. Lohr, entered into an agreement whereby the defendants agreed to sell and convey the said premises to the said Lohrs for the sum of \$200; that thereafter, in the fall of 1913, the said Lohrs made and entered into an agreement to sell a part of said premises with certain improvements they had made thereon to W. H. Boothe (plaintiff's testator); that on or about January 10, 1914, the said Lohrs had completed the payment of the purchase price for the said premises, and in order to save expense of making and recording a deed from the defendants to the Lohrs and then from the Lohrs to W. H. Boothe a deed for said property was made by the defendants direct to W. H. Boothe; that the defendants in no way contracted for or purchased the materials used in the construction of the buildings on said premises nor authorized any incumbrance to be placed thereon, with knowledge or otherwise.

A reply was made denying the affirmative allegations of the complaint and alleging that W. H. Boothe, plaintiff's testator, paid the Lohrs \$4,800 for the premises thus conveyed to him by the defendants.

Trial to the court without a jury resulted in findings and a judgment in defendants' favor dismissing the plaintiff's complaint. Motion for a new trial was made and denied. Plaintiff appeals.

For reversal of the judgment plaintiff assigns as errors the admission and rejection of certain testimony, and that the findings of fact, conclusions of law, and the judgment are not supported by the evidence in this case, and that the same are against law.

The evidence, briefly stated, shows that in 1913 the defendants sold the premises in

question, with other lands, while unimproved, to D. S. Lohr. A deed was then made by the defendants to H. E. Lohr, the wife of D. S. Lohr, and placed in escrow at the State Bank of Tremonton, to be delivered on payment of the purchase price. On January 10, 1914, the Lohrs had completed payment of the purchase price, and meanwhile had constructed on a part of the premises valuable improvements for which the Wilson Lumber Company had furnished material, unpaid for, of the value of \$652.85. The testimony is not altogether clear as to whether or not the deed from the defendants to the wife of D. S. Lohr was ever delivered to her out of escrow. However, the Lohrs had then sold or exchanged the premises in question, with improvements thereon, to W. H. Boothe for a consideration of \$5,000, and for the purpose of saving the expenses of an additional transfer the deed from the defendants to the wife of D. S. Lohr was destroyed, and at the request of the Lohrs the deed here in question was made and delivered by the defendants directly to W. H. Boothe for the premises purchased by him from the Lohrs. Subsequently, June 16, 1914, the Wilson Lumber Company filed a lien against the premises thus conveyed to W. H. Boothe for materials, the last of which was furnished the Lohrs for the construction of buildings thereon May 31, 1914.

On March 23, 1915, the Wilson Lumber Company commenced an action for the foreclosure of their lien against the Lohrs, the defendants, and W. H. Boothe, wherein a judgment and decree of foreclosure was rendered and entered for the amount of the actual damages sued for and theretofore paid by W. H. Boothe, plaintiff's testator, in order to discharge said indebtedness against the premises so conveyed to him by the deed of the defendants.

There was no testimony tending to show that any special damages were sustained by the plaintiff by reason of the incumbrance found and adjudged against the premises in the suit for the foreclosure of the material-man's lien.

The warranty deed from the defendants to the plaintiff for the premises in question is in the usual form, authorized by Comp. Laws Utah 1917, § 4881, which provides:

"Such deed, when executed as required by law, shall have the effect of a conveyance in fee simple to the grantee, his heirs, and assigns, of the premises therein named, together with all appurtenances, rights and privileges thereto belonging, with covenants from the grantor, his heirs, and personal representatives, that he is lawfully seized of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs and assigns in the quiet possession thereof; that the premises are free from all incumbrances; and that the grantor, his heirs, and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs, and assigns, against

all lawful claims whatsoever. Any exception to such covenants may be briefly inserted in such deed following the description of the land."

[1] The testimony conclusively shows that plaintiff's testator in taking the deed from the defendants had no knowledge of any incumbrance against the premises thereby conveyed. He demanded a warranty deed to protect himself against incumbrances, and, in the absence of any exception to the covenants that such a deed imports, the defendants giving it must be held to answer for all damages sustained by him by reason of incumbrances against the premises conveyed at the time of the execution of the deed. 11 Cyc. p. 1066.

The term "incumbrance," as used in a deed of conveyance, must be held and is generally regarded and interpreted to mean "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance." Rawle on Covenants of Title (5th Ed.) § 75; Post v. Campau, 42 Mich. 90, 3 N. W. 272.

[2] It is urged by respondents that there was no valid lien against the premises at the time of the execution of the deed. We think the finding of the trial court in the case of Wilson Lumber Company, above referred to, that the Wilson Lumber Company "furnished to the defendant D. S. Lohr, at his special instance and request, lumber and building materials for the construction of said buildings, and which said lumber and materials were in fact used for said purposes, between the said 7th day of November, 1913, and the last day of May, 1914, of the reasonable value of \$874.41, and that no part of said sum has been paid, except the sum of \$221.56, and that there is now due and owing to the plaintiff for the said lumber and materials so furnished the sum of \$652.85," for which judgment was rendered including interest, costs, and disbursements, in all aggregating \$804.80, must be held conclusive as to the fact that the same was an incumbrance against the premises conveyed by the defendants. Lowe Co. v. Warehouse Co., 39 Utah, 395, 117 Pac. 874, Ann. Cas. 1913E, 246.

It follows from what has been pointed out that the trial court erred in admitting the testimony, over plaintiff's objection, tending to show the character of the dealings of the defendants with the Lohrs with respect to the property involved. In view of the fact that the defendants conveyed the premises to the plaintiff by warranty deed, without exception to the covenants the deed imports, they must be held to answer for the actual damages sustained and proven by the plaintiff, amounting to \$847.80, and as prayed for in the complaint, and the trial court erred in dismissing plaintiff's action.

It is therefore ordered that the case be remanded, with directions to enter judgment in plaintiff's favor for \$847.80, the actual dam-

ages sustained by him in discharging the incumbrance against the property, together with interest and costs; costs of this appeal to be taxed against respondents.

FRICK, WEBER, and THURMAN, JJ., concur.

GIDEON, J. I concur in the order reversing the judgment. I also concur in the order directing the district court to enter judgment for the plaintiff. I do so, however, not upon the error of the court in admitting incompetent or hearsay testimony, but what I conceive to be the erroneous conclusions of law deduced by the district court from its findings of fact. The findings made by the court are substantially the same as the statement of facts contained in the opinion of the Chief Justice. From such findings the court concluded as a matter of law that the plaintiff was not entitled to recover. In that I think the court was in error. The findings of fact, in my opinion, support a judgment for the plaintiff, and do not support a judgment for the defendant. For these reasons I concur in the order directing a judgment for plaintiff. If I did not think the findings of fact as made by the trial court supported and authorized a judgment for the plaintiff, I should decline to concur in the order directing the lower court to enter a judgment.

KENNEDY v. BURBIDGE. (No. 3361.)

(Supreme Court of Utah. June 18, 1919. On Application for Rehearing, Aug. 27, 1919.)

1. MALICIOUS PROSECUTION — ELEMENTS.

In an action for malicious prosecution, it is necessary to allege and prove that the proceeding complained of as ground for the action was without probable cause, was malicious, and was finally terminated in favor of complainant.

2. MALICIOUS PROSECUTION — EFFECT OF CONVICTION — PROBABLE CAUSE.

A judgment of conviction followed by a reversal, when offered as evidence in a case for malicious prosecution, is at least prima facie evidence of probable cause.

3. MALICIOUS PROSECUTION — PLEADING — PROBABLE CAUSE.

Complaint, in action for malicious prosecution, showing that plaintiff was convicted in proceeding complained of, and that prosecution was dismissed on appeal, fails to state a cause of action, unless it goes farther and alleges some fact or facts, the legal effect of which is to impeach the validity of the judgment and render it worthless as evidence of probable cause.

4. MALICIOUS PROSECUTION — EFFECT OF CONVICTION AND REVERSAL.

A judgment of conviction, followed by a reversal, is not evidence of probable cause, where

procured by fraud, perjury, or other undue or unfair means employed by the defendant.

5. MALICIOUS PROSECUTION — PROBABLE CAUSE — CONVICTION — PERJURY.

A judgment of conviction is not evidence of probable cause in an action for malicious prosecution, where based upon testimony which was untrue, regardless of whether or not such testimony was given unlawfully and corruptly.

6. MALICIOUS PROSECUTION — PLEADING — SUFFICIENCY.

A complaint in an action for malicious prosecution held sufficient to show that judgment of conviction, which was reversed, was founded upon testimony which was false and untrue.

On Application for Rehearing.

7. MALICIOUS PROSECUTION — PROBABLE CAUSE.

The mere fact that information upon which a prosecutor acted in having a person arrested was false does not show that he acted without probable cause, but where it is shown that prosecutor either knew that information was false, or had no personal knowledge of the truth, or made no investigation as to its accuracy before instituting a prosecution, there was want of probable cause.

8. PLEADING — DEMURRER — ADMISSIONS.

On demurrer to a complaint, its allegations must be taken as true.

Appeal from District Court, Salt Lake County; P. O. Evans, Judge.

Action by Pat Kennedy against J. E. Burbidge. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Evans & Sullivan, of Salt Lake City, for appellant.

Wm. H. Folland, City Atty., and H. H. Smith and W. W. Little, Asst. City Attys., all of Salt Lake City, for respondent.

THURMAN, J. The plaintiff was convicted upon the complaint of defendant in the city court of Salt Lake City of the offense of willfully and knowingly having in his possession intoxicating liquor. Plaintiff appealed from the judgment to the district court of Salt Lake county, in which said court, upon motion of the city attorney, the plaintiff was found not guilty and the action dismissed. Plaintiff brought this action against the defendant charging malicious prosecution in the above proceeding.

This appeal is from a judgment sustaining defendant's demurrer to plaintiff's complaint and dismissing the action.

The complaint, in substance, alleges that defendant maliciously, and without probable cause, procured a criminal complaint to be prepared against the plaintiff, and without probable cause swore to the same; that the said criminal complaint was sworn to by defendant charging plaintiff with unlawfully,

willfully, and knowingly having in his possession intoxicating liquor, to wit, cider containing an excess of one-half of 1 per centum of alcohol, contrary to the ordinances of said city; that thereafter defendant, by reason of said complaint, maliciously and without probable cause procured a warrant for the arrest of plaintiff, and caused him to be arrested and deprived of his liberty; that all of the material allegations set forth in the affidavit made by defendant were false and untrue, and were made by defendant maliciously, with no sufficient provocation, without probable cause therefor, and without any personal knowledge on the part of the defendant of the facts therein sworn to, and without sufficient investigation to obtain knowledge concerning the same; that said complaint was made by defendant for the sole and only purpose of embarrassing, humiliating, and distressing plaintiff and injuring him in his person, his good name and business. The plaintiff then, in substance, alleges that a trial was had on said complaint in the said city court, and that plaintiff was convicted of said alleged offense, but that the evidence upon which he was convicted was incompetent, immaterial, and wholly failed to prove any intention on the plaintiff's part to violate any law of the state or ordinance of said city. Finally, it is alleged by plaintiff that he appealed from said judgment of conviction to the district court of Salt Lake county, in which said court, on motion of the city attorney, the jury was instructed to return a verdict of not guilty; that said verdict was rendered and judgment of acquittal entered thereon; that by reason of the wrongful acts of defendant in swearing falsely to the complaint, charging plaintiff with an offense and otherwise causing plaintiff to be prosecuted thereon, plaintiff was damaged in the sum of \$1,400.

Defendant interposed a general demurrer to the complaint, specifying in particular the fact that it appeared from the complaint that plaintiff was convicted of the offense charged in the city court, and, notwithstanding it appeared that said conviction was reversed in the district court on appeal, it did not appear by any allegation that said conviction in the city court was procured by perjury or fraud.

The district court sustained the demurrer, and judgment was entered, dismissing the action. Plaintiff appeals.

The record presents but two questions for our consideration. (1) In an action for malicious prosecution, where the complaint alleges a conviction and afterwards an acquittal in the proceeding complained of, is it essential that the complaint should also allege that the conviction was procured by fraud or perjury, or other undue means? (2) If such allegation is essential, is the complaint in the case at bar fatally defective in this regard?

[1] In an action for malicious prosecution at least three distinct matters are necessary to be alleged and proved: (1) That the proceeding complained of as ground for the action was without probable cause; (2) that the proceeding was malicious; and (3) that the proceeding was finally terminated in favor of the plaintiff. In this case the defendant does not contend that the complaint is defective in failing to allege that the proceeding complained of by plaintiff was malicious. Neither is it contended that the complaint fails to show that the proceeding finally terminated in favor of the plaintiff. The question is narrowed down to the proposition as to whether or not the complaint on its face discloses a want of probable cause for the proceeding complained of. The complaint alleges the fact that plaintiff in the city court was convicted of the offense instituted against him by the defendant, and, under the authorities hereinafter cited, such conviction is at least *prima facie* evidence of probable cause for the prosecution, notwithstanding the conviction is afterwards reversed. Some of the authorities go so far as to hold that such evidence is absolutely conclusive, but in our opinion the weight of judicial opinion as well as that of jurists and text-writers, is to the effect that evidence of a conviction is only *prima facie*, and may be rebutted by competent evidence which impeaches the validity of the judgment. As will be seen from the decisions to which we shall refer, the most common expression is that a judgment of conviction against the plaintiff in a case of this kind can be impeached and overthrown only by showing that the judgment was procured by perjury, fraud, or other undue means. The majority of the authorities brought to our attention by both of the parties to this litigation demonstrate that such is the case wherever this particular question is involved.

The authorities cited and relied on by respondent are as follows: *Whitney v. Peckham*, 15 Mass. 243; *Griffs v. Sellars*, 19 N. C. 492, 31 Am. Dec. 422; *Price v. Stanley*, 128 N. C. 38, 38 S. E. 83; *Smith v. Thomas*, 149 N. C. 100, 62 S. E. 772; *Herman v. Brookerhoff*, 8 Watts (Pa.) 240; *Olson v. Neal*, 63 Iowa, 214, 18 N. W. 863; *Saunders v. Baldwin*, 112 Va. 431, 71 S. E. 620, 34 L. R. A. (N. S.) 958, and note, Ann. Cas. 1913B, 1049; *Crescent City, etc., Co. v. Butchers' Union, etc., Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614; *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Burt v. Place*, 4 Wend. (N. Y.) 591; *Spring v. Besore*, 12 B. Mon. (Ky.) 551; *Thomas v. Muehlmann*, 92 Ill. App. 571; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Carpenter v. Sibley*, 153 Cal. 215, 94 Pac. 879, 15 L. R. A. (N. S.) 1143, and note, 126 Am. St. Rep. 77, 15 Ann. Cas. 484; *Fones v. Murdock*, 80 Or. 340, 157 Pac. 148; Annotated note L. R. A. 1916F, 196-208; *Adams v. Bicknell*, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576;

Blucher v. Zonker, 19 Ind. App. 615, 49 N. E. 911; Haddad v. Chesapeake & O. R. Co., 77 W. Va. 710, 88 S. E. 1038, L. R. A. 1916F, 192; Dennehey v. Woodsum, 100 Mass. 195; King v. Estabrooks, 77 Vt. 371, 60 Atl. 84; Schofield v. Thackaberry, 115 Ill. App. 118; Henderson v. McGruder, 49 Ind. App. 682, 98 N. E. 137; Topolewski v. Plankinton Pkg. Co., 143 Wis. 52, 126 N. W. 554.

The following cases are relied on by appellant: Bowman v. Brown, 52 Iowa, 437, 3 N. W. 609; Moffatt et al. v. Fisher, 47 Iowa, 473; Goodrich v. Warner, 21 Conn. 443.

[2-4] In addition to these, the decisions that could be cited to the same effect are almost numberless, as will appear from the cases and notes specifically referred to. That the authorities are not in complete harmony will be found upon the most casual examination. The Minnesota court, in Skeffington v. Eylward, 97 Minn. 244, 105 N. W. 638, 114 Am. St. Rep. 711, divides the cases into three classes: (1) Those which hold that a conviction is conclusive evidence of probable cause, notwithstanding a reversal on appeal; (2) those in which it is held that a judgment of conviction, notwithstanding a reversal, can only be impeached by evidence that it was procured by fraud or perjury; and (3) those which hold that a judgment of conviction when reversed on appeal is only prima facie evidence which may be rebutted by any competent evidence which clearly overcomes the presumption arising from the effect of the conviction in the first instance. The writer, after a somewhat careful review of a large number of cases, including those cited, is of the opinion that the above classification by the Minnesota court is substantially correct. Conceding this to be true, there is no escape from the conclusion that a judgment of conviction, followed by a reversal, when offered as evidence in a case for malicious prosecution, is at least prima facie evidence of probable cause for the prosecution. It follows therefore that where the complaint itself in an action for malicious prosecution shows that plaintiff was convicted in the proceeding complained of, notwithstanding a reversal afterwards on appeal, the complaint fails to state a cause of action, unless it goes farther and alleges some fact or facts the legal effect of which is to impeach the validity of the judgment and render it worthless as evidence of probable cause. The fact or facts so alleged should be to the effect that the judgment of conviction relied on as proof of probable cause was procured by fraud, perjury, or other undue or unfair means employed by the defendant.

[5] This brings us to a consideration of the question as to whether or not the complaint in the present case is fatally defective in this respect. Before proceeding, however, to determine that question it is pertinent to make one or two observations upon other matters intimately connected with the ques-

tion under review. All of the authorities which we have examined permit evidence of conviction for the purpose of proving probable cause. This is so because when one party is charged with prosecuting another without probable cause the most satisfactory evidence that there was probable cause would be a judgment of conviction, fairly obtained before an unbiased court or jury. This is so manifest as, in our judgment, to be uncontrovertible. But suppose the judgment of conviction was procured by perjury or fraud, or by any means which show that the judgment is invalid, unauthorized, and of no efficacy whatever as evidence of probable cause. Could it then be contended that such a judgment has probative value to establish probable cause? We have no hesitancy in holding that in such a case the probative effect of the judgment is entirely overcome, and that it stands in the case the same as if it had never been rendered. Suppose that the judgment was procured by testimony that was admittedly false and untrue. Should such a judgment in a case of this kind be given effect as proof of probable cause? Clearly not. And even though the testimony was not given willfully and corruptly so as to make it a case of perjury as known to the criminal law, nevertheless its probative effect is just the same. It deceived and misled the court, and caused him to enter a judgment which, for the purpose of evidence in a case of this kind, should have no effect whatever. In *Nehr v. Dobbs*, 47 Neb. at page 870, 66 N. W. at page 866, a Nebraska case not cited in the briefs, the court said:

"The reason that a conviction procured by perjury is not proof of the existence of probable cause for the prosecution is that the false testimony deceived the trial court, so that the inference naturally drawn from a judgment of that court is no longer a reasonable inference."

This states the proposition in a nutshell. It is the falsity of the testimony and its tendency to deceive and mislead the court that vitiates the judgment and renders it ineffective when offered as evidence of probable cause, whether the testimony was willful and corrupt or given honestly and in good faith.

This brings us to a consideration of such portions of the complaint as are material to the question before us. After quoting in full the affidavit filed by the defendant against the plaintiff upon which the warrant of arrest was issued out of the city court the complaint of plaintiff, in the fourth paragraph, alleges:

"Plaintiff further alleges that all the material allegations of fact set forth in said affidavit of said defendant as hereinbefore set forth were false and untrue, and were made by defendant maliciously and with no sufficient provocation or probable cause therefor, and were made by defendant without any personal knowledge of the facts therein sworn to, and without sufficient investigation to obtain knowledge concerning the truth of the facts set out,

contained, and sworn to in said complaint, and were made by said defendant for the sole and only purpose of embarrassing, humiliating, and distressing this plaintiff and injuring him in his person and good name, and in his property, and were made by said defendant as plaintiff is informed and believes, and therefore alleges, with the object and purpose of injuring plaintiff's said business."

It is also alleged in the fifth paragraph of the complaint that a trial was had of said cause, and plaintiff was adjudged to be guilty of violating the law as charged in said complaint, and sentenced by the judge of said court. In the sixth paragraph it is alleged that, the evidence in the district court to which the case was appealed showed that in truth and in fact all of the material allegations in the criminal complaint defendant filed in the city court were wholly false and untrue, and that the city attorney thereupon moved the said district court to instruct the jury to return a verdict of not guilty, which was accordingly done, and the judgment of acquittal was thereupon made and entered.

[6] Without commenting in detail as to the meaning and effect of these allegations, it is sufficient to say they charge in effect that the whole proceeding against the plaintiff in the city court had its foundation upon testimony which was false and untrue, and, for the purposes of this case, that fact is admitted by the demurrer. Therefore, in accordance with the views hereinbefore expressed, it seems to the court that the invalidity of the judgment of the city court, relied on by the defendant as a defense, is sufficiently alleged in plaintiff's complaint, and that the court erred in sustaining the demurrer and dismissing the action.

In arriving at this conclusion we have not deemed it necessary to quote from or comment at length upon particular cases. They speak for themselves, and we are satisfied that the conclusion reached is within the spirit and intention of the best-reasoned opinions.

The case is therefore remanded to the district court of Salt Lake county, with directions to said court to reinstate plaintiff's complaint, overrule the demurrer interposed thereto, permit defendant to file an answer to said complaint upon such terms as may be just, and proceed with the hearing of said cause. Appellant to recover costs on appeal.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

On Application for Rehearing.

THURMAN, J. [7, 8] In his application for a rehearing respondent cites many additional cases to the same effect as those cited in his former brief. We find no reason, however, for modifying the opinion heretofore rendered, except to make more clear the principle upon which we decided the question in-

volved. We are not disposed to hold that a prosecutor acts without probable cause merely because it turns out that the information upon which he acts was false. But where, in addition to this fact, it is shown that the prosecutor either knew that the information upon which he acted was false, or had no personal knowledge of its truth, and made no investigation to determine its accuracy before instituting the prosecution, a different question is presented. A judgment obtained under either of said conditions should have no standing in a court of justice as evidence of probable cause, much less be treated as conclusive. While every reasonable allowance should be made for possible errors and mistakes, we know of no reason why in a case of this kind a judgment wrongfully or recklessly procured should be used as evidence by the wrongdoer to defeat the person injured in his efforts to obtain redress. Of course, we must assume the allegations of the complaint to be true. That is all that is before us. The complaint in this case not only alleges a judgment of conviction, but it also alleges other facts which in our opinion effectually impeached the judgment and rendered it worthless as evidence of probable cause.

The application for a rehearing is denied.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

FARMER v. CHRISTENSEN et al. (No. 3280.)

(Supreme Court of Utah. July 9, 1919.)

1. PARENT AND CHILD §2(3) — RIGHT TO CUSTODY.

Other things equal, the natural parent of a child is entitled to its care, custody, and control, but may by agreement or conduct deprive himself of his natural right to confer it upon others; the guiding principle always being the best interests of the child for the present and future.¹

2. PARENT AND CHILD §2(2) — RIGHT TO CUSTODY.

Divorced father of boy living with his maternal grandmother and his mother's second husband *held* entitled to the custody of the boy in order that he might be adopted by his father's sister and her husband, fit persons by character and means, and anxious to have the child, despite a strong affection between the boy and his stepfather and grandmother.

Appeal from District Court, Salt Lake County; R. B. Porter, Judge.

Suit by George F. Farmer against John W. Christensen and another. From judgment

¹ Stanford v. Gray, 42 Utah, 228, 129 Pac. 423, Ann. Cas. 1916A, 989; Hummel v. Parrish, 43 Utah, 373, 134 Pac. 898.

for petitioner, defendants appeal. Case remanded, with directions to strike a finding from the record, and judgment otherwise affirmed conditionally.

Rogers & Haas, of Salt Lake City, for appellants.

Ray Van Cott, of Salt Lake City, for respondent.

GIDEON, J. George F. Farmer filed a petition in the district court of Salt Lake county, Utah, against John W. Christensen and Mrs. G. A. Almquist, designated herein as defendants. The petitioner alleged that Joseph Harry Farmer, of the age of 10 years, is his son and is unlawfully detained and restrained of his liberty by defendants. Defendants answered, admitting that petitioner is the father of the child, but denied his right to its custody, and also denied that said child was unlawfully restrained by them. A hearing was had before the district court, and the custody of the minor awarded to petitioner. From that judgment defendants appeal.

The petitioner, in the year 1902, was married to Emma Farmer, the mother of the child. Two children were born of that marriage, a son now 14 years of age and the child involved in this litigation, who was 10 years old in September, 1917. The eldest son, not in any way involved in these proceedings, at the age of 2½ years, became seriously sick with spinal meningitis. That disease left him entirely deaf. During such sickness he was taken to the home of a Mrs. Jacobsen, a sister of petitioner, and he has remained in that home and been cared for by that worthy woman and her husband ever since. The petitioner has at no time contributed to the support of this afflicted son. Petitioner and his wife lived together until 1909. During that year the mother of the child refused to continue the marital relation with the petitioner, and thereafter, in the year 1912, filed a complaint for divorce in the district court of Salt Lake county, charging cruel treatment and failure to provide her with the common necessities of life. A decree of divorce was granted plaintiff, the former wife of petitioner herein. She was awarded custody of the two children. Subsequent to that, in the year 1915, the mother of the child married defendant John W. Christensen. The mother was then in poor health, and thereafter, in the fall of 1916, died. From and prior to the date of the marriage, the minor child had been a member of the household of Christensen, and said minor has since said time, at the date of filing this petition, and at the date of trial, resided, and at this time resides, at the home of said Christensen. The defendant Mrs. Almquist is the mother of the former wife of Farmer and grandmother of the child. Said grandmother, after the marriage of Christensen and the boy's mother, resided and had her home with

them. She has continued since the death of her daughter to reside at the home of said Christensen and has cared for and been the companion of the boy during all that time. A strong attachment and affection exist between the grandmother and the child as well as between the child and defendant Christensen. The boy is, for such reason, extremely anxious that he be permitted to continue to make his home with his said grandmother and stepfather.

The petitioner is a resident of Idaho. He has never remarried. He frankly admitted during the trial that he is not situated so that he can provide a good home for his son Joseph or give him the care and attention that he desires the child should have. It also appears, and is so stated by the petitioner, that he desires that the boy shall be adopted by one Samuel M. Taylor and his wife, Ada F. Taylor, residents of Salt Lake City. It likewise appears in the record that the father, prior to trial, executed the necessary relinquishment of said minor child and consented that he might be adopted by Taylor and wife. Mr. and Mrs. Taylor are well-to-do people, about 40 years of age, and have no children of their own. They own a good home. Mr. Taylor has an income of \$2,500 a year independent of his wife's income. He testified, and that is not disputed, that he has property worth \$20,000. Said Taylor and wife, in their testimony, expressed a very ardent desire to adopt this boy and make him their heir. They both expressed a liking and affection for the child and felt sure that they could do better for him in the way of furnishing a home, education, and general moral training than he would likely receive from those in whose custody he now is.

The grandmother is now over 70 years of age. The stepfather was 31 at the date of trial. The grandmother is without property, and, the district court found, is quite feeble. Mr. Christensen owns his home and has some other property. He is an industrious, and, as appears from the record, a very kind and considerate man. He is deeply attached to the boy, and the district judge stated in summing up the case that his conduct toward and treatment of the child have been most considerate; that because of said conduct and treatment there has grown up between him and the boy a strong attachment, and the boy, for that reason, is extremely reluctant to leave his home.

During the oral argument it was suggested, and consented to by both parties, that the members of this court could, if they so desired, either collectively or individually, talk to the child and learn his wishes and feelings respecting the parties to these proceedings. Accordingly the Chief Justice and the writer of this opinion have had a personal interview with the boy. He is an exceptionally bright child. The result of that interview confirms

what is apparent all through the record, the desire of the boy to be left where he is, his strong affection for his grandmother and stepfather, and the considerate treatment which the child has been receiving.

The record discloses that, so far as the father of the child is concerned, his conduct during the life of the boy's mother, both before the divorce and afterwards, and his neglect of the child since the death of its mother, have been such that he is entitled to very little, if any, consideration respecting the future care or custody of the child. The record abundantly, in my judgment, proves that the boy's mother was not only justified in refusing to continue the marital relations with the boy's father, but that his treatment was such that she could not, without being subjected to neglect and cruel treatment, do otherwise. The boy was born in 1907. He was therefore 2 years old when his mother refused to live longer with his father. The testimony abundantly establishes the fact that during the time from the child's birth until his mother left his father the father drank to excess, neglected his family, did not provide the child either with clothing or other necessities of life as he ought to and could have done; that after his wife separated from him until the date of the trial he did not trouble himself to know whether the child was clothed or fed. The most that it is contended he had contributed to the support of his wife or the child, notwithstanding his wife was sick in the fall of 1909, was the sum of \$32 at that time and \$16 at a later date. If this controversy were between the father and the defendants, no court, in my judgment, would hesitate in dismissing the petition.

[1] It is true, everything else being equal, that the natural parent of a child is entitled to its care, custody, and control. This court, however, by its former decisions, is committed to the more humane doctrine that in cases of this nature the natural parent may, by agreement or by conduct, deprive himself of his natural right and confer it upon others; that in cases where the parent has lost that right either by agreement or conduct the guiding principle will always be the best interests of the child for the present and its future. *Stanford v. Gray*, 42 Utah, 228, 129 Pac. 423, Ann. Cas. 1916A, 899; *Hummel v. Parrish*, 43 Utah, 373, 134 Pac. 898.

[2] Under the facts as appearing in this record it is not easy to determine just what disposition should be made of the child. The fact is that the little boy, to a great extent, is a stranger to Mr. and Mrs. Taylor. True, he has visited their place a few times in years gone by, but, as he testified, he does not now know where their present residence is located. Very naturally, by reason of the treatment of his stepfather and his grandmother, a strong affection exists between them. It will be with grief and no little heart burning that the grandmother is part-

ed from him or he from her as well as from the stepfather. Nevertheless the future interests of the child must control the actions or order of the court.

The district court, after a hearing running over a period of several days, concluded that the interests of the child, both present and future, would be best subserved by granting the claim of the petitioner. The grandmother, in the very nature of things, can live only a few years longer. She is without property for her own support and cannot be of any help in the future education of the child. The defendant Christensen is a young man and in all probability will marry again. Doubtless it is his intention to do everything within his means or power to provide the little boy with a home and to educate him and treat him as though he were his own child. What a change in Mr. Christensen's domestic relations might bring to the boy or the treatment he might receive in this new home are, to say the least, problematical. On the other hand, the record shows that Mrs. Taylor is related to the boy by blood, being a sister of the boy's father. Both Mrs. Taylor and her husband are anxious to adopt the child, and, as they both testified, treat him as their own child. They are able to do much more for him in a material way than either or both of the defendants. If, however, there were no other reasons than material benefit, the court would not be justified, for that reason alone, in awarding them the custody of the child. No word of suspicion is found in the entire case against the character of either Taylor or his wife. The lower court evidently did, and so must this court, accept their statements that the little boy will be treated with every consideration and kindness and that every effort will be made by them tending to promote the present happiness and future usefulness of the child, and that his surroundings will be of such a pleasant nature and such kindness and consideration will be shown him as will cause him to become attached to and fond of his adopted parents. Without that assurance the court would not be justified in awarding them the custody of the child.

Moreover, it is in evidence, and in fact it is apparent from the entire record, that the relationship existing between the families of Mr. and Mrs. Taylor and that of Mrs. Jacobson is most intimate and cordial. As stated herein, the elder brother of this minor is now, and has been since he was of the age of about 3 years, making his home with Mrs. Jacobson. It is in every way desirable that the two children should know more of each other than they do under the present arrangement, or are likely to if this little boy continues to make his home with defendants. Conceding the delicacy of taking the child from his present surroundings, I am, nevertheless, in considering the future interests and well-being of this child, clearly of the opinion that it will be for his best interests that his future

should be with the family of his uncle and aunt, and that the district court was justified in the decree entered.

The record in this case is voluminous, covering nearly 800 typewritten pages. Very much testimony was offered by both parties respecting the wishes of the mother of the child as expressed by her during her last illness. Mrs. Taylor testified that the mother at various times appealed to her to care for her son Joseph. Likewise Mrs. Jacobsen testified that the mother of the child said to her, not only once, but repeatedly, that she wished that she (Mrs. Jacobsen) might give the boy a home, and, if she could not, that Mrs. Taylor would. On the other hand, the grandmother, the stepfather, and a Mrs. Dahl, a sister of the boy's mother, testified that frequently during the mother's sickness she expressed a request and desire that the child should continue to remain with the stepfather and the grandmother. I have little doubt that all these witnesses were testifying truthfully, notwithstanding the apparent conflict. The mother seemed to feel that her eldest child was and would be provided with a home and cared for by Mrs. Jacobsen. Let me pause at this place to remark that Mrs. Jacobsen stands out in this record by far the worthiest and most unselfish character mentioned. The future of the republic will be better anchored if her kind is multiplied. The mother's chief anxiety seems to have been, during her last sickness, concerning the future of this little boy. She knew he had nothing to expect from his father. She knew that Mrs. Jacobsen, in addition to rearing a family of her own, had cared for her afflicted child practically since his birth and could not, and ought not be required to, take on additional burdens. The mother was racked by pain and was much of the time not herself mentally. Under such circumstances it is not at all surprising that she made these apparently contradictory pleas. All of this testimony may have been of but little help to the court in determining the conflict between the parties respecting the future interests of the child. The district court, however, deemed it of sufficient importance to make a finding that the deceased had on numerous occasions "requested that her son Joseph be taken, cared for, and reared by Mrs. Jacobsen or by Mrs. Taylor." The court could, with equal propriety, have made a finding that she made the same request of the other parties to this proceeding.

The lower court, doubtless by adopting findings prepared by counsel for petitioner, found that the mother of the child, about the month of July, 1909, left the home of the petitioner without his fault and contrary to his wishes, and that the petitioner had, up until the date of their separation, supported and maintained his wife and child to the best of his ability. That finding is wholly imma-

terial to the question to be determined. In addition to that, in my judgment, it is contrary to not only the findings of the district court in the divorce proceeding, but is against the great weight of the evidence in this action. Moreover, it is an unnecessary and unjust reflection upon a woman who has passed to the great beyond and is not in court to defend herself against any such accusation. It should be annulled and stricken from the findings made by the court.

It also appears in the record, as indicated above, that Mr. Taylor and his wife have filed a petition in the district court of Salt Lake county for the adoption of this little boy, and that the father, petitioner herein, has filed a relinquishment of all his right or claim to the boy and consented to his adoption by Taylor and wife. It is not apparent that any order of adoption was ever made. It also appears that Mr. Christensen has filed a petition with a view of adopting the child, but as I understand, both of these proceedings are held in abeyance pending this appeal. It sufficiently appears from what has been said that this court would not favorably consider awarding the custody of the child to the petitioner, except as that may be a medium for his adoption by Taylor and wife.

For the foregoing reasons the case is remanded to the district court of Salt Lake county, with directions to strike from the record the finding relating to the abandonment of the petitioner by his wife as indicated above. Otherwise the judgment is affirmed conditionally that an order of adoption of the child on the part of Mr. Taylor and wife be filed in this proceeding within 30 days after the remittitur from this court has reached the district court. If no such order of adoption is so filed, the district court is directed to set aside its former order and judgment and dismiss the petition. Neither party will recover costs on appeal.

CORFMAN, O. J., and FRICK, WEBER, and THURMAN, JJ., concur.

MURRAY CITY v. INDUSTRIAL COMMISSION OF UTAH. (No. 3372.)

(Supreme Court of Utah. July 31, 1919.)

MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION ACT—FINDINGS OF COMMISSION—EVIDENCE OF INJURY—SUFFICIENCY.

Findings of the Industrial Commission that a city employé petitioning for compensation was injured in the course of his employment, and that his injury by a slight blow on the neck with a shovel handle was the immediate cause of a paralytic stroke following shortly

after the accident held supported by evidence given by the attending physician.¹

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Action by Murray City against the Industrial Commission of Utah, to set aside its award under the Workmen's Compensation Act. From a judgment or order for plaintiff vacating and setting aside the award, the Commission appeals. Reversed, and cause remanded with directions to set aside the order and judgment and to dismiss the complaint.

Dan B. Shields, Atty. Gen., and H. Van Dam, Jr., Asst. Atty. Gen., for appellant.

D. W. Moffat, of Murray, for respondent.

GIDEON, J. It is admitted that the plaintiff, Murray City, as an employer, is subject to the provisions of the act of the Legislature commonly known as the Industrial Commission Act. It appears that on or about August 25, 1917, one David Hazeldine was employed by the plaintiff city, and was at that date assisting in loading with a shovel slag upon a wagon. Charles White, a teamster, in leveling the slag thrown upon the wagon, while in the act of bringing back his shovel, struck Hazeldine a very slight blow on the neck with one end of the shovel handle. A state of paralysis followed, which particularly affected the left side of the body. A petition was filed by Hazeldine with the defendant commission praying for such relief as he might be entitled to receive. Hearing was had, and an order made by the commission, directing that the plaintiff, Murray City, pay to the claimant, Hazeldine, the sum of \$8.73 per week beginning September 5, 1917, and to continue so long as the disability lasts. Thereafter, on petition of Murray City, a rehearing was granted and additional testimony taken, whereupon the commission adhered to and reaffirmed its former decision. The plaintiff city, being dissatisfied with the award of the commission, in pursuance of Comp. Laws Utah 1917, § 3087, being section 27 of the original act of 1917, filed its complaint in the district court of Salt Lake county, asking that said award be set aside, vacated, or amended, on the ground that the decision was unreasonable and unlawful, and that said decision was not supported by evidence, but was contrary to the evidence, and that the applicant did not receive a personal injury by accident arising out of and in the course of his employment. To that complaint the commission answered, making certain admissions and denials. Among other things it was alleged "that the court is without jurisdiction to hear evidence in the case, and that its jurisdiction is limited to reviewing the record made by

the commission." To the answer was attached and filed with the clerk of the court a copy of the proceedings and testimony taken before the commission. The trial court seems to have treated the answer as a demurrer, and, after argument, overruled the same, entered judgment in favor of the plaintiff city vacating and setting aside the award made by the defendant commission. From that judgment or order the commission appeals to this court.

There is no dispute that the petitioner Hazeldine was, on the date mentioned, in the employ of the city. Neither is there any dispute that he received a slight blow in the course of his employment from the end of the shovel handle in the hands of the witness White, either by Hazeldine walking against it or by White pulling it back in leveling the slag upon his wagon. It is also conceded that it was not such a blow or contact as to cause any abrasion or make any mark or bruise upon the skin. Immediately following this, however, Hazeldine became sick; was given some assistance by his fellow workmen; was later, during the same afternoon, taken to the physician's office. On the following morning paralysis had developed so as to be, as stated by the doctor, complete.

The question for determination by this court is, Is there any substantial evidence in the record to support the finding of the commission that the injury resulted from an accident received while in the course of employment?

It is conceded in the argument of counsel for Murray City that if the evidence of the physician connects the stroke of paralysis with the injury the decision of the Industrial Commission should be sustained. It is likewise conceded by the Attorney General, appearing for the commission, that if the award can be supported such support must be found in the testimony of the attending physician, Dr. Rothwell, as his is the only testimony that connects the paralysis with the accident. We think it advisable, therefore, to set out all of the testimony given by the physician bearing upon or material to the finding of the commission on that point. It is as follows:

"Q. Do you know anything as to an injury sustained by him on or about the 17th of August, 1917? A. Yes. Q. State, Doctor, what the nature of it was and the condition in which you found him. A. Mr. Hazeldine was brought to my office in a buggy on that day by two other men, I believe, and they told me at that time that he had been struck in the neck with the handle, I believe, of a shovel; and at that time he had been struck, I believe, in the left side of his neck, and his head was turned very far to that side. On examination at that time he didn't show any bruise or contusion at the point of injury, and I heard from him the next day. * * * I went down to see him and at the time he had a left-sided paralysis. I kept him in bed for a long time with that, and it

¹ Citing *Industrial Com. v. Evans*, 174 Pac. 825; *Garfield Smelting Co. v. Industrial Com.*, 178 Pac. 57.

is gradually getting better. * * * Q. Well, Doctor, was there any contusion or mark around the area of the injury developed subsequent to the first examination? A. No, sir. Q. Did you connect, in any way, the injury with his stroke of paralysis? A. Well, in this way: Of course, as far as the tap on the neck went, that would not give him the paralysis on the same side. His injury has got to be here (pointing to the base of the skull), but the way I look at Mr. Hazeldine's case, he, doubtless, was carrying at that time a high-blood pressure, as tests with the instruments have since shown, and I have no doubt he was at the time of his injury, and he was working for the city on a hot August day, in a black slag dump, just about as hot a condition as you could get a man to work in. In fact, the heat was terrific, and that would tend to make his pressure higher. He was struck in the neck, and it was started by his being struck; and he, I suppose, had jumped back, and that is when the thing happened. That is, started in in scaring him a little bit, in connection with the already high-blood pressure, and augmented it, and he burst a blood vessel in the right side of the brain. Q. And you call this a stroke of apoplexy, or how do you designate it? A. Yes; a stroke of paralysis. Q. Now, do you say that this accident—while it in itself was not wholly the cause of the stroke—but would you say that it was the proximate cause? A. I would say so, Mr. Nebeker. As I would look at it, the condition is much the same as if we had a loaded cannon in this room and everything ready to be fired off. Let some one touch it off as the accident touched his off, and the whole character is changed. Q. Now, do you make any connection or relation with the fact of him being hit on the left side of the neck with his paralysis on the left side? A. No; nothing whatever. Q. Is it not a fact, Doctor, that an injury on the one side would more likely have an effect on the opposite side? A. Yes, absolutely. The only way it could happen to give him the paralysis would be to give him a fracture of the vertebrae in the neck. Then it would cross over, for they cross over right at the base of the brain. * * * Q. Now, Doctor, how soon after receiving that accident would you say from your experience as a physician that this stroke followed the accident? A. Well, now, I saw him, as I remember, around 5 o'clock in the afternoon, and he had it the next morning. It was complete the next morning. It was not complete that afternoon. Of course those things all depend on the size of the vessel that bursts. If it is a very small vessel it takes a long time to form a clot in the brain to destroy the nerve centers; while a large vessel can destroy it immediately in such a manner as to cause instant death. Q. Could you tell at your first examination, at the time he was brought to your office immediately following the accident—did you determine at that time that he was suffering from a stroke? A. No; he was not. He was suffering from what we call shock, but it had not made itself evident as paralysis. Q. Is there any evidence in your mind that the shock received from the accident was the proximate cause of this stroke, or— A. Well, let me see if my idea of the proximate cause is the same as yours. Q. Would it have happened if the accident had not been sustained? A. Perhaps. As I say, that blood pressure was there,

and everything was there to cause a rupture of the blood vessel, but whether or not it would ever have ruptured of its own accord no one can tell. Q. You believe, then, that the accident would aggravate or accelerate the process of the action? A. Yes, sir. Q. Did he sustain what you would call a severe stroke, to clear up as quickly as it has, or a light stroke? A. Well, rather a light stroke, to clear up as quickly as it has."

The commission made findings, and from such findings deduced the following conclusion:

"In view of the extreme hot weather, age of the applicant, and the obvious susceptibility of applicant to suffer a paralytic stroke at the time of the accident, the fact that no evidence of sickness or distress was apparent immediately before the blow, that a strange feeling, sickness, and a paralytic stroke developed in usual time immediately following the blow, it is reasonable to conclude that the blow from the shovel, received accidentally and arising out of and in the course of his employment by the defendant corporation, was the proximate cause of the disability suffered by applicant, and an award of compensation should be made accordingly."

It is the contention of Murray City that there is nothing in the testimony of the physician to support the finding that Hazeldine was injured while in the course of his employment, and that, if injured, then the slight stroke which he received could not have produced the paralytic condition that followed.

As indicated above, the only question before this court for determination is whether the above testimony of the physician is sufficient to support the commission's findings. Without attempting to analyze in detail or set forth the deductions and conclusions that might be legally or logically drawn from the physician's testimony, we remark that we have no hesitancy in holding that there was testimony before the commission to support its findings, both that the applicant (petitioner) was injured in the course of his employment, and that such injury was the immediate cause of the paralytic stroke following shortly after the accident or injury. The following authorities support the conclusion reached: *Honnold, Workmen's Comp.* § 88; *La Veck v. Parke, Davis Co.*, 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277; *Crowley v. City of Lowell*, 223 Mass. 298, 111 N. E. 786. Other phases of the Industrial Commission Act have been considered by this court in two cases, namely *Industrial Co. v. Evans*, 174 Pac. 825; *Garfield Smelting Co. v. Industrial Com.*, 178 Pac. 57.

It follows from the foregoing that the district court erred in entering judgment setting aside the award of the commission. The judgment of the lower court is therefore reversed, and the cause is remanded to the district court of Salt Lake county, with directions to set aside its order and judg-

ment and to dismiss the complaint. Appellant to recover costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

PINGREE NAT. BANK OF OGDEN v. WEBER COUNTY et al. (No. 3314.)

(Supreme Court of Utah. July 8, 1919. On Application for Rehearing, Aug. 27, 1919.)

1. TAXATION ⚡454—ASSESSMENT—CONCLUSIVENESS—REVIEW.

The valuation of bank shares by an assessor and board of equalization, in determining tax the shares should bear, is conclusive in absence of fraud.¹

2. APPEAL AND ERROR ⚡1054(3)—HARMLESS ERROR—EVIDENCE.

Error in admitting evidence is harmless, where court disregarded it in entering judgment.

3. TAXATION ⚡543(6)—RECOVERING UNLAWFUL TAX PAID—COMPLAINT.

A complaint alleging that excessive valuation of bank shares resulted in an exorbitant and unlawful tax, etc., authorizes admission of evidence that a deduction of real estate values from the total value of the shares was not made in manner required by Comp. Laws 1917, § 5869.

4. TAXATION ⚡128—BANK SHARES—DEDUCTING REAL ESTATE VALUE.

Comp. Laws 1917, § 5869, relating to assessment of bank shares, is not complied with by deducting assessed value of bank's realty from total value of shares, but amount to be deducted is a sum bearing same relation to total value of shares as assessed value of realty bears to book value of capital stock, surplus, and undivided profits.

5. APPEAL AND ERROR ⚡1106(4)—DISPOSITION OF CASE—REMANDING.

Where the record in an action at law to recover taxes illegally exacted is indefinite as to whether the tax was properly calculated, the case will be remanded for purpose of taking further evidence.

6. TAXATION ⚡537—RECOVERY OF TAX PAID—ASSESSMENT—CONCLUSIVENESS.

An assessment of bank shares for taxation by a county assessor and board of equalization is not conclusive where they misapplied the statutory method of calculating taxes, but is subject to judicial revision in action to recover taxes under Comp. Laws 1917, § 6094.

On Application for Rehearing.

7. APPEAL AND ERROR ⚡835(2)—RESERVING GROUNDS FOR REVIEW—ASSIGNMENTS OF ERROR.

The alleged unconstitutionality of a statute cannot be considered upon a rehearing application, where the point was not raised below nor assigned as error on appeal.²

¹ Continental Nat. Bank v. Naylor, 179 Pac. 67.

² Lyon v. Mauss, 31 Utah, 283, 87 Pac. 1014; Ege-lund v. Fayter, 172 Pac. 313; Holt v. Great Eastern Casualty Co., 173 Pac. 1168.

Appeal from District Court, Weber County; A. W. Agee, Judge.

Action by the Pingree National Bank of Ogden, Utah, against Weber County and Joseph E. Storey. Judgment for plaintiff against the first-named defendant, and it appeals and plaintiff assigns cross-errors. Reversed and remanded, with directions.

C. L. Farr and J. N. Kimball, both of Ogden, for appellant.

H. H. Henderson, of Ogden, for respondent.

THURMAN, J. The plaintiff is a national bank doing business at Ogden, Weber county, Utah. On the 1st day of January, 1916, its capital stock amounted to \$175,000, divided among 1,750 shareholders. Its surplus amounted to \$75,000 and its undivided profits to \$644.21. Its total assets, as shown by a verified statement furnished the county assessor by the plaintiff, amounted to the sum of \$250,644.21. The capital stock included the real estate used by the plaintiff for banking purposes in Weber county. The assessor, for the purpose of taxation in 1916, determined the market value of all of said property to be the sum of \$525,000. The real estate was valued at \$66,760, which deducted from the value of all the property left a balance of \$458,240. From this sum a further deduction was made of 10 per cent., leaving a final balance of \$412,416, at which sum the shares were assessed.

It is, in substance, alleged in the complaint that said assessor wrongfully, fraudulently, unlawfully, systematically, and intentionally assessed the value of said shares at the sum last named for the purpose of compelling plaintiff to pay more than its just share of the taxes, and that said property was assessed at a higher valuation than other property of the same kind assessed by said assessor. It is also alleged that plaintiff appeared before the county board of equalization and applied for a reduction of said taxes, and pointed out to the board that the assessor had assessed said shares greatly in excess of the value of plaintiff's assets and for more than their full cash value; that said board fraudulently, wrongfully, arbitrarily, and capriciously refused to reduce the valuation. The complaint further alleges that plaintiff paid to the defendant Storey as county treasurer all of said taxes, including the assessment on real estate, the total sum of \$9,593.18, and filed a written protest with said county treasurer protesting the sum of \$8,298.30, included in the above tax. It is also alleged that the statute under which the shares were assessed is unconstitutional and void; that it violates sections 2, 3, and 10 of article 13 of the Constitution of Utah, because said assessment was made with the intention and purpose of compelling plaintiff, in behalf of its shareholders, to pay an excessive and dispro-

portionate amount of the taxes assessed; that said tax so assessed is excessive, discriminative, unequal, and nonuniform and in violation of the Constitution and laws of the United States. Various other allegations are made charging fraud and discrimination, but the foregoing sufficiently illustrates the nature of plaintiff's claim, for which it prayed judgment in the sum of \$8,298.30.

The defendants admit substantially all the allegations of the complaint, except such as charge excessive valuation, intentional wrongdoing, and fraud.

The case was tried to a jury. The action against the treasurer was dismissed, and under direction of the court a verdict was rendered and judgment entered against the county in the sum of \$613.60, from which judgment the county appeals and assigns many errors. It insists that plaintiff was not entitled to judgment in any sum whatsoever. Respondent assigns cross-errors, by which it seeks judgment for a greater amount.

[1, 2] At the trial, evidence was admitted for respondent, over appellant's objection, to prove the market value of the shares. Appellant insists that such evidence was inadmissible under the pleadings in the absence of any proof of fraud. In our judgment, the contention of appellant should have been sustained, for the reason that unless fraud in making the assessment was established the action of the assessor and board of equalization as to this matter, which was within their discretion, was final and conclusive. *Continental Nat. Bank v. Naylor*, 179 Pac. 67, and cases cited at page 76. The error, however, was harmless, inasmuch as the court found that no fraud was proven and disregarded the testimony in entering its judgment.

[3] Certain portions of the assessment book were admitted in evidence over appellant's objection. The evidence so admitted tended to show the method adopted by the assessor in determining the value at which the shares should be assessed. It showed that the market value of the shares was fixed at \$525,000. From this entire value was deducted the value of the real estate, \$66,760, obtaining as a result \$458,240. From this sum a further deduction of 10 per cent. was made, leaving as hereinbefore stated, a final balance of \$412,416, at which the shares were assessed. The evidence was offered by respondent for the purpose of showing that deducting the value of the real estate from the entire value of the shares is not a compliance with the rules laid down in section 5869, Comp. Laws Utah 1917. Appellant objected to the evidence mainly on the ground that no such objection to the assessment was made or relied on in the complaint. It is true that the specific point is not presented in the complaint, but it does appear therefrom in more ways than one that the plaintiff complains of excessive valuation by

which the shares of the stockholders were assessed too high. In other words, it complains that the method adopted by the assessor resulted in requiring respondent to pay a tax which was exorbitant and unlawful. The complaint does not call particular attention to the fact that the statute above referred to was disregarded by the assessor in determining the value at which the shares should be assessed. In the absence of a special demurrer, however, we think the evidence was within the issues made by the pleadings.

[4, 5] We cannot ascertain from the record before us whether or not the assessor, in determining the value at which the shares should be assessed, followed the rule provided in section 5869, *supra*. Whether the assessment made was prejudicial to the plaintiff depends entirely upon the question as to whether the sum \$66,760 represents the amount contemplated by said section to be deducted on account of the real estate or only the value at which the real estate was finally assessed. If the former, respondent could not have been prejudiced. If we deduct from the full cash value of the shares the amount contemplated by the statute, the result obtained must of necessity represent the value of the shares to be assessed, less the further deduction of 10 per cent. If from this amount we deduct the 10 per cent., we obtain the value at which the shares should be assessed. This proposition is incontrovertible. Therefore we conclude, if the \$66,760 represents the correct amount to be deducted on account of the real estate as provided by the section of the statute referred to, and that sum was deducted from the full cash value of the shares, the plaintiff has no grounds of complaint and the court should have found for the defendant no cause of action. If, on the other hand, the \$66,760 appearing in the record represents only the assessed value of the real estate, or the value upon which the tax was computed, another and different result would be obtained. This court had occasion to apply the rule prescribed by said section in *Continental National Bank v. Naylor*, *supra*. It is therefore unnecessary to do more than make a concrete application of it in the present case. The formula is, as the assessed value of the real estate is to the book value of the capital stock, surplus, and undivided profits combined, so is x to the entire value of the shares of stock. In this case, as \$66,760 is to \$250,644.21, so is x to \$525,000. \$66,760 multiplied by \$525,000 and the product divided by \$250,644.21 gives the amount that should be deducted from the entire value, \$525,000, on account of the real estate. The result is \$139,835.61. This deducted from \$525,000 leaves a balance of \$385,164.39. Ten per cent. of this sum deducted from it leaves a balance of \$346,647.96, the value upon which the tax should have been computed,

Instead of the \$412,416 fixed by the assessor. The difference between these amounts, or \$85,768.70, represents the excess valuation upon which the assessor computed the tax. The rate of taxation being 20.1 mills, the overassessment amounted to \$1,321.93. The plaintiff having paid the same December 4, 1916, would be entitled to judgment therefor with interest from the date last named.

The trial court recognized the true rule of computation and endeavored to apply it in arriving at a correct conclusion. By miscalculation, however, it found the overassessment to be less than one-half the amount found by us in the above computation.

The record in this case is uncertain and indefinite as to whether the \$68,760 represents the correct amount to be deducted on account of the real estate as provided by the statute, or the value at which it was assessed and upon which the tax was computed. We have pointed out in either case what the judgment should be, and have concluded to remand the case to the district court of Weber county for further proceedings. It is not usual to remand cases at law for the purpose of taking further evidence, but in a case such as this, where it is merely a question of an amount determinable by a positive rule of law, we are of the opinion we have the power to direct that the proper amount be ascertained. To undertake to enter judgment on the record as it now stands would possibly result in grave injustice to one or the other of the parties litigant.

[6] Before concluding this opinion, we deem it advisable to further elaborate one question presented by the record. If we understand the position of appellant, it contends that the court, under the pleadings, without proof of fraud, had no power to hear and determine the cause for the reason that the judgment of the assessor and county board of equalization was final and conclusive. We are not prepared to dispute this contention as to matters clearly within the discretion of those officers. We have already suggested in this opinion that the valuation of property for taxation purposes was within their discretion, and in the absence of evidence tending to show fraud the objection to evidence relating to value should have been sustained. But, as suggested by the trial court in this case, the question here presented was not a matter of discretion at all. It was a matter of statutory requirement susceptible of ascertainment to a mathematical certainty. It was a mistake on the part of the assessor in the application of a plain provision of the statute. The mistake was repeated by the county board of

equalization. The record on its face discloses the mistake, if the valuation of the real estate as given means the value at which it was assessed. It would be a reflection upon the judiciary of the state and its efficiency in the administration of justice if we were compelled to hold that the courts are powerless to correct a palpable error about which there can be no reasonable difference of opinion.

This action was brought in pursuance of Comp. Laws Utah 1917, § 6094, and if the tax is found to be unlawful in matters as to which the assessing officer has no discretion, the party aggrieved is entitled to the remedy provided in that section.

For the reasons heretofore stated, the judgment of the trial court is reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed. Each party to pay its own costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

On Application for Rehearing.

THURMAN, J. [7] On application for a rehearing appellant contends that section 5869, Comp. Laws Utah 1917 (section 2509, Comp. Laws 1907) is unconstitutional. This section prescribes the method of computing the amount to be deducted from the value of bank shares on account of real estate separately assessed. It is vigorously contended that the method adopted violates those provisions of the Constitution requiring that taxation be uniform and in proportion to the value of the property.

The question is a serious one, and if seasonably presented would be entitled to serious consideration. Respondent, replying to the application for rehearing, makes the point that the question was not raised in the court below, neither was it assigned as error on appeal. An inflexible rule of this court requires that every proposition relied on as ground for reversing a judgment must be assigned as error. It is one of our most important rules of practice and its importance has been emphasized in numerous decisions of this court. *Lyon v. Mauss*, 31 Utah, 283, 87 Pac. 1014; *Egelund v. Fayter*, 172 Pac. 313; *Holt v. Great Eastern Casualty Co.*, 173 Pac. 1168.

For the reasons stated, the question presented cannot be considered on this appeal. Application for rehearing denied.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

In re DUFFILL'S ESTATE (two cases).
(L. A. Nos. 5886, 5907.)

(Supreme Court of California. July 30, 1919.
Rehearing Denied Aug. 28, 1919.)

1. WILLS ⚡656—CONDITIONS—OPERATION—
REMOVAL OF CONDITION.

Provision in testatrix's will that in case her son shall marry "A." that trustee shall pay to him thereafter annually a sum less than the amount theretofore named operated upon the trustee only; and, where son was divorced from his then wife, and thereafter married "A." before the death of testatrix, the contingency upon which the inhibition was to become effective was removed, in view of Civ. Code, § 749, providing that condition in will shall take effect at testator's death.

2. WILLS ⚡481—TIME OF TAKING EFFECT.

Wills generally speak as of the date of the death of their makers.

3. TRUSTS ⚡272(3) — STOCK DIVIDENDS —
"INCOME"—"PRINCIPAL."

Stock dividends paid out of earnings accumulating after the death of a stockholder, who has created a trust estate by will, are income belonging to the life beneficiary of the trust, and not principal belonging to the corpus of the estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income; Principal.]

4. LIFE ESTATES ⚡15(2) — DIVIDENDS —
WHETHER INCOME OR PRINCIPAL.

The determination of the directors of a corporation as to the source of its dividends has no binding or persuasive effect upon the court when it is required to decide whether a stock dividend constitutes income which goes to the tenant for life or for years or is principal to be held for the benefit of the remaindermen.

5. LIFE ESTATES ⚡15(2) — DIVIDENDS —
"PRINCIPAL" OR "INCOME."

If the funds out of which a dividend is paid accrued before the life estate arose, it is principal belonging to the corpus of the estate, but if the fund was earned after the life estate arose it is income belonging to the life tenant.

6. PERPETUITIES ⚡9(7)—ACCUMULATIONS.

Provision in will that when grandson shall become 21 trustee shall segregate trust fund and any accumulations thereof and convey one part to the son, etc., though void by Civ. Code, § 723, as providing for further accumulation of income of other half until grandson becomes 25 years of age, held not to make invalid the gift of the income in view of section 733.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the Estate of Eugenie A. Duffill, deceased. From decree of distribution Albert Duffill, a minor, by his guardian, Los Angeles Trust & Savings Bank, and oth-

ers, appeal, Harry Duffill appealing from certain portions of the decree. Affirmed.

E. E. Bacon, W. E. Mitchell, Gibson, Dunn & Crutcher, Hunsaker & Britt and Le Roy M. Edwards and Samuel Poorman, Jr., all of Los Angeles, for appellant Harry Duffill.

Kemp, Mitchell & Silberberg, of Los Angeles, for remaining appellants.

MELVIN, J. Certain parties to a proceeding on objections by the heir at law to the distribution of the estate under the will of Eugenie A. Duffill have appealed from the decree of distribution. These are Albert Duffill, a minor, by his guardian, Los Angeles Trust & Savings Bank, a corporation, Martha Duffill and Los Angeles Trust & Savings Bank, a corporation, executor and trustee named in the will.

While the appeal is general, appellants attack: (1) That part of the decree holding invalid the provision in the will reducing the devise to Harry Duffill (son of the testatrix), and making smaller his annuity in the event of his marriage to Mrs. Alice McNamara; and (2) that portion of the judgment by which one-half of certain stock dividends, received by the executor during administration, and paid, as appellants allege, from the earnings of the Grasselli Chemical Company, which accrued prior to the death of Eugenie A. Duffill, should go to Harry Duffill at once as income from a trust created by the will; the contention of appellants being that these dividends should become part of the corpus of the trust for subsequent distribution under the terms thereof.

The will was dated September 10, 1914. Mrs. Duffill, the testatrix, died January 7, 1916. At the time of the execution of the will Harry Duffill was living with his mother. Martha Duffill, Harry's wife, and their son Albert were living elsewhere. A suit for divorce in which she was plaintiff and in which Mrs. Alice McNamara was named as corespondent was pending. This was later tried, an interlocutory decree being entered December 14, 1914. A final decree was given on the 16th day of December, 1915, and on the following day Mrs. McNamara and Harry Duffill were married. The latter immediately apprised his mother of the marriage.

The principal asset of the estate was 4,467 shares of stock of the Grasselli Chemical Company, of the par value of \$46,700, which had paid excellent dividends. Its value had been augmented shortly before the death of the testatrix by the payment of a stock dividend of 10 per cent., which was received by the executor after her death, and thereafter other dividends both in cash and stock were declared and paid.

The executor in due time after probate filed its final account and petition for distribution, which was resisted by Harry Duffill.

There was a hearing upon this matter and thereafter, but before decision, there was a stipulation, to which we shall later refer more in detail, establishing certain facts surrounding the issuance of stock dividends by the Grasselli Chemical Company, and in July, 1918, the court signed the order and decree from which the appeal of proponents is prosecuted.

The principal beneficiaries under the will were Harry Duffill, the son, and Albert Duffill, the grandson, of the testatrix in whose favor certain trusts were created. That which was created for the benefit of Harry Duffill provided for the payment by the trustee, Los Angeles Trust & Savings Bank, to him annually of the sum of \$4,000 during the minority of his son Albert. This trust provision contained the following language:

"Provided, that if my son Harry Duffill shall marry one Mrs. Alice McNamara, then and in that event, I desire that the said trustee shall pay to him thereafter only the sum of two thousand dollars (\$2,000) per year instead of four thousand dollars (\$4,000) per year."

The will also contained a provision for the final distribution of Harry Duffill's estate in the following language:

"When my grandson Albert Duffill shall attain the age of twenty-one years, said trustee shall segregate said trust fund and any accumulations thereof, into two equal parts and transfer and convey one of said parts to my son Harry Duffill, provided, however, that in the event my said son Harry Duffill shall have married Mrs. Alice McNamara prior to the date when said Albert Duffill shall have attained the age of twenty-one years, then and in that event the said trustee shall at said time distribute to my son Harry Duffill one-half of the balance of the estate in the hands of said trustee after withdrawing therefrom all of the stock of the Grasselli Chemical Company."

The trial court found that at the time of his marriage to Mrs. McNamara, in the lifetime of his mother, Harry Duffill "had neither knowledge nor notice of those provisions of said will in restraint of such marriage, nor had he knowledge or notice thereof until after the testatrix's decease." Harry Duffill, the heir at law, and all other persons interested in the estate, except Albert were adults at the date of the death of Mrs. Eugenie A. Duffill. The court held that all of the provisions of the will for the accumulation of income for the benefit of any person other than the minor grandson were void, and that the conditions for the prevention of the marriage of Harry Duffill were also void. Distribution on this theory was decreed.

[1, 2] Counsel for appellants have learnedly discussed the rules of the civil law and of the ecclesiastical law derived therefrom. It is asserted by them that section 710, Civil Code, is merely a codification of the ecclesiastical law and the temporal law regarding restraints upon marriage, and that while the ancient

and the modern rule prohibited or disregarded general restraints upon entry into the marriage state, any particular inhibition against marriage to a named individual has always been upheld. Under the circumstances presented by this appeal, it is not necessary for us to decide whether section 710, Civil Code, is a codification of English probate law or not, because even assuming, for the sake of argument, that this part of the will would be effective if a marriage between Mrs. McNamara and Harry Duffill had been contracted after the death of the testatrix, their marriage before Mrs. Duffill's death removed the very contingency upon which the inhibition in the will was to become effective. Wills generally speak as of the date of the death of their makers. Section 749, Civil Code, provides that:

"The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest."

There is nothing in the will by which Harry Duffill is to receive a diminished share of the property in the event of his marriage before his mother's death. When she executed the testament he was a married man, and could not have been legally married to Mrs. McNamara. He was being sued for divorce. The mother perhaps, indeed probably, believed that in the event of the granting of the divorce during her lifetime she could influence her son against marrying Mrs. McNamara. The will (either for that or some other reason) contemplated the possibility of the marriage after Mrs. Duffill's death. The words of restraint operate not upon Harry, but upon the trustee. The income is not to be automatically decreased upon his marriage, but the trustee shall "thereafter" pay to him only \$2,000 annually. The direction as to the corpus is that the trustee shall distribute Harry Duffill's share when Albert shall have attained the age of 21 years, withholding all of the stock in the Grasselli Company, if he shall have married Alice McNamara. All of these things were to be done by the trustee—the conveyancer made so by the will only after the death of the testatrix.

A very similar case to the one at bar is *Brown v. Severson*, 59 Tenn. (12 Heisk.) 381. The will considered in the opinion in that case directed that the executor and executrix should hold and administer certain property for the "support, education, and inheritance" of the testator's children. The fund (being all of the property, real and personal, not otherwise disposed of specifically by the will) was to be "legally and equitably estimated" whenever any child should marry or attain lawful age, so that such child should then have an equal share of said estimated fund or property. It was provided, however:

"That no child shall ever marry any blood kin, or blood relation, or any Catholic, or adherent of the Roman Catholic Church, or of its Papal Head; nor before her eighteenth year shall be full; and should any of my said children marry in any way contrary to any part of this provision, then that child shall take or receive, in lieu of what is or has been herein bequeathed to her, one thousand dollars in money, to be disbursed and used by my said executor and executrix in the careful purchase of such things as said child may need in and towards housekeeping, and to be given to said child on loan or in trust, and to constitute the whole of that child's legacy."

One of the daughters, during her father's lifetime and before she was 18 years of age, had married with her father's knowledge. The court held *inter alia* that the provision or condition in the will was intended to apply only to those marriages occurring after his death. After citing the part of the will quoted above the court said:

"It is evident from this that the testator contemplated a forfeiture taking place when his executor and executrix should have charge of his estate, which could only be after his death."

These words are very pertinent to the provisions of the will here under discussion. The court also supported the conclusion reached by section 2195 of the Tennessee Code of 1858, which provides that a will is to speak and take effect as if it had been executed immediately before the testator's death. We decide, therefore, that the court did not err in holding that the provision of the will in restraint of marriage was void.

[3] We shall now discuss the stock dividends declared and paid after Mrs. Duffill's death. The question, according to the trustee and its associated appellants, is this: Do such dividends constitute parts of the corpus of the residuary estate, or are they to be regarded as part of the income thereof? Respondent Harry Duffill insists that the stock dividends were actually paid from earnings of the Grasselli Chemical Company which had been accumulated after the death of the testatrix. We shall examine this contention, before determining the rule of distribution applicable to the dividends. The facts as stipulated are as follows:

On November 23, 1916, the directors of the Grasselli Chemical Company resolved that there be distributed to the common stockholders of record December 15, 1916, "out of the surplus accumulated prior to March 1, 1913," a 10 per cent. common stock dividend, payable January 2, 1917. On August 23, 1917, a similar resolution was passed, making a stock dividend of 3¼ per cent. payable out of the same surplus, the "same to be distributed on September 29, 1917." On November 22, 1917, the said directors resolved that there be distributed to the common stockholders of record December 15, 1917, out of the earnings of the year 1917, a 4.15 per cent.

dividend, the same to be distributed December 31, 1917. It was further stipulated that the Grasselli Chemical Company had surplus and undivided profits of the value shown on its books in the following amounts upon the dates specified:

January 1, 1913\$ 8,116,176 84
January 1, 19144,685,254 08
January 1, 19155,335,384 88
January 1, 19167,213,304 56
January 1, 19179,796,906 40
January 1, 191810,166,737 81

Under the first resolution the executor received a stock dividend of 491.4 shares of the common stock, and 174²⁵/₂₀₀ shares under the second.

[4] While it is true that the first and second resolutions declare the dividends payable out of the surplus accumulated prior to March 1, 1913, that declaration was not binding upon the probate court. Except in a few of the states the determination of the directors of a corporation as to the source of its dividends has no binding or even persuasive effect upon the court when it is required to decide whether a stock dividend constitutes income which goes to the tenant for life or for years or is principal to be held for the benefit of the remainderman. As was said in *McLouth v. Hunt*, 154 N. Y. 179-198, 48 N. E. 548, 553 (39 L. R. A. 230):

"The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remainderman. When questions arise under a will between parties standing in such relations to each other, with respect to the right to accumulated earnings upon capital stock, the courts must determine the question for themselves, according to the nature and substance of the thing which the corporation has assumed to transfer from the one to the other, and they are not concluded by mere names or forms. For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter, but when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted the action of the corporation will not conclude the courts."

And in the opinion in the case of *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472-477, 36 S. W. 1064, 1065 (33 L. R. A. 856) the court said:

"The right to the use of the property entitles the life tenant to its net income. As applied to land, it entitles him to the crops or rent; as applied to money or bonds, it entitles him to the interest; and as applied to corporate stock, it should, upon the same reasoning, entitle him to the net earnings. If the life tenant may not be deprived of crops or rents to make the land better, or of interest to enlarge the corpus of money or bonds, why should he be deprived of net earnings of corporate stock, covered by stock dividends, to augment the remainder estate? It does not seem to us a sufficient answer to say that the corporation, in the latter case, has seen fit, in the due exercise of its power, to capitalize

such earnings, rather than pay them out in cash dividends. What has the capitalization of the earnings to do with their ownership as between life tenant and remainderman, or how can the change of form affect the title of those persons? Can the corporation, after earnings have been made and ascertained, give them to one person by this procedure or to another by that procedure? Certainly not. * * * The life tenant of corporate stock is entitled to the undiminished benefit of its net earnings in any and every contingency; less than that would not allow him the full use of the life estate."

In *Hite's Devisees v. Hite's Executor*, 93 Ky. 257-266, 20 S. W. 778, 780 (19 L. R. A. 173, 40 Am. St. Rep. 189), the court said:

"Where a dividend, although declared in stock, is based upon the earnings of the company, it is in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit. If it be not income, what is it? If it is, then it is rightfully and equitably the property of the life tenant. If it be really profit, then he should have it, whether paid in stock or money."

This doctrine is further expounded, and the authorities supporting it are cited in 2 Cook on Corporations (7th Ed.) § 554, and in Thompson on Corporations (2d Ed.) § 5410.

In such a case as this the court will ascertain whether the giving of the stock dividend or the money dividend to the life tenant reduces the value of the corpus of the estate as it existed at the time of the death of the testator, or in this case of Mrs. Duffill, the testatrix. The intrinsic value as shown by the books of the corporation (and in this case by the stipulation) is to be taken into consideration. This establishes that which the remainderman is entitled to have preserved for ultimate distribution to him. *Smith's Appeal*, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237. As is well said by learned counsel for Harry Duffill:

"When a share of stock in a corporation is issued it represents a pro rata interest in all the property of the corporation, and a board of directors has no power to declare any particular share, or class of shares, to be representative of any particular part of the corporate assets, in the absence of clear legislative authority for such a declaration.

"When a board of directors declares a stock dividend out of surplus earnings, they mean only that they increase the outstanding stock of the corporation to correspond with an equal amount of the increase of the corporate assets; the stock when issued is not limited for its value to such increased amount of assets, but derives its value from the entire assets of the concern. No form of words declaring the dividend can alter this fact.

"The shares received as stock dividends by the estate of Mrs. Duffill since her death represent profits accruing to such estate because of its interest, as a holder of stock owned by her at the time of her death, in the aggregate of all the assets of the Grasselli Corporation, and not of any particular part of those assets; and such

stock dividends are income of her estate, if their issuance does not reduce the value of the shares owned by her at the time of her death."

That they do not reduce the value of said shares is clear. Mrs. Duffill died January 7, 1916. The surplus and undivided profits of the corporation at that time, as will be seen by reference to the figures quoted above from the stipulation of the parties, were more than \$7,000,000. After her death two stock dividends were declared of 10 and 3½ per cent., respectively, directed to be paid out of the surplus accumulated prior to March 1, 1913. A later stock dividend of 4.15 was payable, according to declaration of the directors, out of the earnings of the year 1917. The total amount of these dividends was less than 19 per cent. Deducting all the cash and cash dividends declared after Mrs. Duffill's death, the company had on January 1, 1918, surplus and undivided profits amounting to more than \$10,000,000—an increase of more than 40 per cent. in surplus and undivided profits against an augmentation of the outstanding capital stock of less than 19 per cent. This demonstrates that the stock dividends were actually paid out of the earnings of the corporation, after Mrs. Duffill's death.

[5] In the brief of the appealing executor and its associates the two methods of apportioning dividends which are in use in America are discussed. These are called by Cook, in his work on Corporations (7th Ed.) § 553 et seq., "the American or Pennsylvania rule" and "the Massachusetts rule." According to the American rule, if it be found that the fund out of which the dividend is paid accrued before the life estate arose, it is held to be principal belonging to the corpus of the estate. But when it is found that such fund was earned after the life estate arose, then it is income belonging to the life tenant. Of the other rule, known sometimes as "the rule in *Minot's Case*," which prevails in Massachusetts, Georgia, Rhode Island, and Illinois, the learned author says:

"It regards cash dividends, whether large or small, as income, and stock dividends, whenever earned and however declared, as capital, and the rule, accordingly, is a simple one. Cash dividends belong to the tenant for life and stock dividends to the corpus. There is little doubt, however, that this rule works great hardship and injustice in many cases. Hence the rule is not rigidly adhered to, but the court, in deciding whether the distribution is a stock or a cash dividend, may consider the actual and substantial character of the transaction, and not its nominal character merely."

That we adopt the American or Pennsylvania rule is evident from the foregoing discussion and the cases cited. In *re Osborne*, 209 N. Y. 450-477, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, is an excellent example of the application of the rule which there was stated as follows:

"(1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they inhere in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

Tested by this rule, the decision of the probate court distributing one-half of the stock dividends to Harry Duffill must stand.

That part of the judgment from which the executor and trustee and its associates appeal, therefore, should be affirmed.

[6] We will now consider the appeal of Harry Duffill from certain parts of the decree, and hereinafter in this opinion we shall refer to him as "the appellant." His appeal is from so much of the decree of distribution as upholds any part of the trust scheme set forth in the will of his mother. Appellant's counsel contend that the two trust schemes, one chiefly for the supposed benefit of himself and the other to provide an income for his son Albert, and to distribute half the accumulated fortune to the latter after his minority, are so intimately interwoven in one testamentary scheme that the destruction of one trust involves the other. The appellant, therefore, asks the court to decide that his mother died intestate, and that he, as heir at law, is the sole inheritor of her estate. In this behalf a number of cases are cited, including *Estate of Fair*, 132 Cal. 523-540, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, *Carpenter v. Cook*, 132 Cal. 621-625, 64 Pac. 997, 84 Am. St. Rep. 118, *Hofsas v. Cummings*, 141 Cal. 525, 75 Pac. 110, *Estate of Dixon*, 143 Cal. 511, 77 Pac. 412, and *Estate of Whitney*, 176 Cal. 12, 167 Pac. 399. Without analysis of these authorities in detail it is enough to say that each is dependent for the conclusion reached by the court upon the peculiar facts appearing from the record. In the case now before us the two trust provisions are easily sustainable, and the will may be upheld as a substantial declaration of the testamentary intent after eliminating the unlawful conditions.

We have in this opinion discussed the terms of the trust relating to Harry Duffill. But it will be necessary again to examine the fifth clause of the will in order to have in mind the substantial parts of the trust in favor of the grandson of testatrix. The trustee is by the will ordered to invest and reinvest the property, "and to apply and distribute the income and principal" as thereafter directed. The trustee also is to pay \$3,000 a year to Alfred, during minority; to pay appellant \$4,000 a year during his son's

minority (said annuity to be reduced in case of the prohibited marriage taking place) and then follows this language:

"When my grandson Albert Duffill shall attain the age of twenty-one years, said trustee shall segregate said trust fund, and any accumulations thereof, into two equal parts and transfer and convey one of said parts to my son Harry Duffill."

This is followed by the void condition regarding marriage. After Albert's majority, the portion distributable to his father having been first subtracted from the corpus of the trust estate, the distribution is to be as follows:

"Said trustee shall pay to said Albert Duffill the entire income from said portion of said trust estate so distributable to said grandson Albert Duffill, and shall distribute to the said Albert Duffill said portion of said trust estate so distributable to him under the terms hereof in such portions, and at such times as it, in its discretion, deems for the best interests of my said grandson Albert Duffill, after said Albert Duffill shall have reached said age of twenty-one years with the limitation that said entire portion shall have been distributed by said trustee to my said grandson on or before the time when said grandson shall have attained the age of twenty-five years."

The decree of distribution provides as follows:

"That the provisions of said paragraph fifthly in restraint of the marriage of the said Harry Duffill with said Mrs. Alice McNamara are, and each of them is, null and void, and also that each and every the directions, trusts and provisions of said paragraph fifthly for the accumulation of the income of testatrix's residuary estate, except in so far as such accumulation is directed to be made for the benefit of said minor, Albert Duffill, and only during his minority, are altogether in contravention of the statutes of the state of California in such case made and provided, and are void; that the devise and bequest of all the rest, residue, and remainder of the estate of the decedent to the Los Angeles Trust & Savings Bank, in trust, as provided in said paragraph fifthly of said will, constitute a valid trust, and should be enforced according to the provisions of said will, except in the particulars wherein said provisions have hereinbefore been found and declared to be illegal and void."

The other portions of the decree relate to the carrying out of the details of this general order of distribution.

It is conceded that the implied directions for the accumulation of the income except in the trust estate of the minor are void. But only such directions are made void by the statute. Section 723, Civ. Code; *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825. But the gift of the income does not fall with the invalid direction for accumulation. Section 733 of Civil Code is as follows:

"When, in consequence of a valid limitation of a future interest, there is a suspension of

the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest."

The courts of New York under a similar statute have consistently held that the void trust for accumulation of income does not invalidate the gift of the principal. *Kilpatrick v. Johnson*, 15 N. Y. 322; *Pruyn v. Sears*, 96 Misc. Rep. 200, 161 N. Y. Supp. 58; *Cochrane v. Schell*, 140 N. Y. 516, 35 N. E. 971; *Manice v. Manice*, 43 N. Y. 303-376; *Matter of Ossman v. Von Roemer*, 221 N. Y. 381, 117 N. E. 576; *Cook v. Lowry*, 95 N. Y. 103.

The testatrix intended that appellant should receive one-half of the income, but upon the void condition that it should be accumulated during Albert's minority. He receives it under the decree freed of the void condition against accumulation. Being the person entitled to the next eventual interest he is entitled to it, and the trust itself is not destroyed in other respects. The decree avoids the direction for accumulation only, and distributes to the intended object of the bounty of testatrix. So, with the void condition against marriage. The result of eliminating it is the same as if it were valid, but had never been violated. The decree does, in our opinion, substantially carry out the wishes of the testatrix in so far as they were not in contravention of law. The fact that the carrying out of the wishes of Mrs. Duffill in the matter of the prohibition of her son's marriage would have changed the distribution of a large part of the property is immaterial. The law strikes out the immaterial provision with reference to marriage, but the gift stands. So, with the accumulations. Undoubtedly the testatrix intended the income to be retained and to go with the corpus of the trust estate in final distribution. Her intent was by the decree only frustrated as to the time when her son Harry should receive his part of the income, and this result was reached because of her unlawful wish for accumulation of that portion.

As was said by Mr. Justice Henshaw in the opinion in *Estate of Yates*, 170 Cal. 254-256, 149 Pac. 555, 556, in speaking of legacies given in trust for accumulations of principal and interest until the beneficiary should reach the age of 25 years:

"The direction in these trusts for accumulations beyond the age of the minority of the legatees is unquestionably void. Civ. Code, §§ 723, 724. But this fact does not in law operate to destroy the trust in its creation, but merely to avoid the provision for the illegal accumulations (Civ. Code, § 725), with the result that the legatees after maturity would be entitled to receive the incomes of the trust funds."

We cannot agree with appellant in his contention that the whole testamentary scheme

failed, and that the decree of the superior court sitting in probate amounted to the fabrication of a new will.

No other subjects discussed in the briefs require further analysis or comment.

That part of the judgment attacked in the appeal of Harry Duffill (L. A. No. 5907) is affirmed.

That part of the judgment from which the executor and trustee and its associates appeal is affirmed.

We concur: ANGELLOTTI, P. J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

FROST v. CITY OF LOS ANGELES et al. (L. A. 4443.)

(Supreme Court of California. Aug. 11, 1919.)

1. NUISANCE §72 — PUBLIC NUISANCE — WHO MAY SUE TO ENJOIN.

To entitle a private party to sue to enjoin a public nuisance, he must allege and prove facts showing that it causes special injury to himself in person or property, and of a character different in kind from that suffered by the general public.

2. WATERS AND WATER COURSES §182 — WATER COMPANIES — STATUTES — CONSTITUTIONALITY.

St. 1913, p. 793, providing that every person, private corporation, or municipality engaged in furnishing water for human consumption, and having over 250 surface connections, shall be guilty of maintaining a nuisance, unless the water being supplied is the purest and most healthful securable, under all circumstances and conditions, is unreasonable and unconstitutional, amounting to an absolute prohibition of a lawful business.

3. CONSTITUTIONAL LAW §81 — POLICE POWER.

The state Legislature is possessed of the entire police power, except as its power is limited by the provisions of the Constitution; but it cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business, which is not inherently, or because of the manner in which it is carried on, injurious to persons or property, or to the public health, convenience, safety, or morals.

4. STATUTES §270 — AMENDMENT — EFFECT ON PENDING SUITS.

The amendment of an unconstitutional statute, making it constitutional, does not have retroactive effect so as to affect the validity of a judgment determining such statute unconstitutional, rendered before the amendment, and such a judgment will not be reversed on appeal by reason of such amendment.

5. STATUTES \S 64(2) — PARTIAL INVALIDITY.

St. 1913, p. 793, providing for a permit for supplying water which must be the purest and most healthful obtainable, and that furnishing water without a permit is a public nuisance, being in part unconstitutional, the court could not grant an injunction against a city furnishing pure water without a permit by eliminating the unconstitutional part, requiring that the purest water be furnished.

6. INJUNCTION \S 24—FURNISHING WATER SUPPLY WITHOUT PERMIT—INCONVENIENCE AS GROUND FOR REFUSAL.

It must be presumed that the Legislature, when it granted permission, under St. 1913, p. 793, to any citizen or consumer using the water, the right to enjoin a water company or municipality from supplying water without a permit from the State Board of Health, did not intend to change in any other respects the principles of equity regarding injunctions; and hence where the water furnished is wholesome and sanitary, an injunction will not issue to protect the technical unsubstantial right of the consumer that a permit be obtained, where the effect of issuing an injunction and stopping the city from supplying its inhabitants will cause the greatest imaginable inconvenience to the city and its inhabitants, and will be of no benefit to the plaintiff consumer.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Edgar M. Frost against the City of Los Angeles and certain officers constituting its board of public service. Judgment for defendants, and plaintiff appeals. Affirmed.

Ingle Carpenter and Charles W. Fourl, both of Los Angeles, for appellant.

Albert Lee Stephens, City Atty., W. B. Matthews, and W. B. Himrod, all of Los Angeles, for respondents.

SHAW, J. This is an action to enjoin the city of Los Angeles and certain officers constituting its board of public service from continuing to supply water from the Los Angeles aqueduct to its inhabitants for domestic uses. The court, after an elaborate trial, gave findings and judgment for the defendants. The plaintiff appeals.

The complaint sets forth that the city has constructed an aqueduct whereby it carries water from the Owens river, in the counties of Mono and Inyo, for a distance of 200 miles, to Los Angeles, and there distributes the same for domestic use to its inhabitants including the plaintiff and his family; that said water is polluted and unfit for human consumption, and that the city is so furnishing it without having obtained any permit to do so from the board of health of the state of California. The claim of the plaintiff is twofold: First, that the supplying of unfit water such as that described, for domestic

use, is per se a public nuisance; and, second, that the city is without authority to furnish any kind of water for public use unless it has first obtained a permit from the state board of health. For the latter point plaintiff relies on the statute providing that the continuation of such supply may be enjoined at the suit of any person who receives water of that character for domestic use from the person sought to be enjoined. Stats. 1913, p. 793.

The court expressly found that the water furnished and supplied by the city through its aqueduct and distributing system "is safe, wholesome, sanitary, healthful, potable, and fit for human consumption"; and, further, that the city was not supplying to the plaintiff for domestic or other uses any water that was not fit for human consumption. These findings are fully supported by the great preponderance of the evidence. Indeed, it may be said that the evidence to the contrary is so inconsiderable that there is no serious conflict.

[1] In view of these findings, it is clear that the court was justified in refusing to grant any relief based upon the theory that the plaintiff as a private individual was maintaining an action to abate or enjoin a condition which constituted a public nuisance. "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Civ. Code, \S 8493. To entitle a party to sue to enjoin a public nuisance, he must allege and prove facts showing that it causes special injury to himself in person or property, and of a character different in kind from that suffered by the general public. *Brown v. Rea*, 150 Cal. 174, 88 Pac. 713; *City Store v. San Jose, etc., Co.*, 150 Cal. 279, 88 Pac. 977; *Spring V. W. W. v. Fifield*, 136 Cal. 15, 68 Pac. 108; *Code Civ. Proc.* \S 731. Since the plaintiff is not injured at all, either specially or otherwise, he cannot under the general law maintain any action with respect to the continuance of the water service. Further, in that aspect the case is entirely without merit, since the thing complained of, the supplying of water unfit for public use, does not exist.

The only foundation upon which the plaintiff can sustain his action is found in the act of 1913 aforesaid. This act makes it unlawful for any person or corporation, private or municipal, to furnish water to any person, for domestic uses, "which is polluted or dangerous to health." It requires any person or corporation desiring to furnish water for domestic use, or, being already engaged in that business who desires to continue so doing, to apply to the state board of health for permission to do so; directs that an investigation of the plant and water supply may be made, and that hearings may be had at the expense of the petitioner, whereupon, if the board finds that the water to be furnished is

of a character which does not endanger the lives or health of human beings, and that it is, under all the circumstances and conditions, the purest and most healthful water obtainable or securable, it shall grant permission for such applicant to furnish, or continue to furnish, such water. The clause upon which the right of the plaintiff to maintain this action depends is, in effect, that any person or corporation whose supply of water for human consumption or domestic use is taken or received from any person or corporation, municipal or private, engaged in such water furnishing business, without having an unrevoked permit to do so as provided in the act, may maintain an action to enjoin such water furnishing person or corporation from furnishing or continuing to furnish water for such purposes, or that it or he may be enjoined at the suit of the state board of health in the same manner.

The respondent contends that this act is unconstitutional so far as it applies to Los Angeles, and also that it is unconstitutional on general grounds as an unreasonable exercise of the police power.

With respect to the first proposition it is argued that any municipal corporation is authorized by the Constitution to establish and operate public works for supplying its inhabitants with water (article 11, § 19); that the Los Angeles charter confers upon that city the power to make all regulations necessary and expedient for the preservation of health and prevention of disease within the city, and to establish a health department with power to enforce such regulations; also to establish and operate waterworks for the purpose of supplying its inhabitants with water, and, in short, with full powers over the entire water system pertaining to that city; and that the subject of providing and furnishing water by the city for its inhabitants is a municipal affair, with respect to which the charter is the exclusive law. In this behalf attention is called to the fact that by an amendment of the charter approved on January 16, 1917, adopted under the provisions of sections 6 and 8 of article 11 of the Constitution as amended in 1914, the city has become entirely independent of the state with respect to its municipal affairs, so that a general law is of no force therein, as to such affairs, whether the charter of the city contains provisions regarding it or not. *Civic Center Ass'n v. R. R. Comm.*, 175 Cal. 441, 168 Pac. 351. The claim is that the supplying of water to the inhabitants of the city of Los Angeles is a municipal affair, and therefore a matter in which the Legislature cannot interfere, even for the purpose of protecting the health of the inhabitants of other portions of the state. It is also claimed that the provision is in violation of section 13, art. 11, of the Constitution, which prohibits the Legislature from delegating to any special

commission power to perform any municipal function, and that it is likewise void as a delegation of legislative power to the state board of health. These several contentions would open an interesting field of inquiry, but, because of our views upon another objection about to be mentioned, we do not think it necessary to determine whether they are well taken or not.

[2] We are of the opinion that the statute of 1913, so far as it provides for the injunction aforesaid, is unconstitutional, because it authorizes an unreasonable exercise of the police power of the state. It provides that every person, private corporation or municipality engaged in furnishing water for human consumption, and having over 250 service connections, shall apply to the state board of health for permission to continue the service; that if the board is, for any cause, unable to proceed at once it shall issue a temporary permit, which shall be good until its final action, and that it shall make a thorough investigation of all the conditions and circumstances, and may allow the applicant to be heard. At the close of the investigation the board must determine the matter, and if it "shall determine, as a fact, that the water being furnished or supplied to such human beings is such, that under all the circumstances and conditions, it does not endanger the lives or health of human beings and *that under all the circumstances and conditions the water being supplied is the purest and most healthful obtainable or securable under all the circumstances and conditions* [sic], it shall grant to petitioner a permit authorizing the petitioner to furnish or continue to furnish or supply such water to such human beings." Section 2, subd. b. It further declares that the furnishing of water without such a permit is a public nuisance, and that it is the duty of the officers of the state to immediately abate the same in the manner provided by law. Subdivision "a" of section 2 requires the board of health to refuse a permit if it determines that the water being supplied may constitute a menace or danger to health or is unhealthful or unsanitary, and no power is given to the board to issue a permanent permit at all, except after it has determined that the water being supplied is the purest and most healthful obtainable under the circumstances.

The act gives the board no discretion. No matter how pure and healthful, short of absolute perfection, the water supply may be, nevertheless, if better water can be obtained by any expenditure of money and effort of which the purveyor to the public use is capable, the permit must be refused; the board has no power to grant any permission; the continuance of the water service at once becomes a public nuisance; it is the bounden duty of the proper state officials to immediately stop it; and any consumer forthwith is invested with the right and power to main-

tain an action to enjoin the continuance of such water service.

It seems obvious from the mere statement of the case that such a law, at least so far as it applies to a water service already in operation, must be held to be unreasonable and invalid. The climate of this state is so arid, the rainfall so light and variable, and the intervals of drought so long, that the denizens of practically every community, from a village having 250 service connections up to the largest city, have and can have no private water supply, but are compelled to depend upon some kind of public water service. It is safe to say that in the majority of such places the water served is not detrimental to the health of the inhabitants. There can be little doubt that in a large number of such cases it would be possible for those engaged in the public water service to find, somewhere available, water of a better quality than that which is being supplied. If such fact could be established, and even if it could not be shown that better water was not obtainable, then, under this law, no permit to continue the original service could be issued by the board, and any consumer could at once enjoin the further service and immediately deprive himself and all other inhabitants of the region of any water from that source, until the better quality of water was secured and delivered to them. In the practical result the inhabitants would be deprived of any water at all in all such cases. Apparently this part of the law is based on the theory that it is better for the urban population of the state that they should die of thirst than that they should quench it with ordinary healthful water, which is not the very purest that can possibly be obtained. The law in this respect amounts to absolute prohibition of a business lawful in itself, and not injurious to health.

[3] The Legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution. But it cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business which is not inherently, or because of the manner in which it is carried on, injurious to persons, or property, or to the public health, convenience, comfort, safety, or morals. *Ex parte Whitwell*, 98 Cal. 73, 81, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; *Ex parte Sing Lee*, 98 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218; *Los Angeles v. Hollywood Cem. Ass'n*, 124 Cal. 349, 57 Pac. 153, 71 Am. St. Rep. 75; *Ex parte McCapes*, 157 Cal. 29, 106 Pac. 229; *In re Dart*, 172 Cal. 59, 155 Pac. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1122. A statement of the precise points decided in some of these decisions will show the practical application of the rule. In *Ex parte Whitwell* an ordinance forbidding any person to maintain a

hospital for insane persons in any building not constructed of brick, iron, or stone, or in any building not surrounded by a high brick or stone wall, or within 400 yards of any dwelling or school, was held to be an unreasonable exercise of the police power. It was said that the restrictions had no reasonable relation to the object of protecting the public interest or the safety, convenience, or comfort of the persons concerned. In the *Sing Lee Case* it was declared that an ordinance prohibiting the carrying on of a public laundry in a town, except in certain specified blocks thereof, without a written permit from the trustees, was void. In *Los Angeles v. Hollywood*, an ordinance prohibiting the establishing of cemeteries within the limits of a county without the permission of the board of supervisors was held void. In the *McCapes Case* it was held that a statute prohibiting any person from building a fire on his own land for burning brush or any other purpose without a written permit from some state or district fire warden was an unreasonable restriction upon the right to use property. The business of furnishing water for the domestic use of inhabitants of any particular territory is a lawful one. To say that a person who is engaged in furnishing such water shall immediately cease doing so, although the water he is furnishing is healthful and safe, until he shall have procured some better quality of water which it is possible for him to obtain, is an unreasonable restriction upon a lawful occupation, and it is a case in which the restriction has no relation whatever to the preservation of the public health, comfort, or convenience, which is obviously the object to which the statute is directed; but, on the contrary, its enforcement would cause far more inconvenience and distress to persons and injury to the public interest than the thing at which it was aimed. Upon the principles we have just discussed, this feature of the law is clearly void.

[4] The subsequent policy of the Legislature indicates that it was of the opinion that this particular prohibition of the law was invalid. The Legislature of 1915 amended the law (St. 1915, p. 1282) by eliminating the clause providing that no permit shall be granted unless the water being furnished was the purest and most healthful obtainable under the circumstances and conditions. To the suggestion that the amendment of the law would affect the action pending so as to allow an injunction which otherwise should have been refused, the answer is that amendments to the law do not operate upon an existing suit in a case like the present, nor have retroactive effect so as to affect the validity of a judgment rendered before the new law came into existence. *Vanderbilt v. All Persons*, 163 Cal. 513, 126 Pac. 158; *Ex parte Sparks*, 120 Cal. 400, 52 Pac. 715. The

judgment appealed from was rendered before the amendment of 1915 was enacted.

[5] The appellant answers the objections to this clause of the law by the suggestion that if it should be found unconstitutional that clause can be eliminated without destroying the entire section, and that without it the statute is valid and enforceable. This point is without merit. It cannot be supposed that the state board would issue a permit in the face of such an imperative mandate against it, or that any municipality or person in the state would expect to be able to obtain a permit from a state board which was forbidden to issue it under the circumstances existing. To direct that an injunction should issue under such circumstances, because by eliminating a material portion of the law it could be made valid, would be in the nature of judicial legislation of a retroactive character.

[6] There is another reason which fully justifies the affirmance of the judgment. We have said that a private person cannot maintain an action to enjoin a public nuisance unless it is specially injurious to himself. The plaintiff in this case is taken out of the operation of this rule solely because of the permission given to him by the state in this act to maintain this action on its behalf, without showing special injury to himself. The state may, of course, grant this permission to any citizen to act in its behalf. But it must be presumed that the Legislature did not intend to change in any other respect the principles of equity regarding injunctions, and consequently that when a citizen applies to a court of equity for relief, under such authority, his rights are no greater with respect to the merits of the case, and the duty of a court of equity to grant relief, than in any other action of equitable cognizance. The general principles of equity governing the issuance of injunctions in such a case must be the same and like reasons must be shown as in other cases of the same character. The primary object of the act of 1913, under which the plaintiff sues on behalf of the state, was to prevent the supplying of water for human use which was unhealthful and unsanitary, and thereby to preserve and protect the general health of the people of the state. The power to grant or refuse a permit was given to the state board of health solely with the object of preventing the use of water detrimental to health. The substance of any action to enjoin such supply must therefore be the prevention of the use of water which is dangerous to health. As we have already shown, the plaintiff wholly

failed to prove such a case. The water which is the subject of this controversy is found by the court, upon evidence which is full and satisfactory, to be safe, wholesome, sanitary, and fit for human consumption. So far as the substantial merits of the action is concerned, it is wholly without foundation. The plaintiff is driven to rest exclusively upon his technical right under the act to enjoin the continuance of the water supply, simply because the state has issued no permit therefor. The established fact is that there is no occasion for interference by the state or by any other person. The only right is the bare technical right to insist that a permit be obtained before the city delivers any more water to its inhabitants for human consumption. It is obvious, therefore, that the issuance of an injunction by the court to stop the city from supplying such water to its inhabitants would cause the greatest imaginable inconvenience both to the city and to its inhabitants, and would be of no benefit whatever to the plaintiff. The refusal of such injunction would deprive the plaintiff of no right beneficial to himself or others, and would put him to no inconvenience whatever. Under these conditions a court of equity is not bound to grant an injunction. "When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical unsubstantial right." 2 Beach on Injunctions, § 1067. "The court may properly be guided by the consideration of the relative convenience of the parties; and if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared to the injury to the defendant, the relief may be denied, and the plaintiff left to the pursuit of his remedy at law." 2 High on Injunctions, § 740. Further authorities are set forth in *Peterson v. Santa Rosa*, 119 Cal. 391, 51 Pac. 557. See, also, *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243.

In this case the right of the plaintiff, such as it is, is wholly technical and unsubstantial, and to enforce it would produce very great mischief, both public and private, not only to himself, but to many of his fellow citizens within the city, and to the municipality as well. The court in its discretion was fully authorized to deny the injunction under such circumstances.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

HART v. CITY OF LOS ANGELES et al.
(L. A. 4444.)

(Supreme Court of California. Aug. 11, 1919.)

INJUNCTION — FURNISHING WATER SUPPLY WITHOUT PERMIT—WHO MAY SUE TO ENJOIN.

A resident of a city, who was not a user of water which came from a source from which the city had not been given a permit by the state board of health to obtain water, as provided by St. 1913, p. 793, could not maintain an action under such statute to enjoin the city from using the water.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Henry A. Hart against the City of Los Angeles and certain officers constituting its board of public service. Judgment for defendants, and plaintiff appeals. Affirmed.

Ingle Carpenter and Chas. W. Fourl, both of Los Angeles, for appellant.

Albert Lee Stephens, W. B. Mathews, and Wm. B. Himrod, all of Los Angeles, for respondents.

SHAW, J. This is an appeal by the plaintiff from a judgment in favor of the defendants. The facts in the case, with a single exception, are the same as those more fully set forth in the case of Frost v. Los Angeles, L. A. No. 4443 (183 Pac. 342 this day decided). The difference consists only in the fact that the plaintiff in this action is not a user of water which comes from the source which is alleged to be contaminated and unfit for use, and which the court found to be safe and healthful. The plaintiff, therefore, does not come within the provisions of the act of 1913 (St. 1913, p. 793), under which alone, in view of the findings of the court, he could maintain an action to enjoin a public nuisance. Consequently he had no right to maintain the action.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

SCHULTHEISS BROS. CO. et al. v. STEINBERG et al. (Civ. 2853.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1919.)

1. APPEAL AND ERROR — 773(4)—ARGUMENT—NECESSITY.

Where no argument is presented for or against an appellant, judgment will be affirmed as to him.

2. APPEAL AND ERROR — 757(1)—BRIEFS—PRINTED TESTIMONY.

Where a case is appealed under the alternative method, court will not refer to portions of the record not printed in the brief but merely indicated by reference to pages of type-written transcript.

3. MECHANICS' LIENS — 163—LIABILITY OF OWNER—EXTENT.

The liability for mechanic's lien claims of an owner failing to file his building contract and bond as required by Code Civ. Proc. § 1183, is not limited to the contract price, even as to contracts made before the Supreme Court had clearly announced such liability.

4. MECHANICS' LIENS — 157(1)—DEFECT IN NOTICE.

A mechanic's lien notice stating that contract payments were due 30 days from delivery, while contract made them payable 10th of following month, held fatally defective under Code Civ. Proc. § 1187, requiring time of payment to be stated, despite section 1203, providing that certain mistakes should not invalidate liens.

Appeals from Superior Court, San Diego County; W. A. Sloane, Judge.

Mechanic's lien proceedings by the Schultheiss Bros. Company and others against Harry H. Steinberg, the Richardson & Fisher Company, Will J. Thayer, and others. From a judgment the named plaintiff and named defendants appeal. Affirmed.

Hoff & Chatterson and Will J. Thayer, all of San Diego, for appellants.

Miller, Thornton, Miller & Watt, of San Francisco, for respondents.

JAMES, J. [1, 2] Several actions brought to enforce liens for labor and material furnished in the erection of a building in the city of San Diego, of which defendant Thayer was the owner, were consolidated and tried together. Certain of the lien claims were allowed and judgment entered thereon, and certain of them were disallowed. Defendant Thayer, the owner of the building, appealed from the judgment entered in favor of Schultheiss Bros. Company. Other appeals were taken by various of the lien claimants who were denied relief, as well as by the defendant Bonding & Surety Company, but dismissals were made by several of the appellants, and the only remaining appeals appear to be those of Steinberg, Richardson & Fisher Company, and Thayer, the owner. No argument was presented on behalf of or against Steinberg, and there is therefore nothing before the court from which it can be determined that the judgment as to him was in any wise erroneous. Attention may be now called to the fact that the appeal is under the alternative method, which requires the parties to print in their briefs such portions of the record as they desire to call to the attention of

the court. In examining the matter the court will not, therefore, refer to any portions of the record which are merely indicated as by page of the transcript.

[3] We will first consider the appeal of the owner Thayer. He states, as evidently was the fact, that as to the judgment in favor of Schultheiss Bros. Company, the court allowed recovery for an amount which, added to other payments made, exceeded the total contract price. He insists that by so doing the constitutional guaranty against the impairment of the obligation of contract was violated. In elaboration of this contention he argues that our Supreme Court, prior to the time of the making of this contract, had held that the Legislature could not legally require the owner of a building to respond to a lien claim in an amount exceeding the contract price. He concedes that by comparatively recent decision the Supreme Court has held that an owner may be required to so respond without there being violated any constitutional right, but insists that the contract was made while the law was as established by the former decisions, and that such adjudications became a part of the law of the state under which the rights of such a contracting owner should be measured. He admits that while there was a written contract and a bond given, neither the contract nor bond was filed with the county recorder, as section 1183, Code of Civil Procedure, requires. The adverse decision to which he refers is that of *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15. At the time of the rendering of that decision the lien law was, in comparative particulars, as it was at the time of the making of the contract by the owner here. In *Roystone Co. v. Darling*, Mr. Justice Shaw makes a very careful review of all of the former decisions, and his determination seems to be that those decisions are not inconsistent with the holding finally announced at the conclusion of the *Roystone* appeal. He points out that while it had been said that the Legislature could not directly provide that a lien claimant could recover from an owner an amount in excess of the original contract price, that those decisions in nowise denied to the Legislature the right to regulate the making of a contract as to its form, as to its being filed and as to security by bond being required to be taken and filed; that such regulations were reasonable; and that as a penalty for their nonobservance the owner might be required to suffer judgment to be had against him for an amount exceeding the total sum which he had agreed to pay to the original contractor. We think the case last referred to is determinative of the question presented on the appeal of Thayer, and that the judgment of Schultheiss Bros. Company should be affirmed.

[4] The appeal of Richardson & Fisher Company presents a question as to the sufficiency of the notice of lien which was filed

by the claimant. The superior court held that the notice was insufficient, in that there was a variance between the contract of the claimant as made with the original contractor and the statement of the terms of that contract as contained in the notice of lien; this particularly as to the time and terms of payment. The notice of lien stated, referring to the matter of payment, "that payment shall be made on or before 30 days from deliveries." The statement in the proposal which resulted in the contract, was that the materials were "subject to 2 per cent. cash discount, payments to be made on or before the 10th of the month following deliveries." Under the proposal or contract it seems quite plain that payments were due on the 10th of the month following deliveries in any event, and that if the charges were paid within that time they were subject to 2 per cent. discount. This was quite different from the time stated in the notice—that payments should be made "on or before 30 days from deliveries." Under the contract, payments might become due, dependent upon the time of delivery, within 11 days, or more than 30 days, as the case might be. Section 1187, Code of Civil Procedure, requires that the notice of lien shall make a statement of the following matters: (1) Statement of demand, after deducting all just offsets and credits; (2) the name of the owner or reputed owner; (3) the name of the person by whom employed, or to whom the material was furnished; (4) statements of the price and when payable and of the work agreed to be done. It is true that section 1203, Code of Civil Procedure, provides that—

"No mistake or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien."

We do not think that the saving effect of this section goes far enough to relieve the claimant from making, as section 1187, Code of Civil Procedure, provides, "statement of the price and when payable. * * *" The case of *California Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 713, 118 Pac. 103, 113, we think is directly in point, and that the court was justified under that decision in determining the matter of this claim in the way it did. The claimant must comply with reasonable accuracy to the requirements of the statute in making out his notice of lien, and there would seem to be little room for excuse, where the contract under which he is working states expressly the terms of payment, for a complete misstatement to be made in that particular.

The several judgments appealed from by Harry H. Steinberg, Richardson & Fisher Company, and W. J. Thayer are affirmed.

We concur: CONREY, P. J.; SHAW, J.

CLOHAN v. KELSO. (Civ. 2643.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919.)

1. APPEAL AND ERROR ⇨933(4)—GRANTING NEW TRIAL—PRESUMPTIONS.

Where the evidence is such that it would have sufficiently supported findings in favor of the party against whom decision was given, and the trial court grants a motion for new trial made upon various grounds, including insufficiency of evidence, without in terms excluding such ground in its order, it will be presumed, on appeal, in favor of such order, that the court changed its opinion as to the effect of the evidence and reached a conclusion favorable to the party moving for new trial.

2. APPEAL AND ERROR ⇨933(4)—NEW TRIAL—PRESUMPTIONS.

On appeal from an order granting a new trial for insufficiency of evidence, the presumption is against the findings of the jury and not in their favor.

3. APPEAL AND ERROR ⇨867(2)—GRANT OF NEW TRIAL—OPINION.

On appeal from an order granting a new trial, the appellate tribunal will consider, not the correctness of the opinion of the lower court uttered upon granting the new trial, but the propriety of the order.

4. NEW TRIAL ⇨70—GROUNDS—EVIDENCE—PERSONAL INJURIES.

Where the jury found in favor of a motorist who ran down plaintiff at a much-traveled corner, where there was evidence that the motorist was proceeding at a speed of 25 miles an hour, and his claim was that plaintiff stepped back into his path to avoid another car proceeding in the same direction at an equal or greater speed, *held*, that an order granting a motion for new trial on the ground that the motorist was proceeding at a negligent rate of speed was proper.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frank E. Clohan against Albert P. Kelso. There was a verdict for defendant, and from an order granting plaintiff new trial defendant appeals. Order affirmed.

B. P. Gibbs, of St. Paul, Minn., and Duke Stone, of Los Angeles, for appellant.

Geo. M. Harker, of Los Angeles, for respondent.

CONREY, P. J. This was an action by the plaintiff against the defendant on account of the alleged negligence of the defendant in driving his automobile against the plaintiff on or about June 30, 1914, at or near the intersection of West Twelfth street and Flower street in the city of Los Angeles, whereby the plaintiff received personal injuries. In answer to special interrogatories, the jury found that immediately preceding the collision

the defendant was operating his automobile at the rate of 25 miles per hour, and that in the judgment of the jury such rate of speed was not negligent. A general verdict was rendered in favor of the defendant, who now appeals from an order granting a new trial.

One of the grounds upon which the motion for new trial was based was that the evidence is insufficient to justify the verdict of the jury that the defendant was free from negligence. Appellant contends that the verdict of the jury in his favor was so clearly in accord with the evidence that there was an abuse of discretion in the trial court in granting a new trial. This raises the only question in the case on this appeal.

[1, 2] "Where the evidence is such that it would have sufficiently supported findings in favor of the party against whom the decision was given, and the trial court grants a motion for new trial made upon various grounds, including that of insufficiency of evidence, without in terms excluding such ground in its order entered on the minutes, we must presume, in favor of such order, 'that the court changed its opinion as to the effect of the evidence, and reached a conclusion upon the hearing of the motion favorable' to the party making the motion." *Pollitz v. Wickersham*, 150 Cal. 238, 244, 88 Pac. 911. This rule is equally applicable whether the case be tried by a jury or by the court without a jury. On appeal from an order granting a new trial the presumption is against the findings and not in their favor. *Condee v. Gyger*, 128 Cal. 546, 59 Pac. 28.

[3, 4] The accident in question occurred in the middle of the afternoon, on a much-traveled street. A witness whose place of business was at the same corner stated that it is very seldom that you could see a block in either direction free of cars. Assuming, as did the court below, that the rate of speed permitted was controlled by the state law, and not by a city ordinance limiting to 10 miles per hour the rate of speed at that street intersection, it was the duty of the defendant to drive his automobile "at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway." Motor Vehicle Act of 1913 (St. 1913, p. 649) § 22, subd. b. At the time of the accident, the plaintiff was walking toward the west across Flower street on the south side of Twelfth street, and the defendant was driving north on Flower street. Defendant, according to his testimony, saw the plaintiff and his companion walking across the street, when defendant was 150 feet from them. Then, he says:

Before the accident "Mr. Clohan hesitated and started on, facing me, with his hand in this position (indicating), as much as to say, 'I

have plenty of time.' Suddenly, as he got to a point beyond my clearance, he stepped back as though something unforeseen had caused him to step back—my recollection is that a car passed me and went on ahead of me."

The argument of counsel for appellant is directed principally to criticism of an opinion filed by the court when the order granting a new trial was made. Whether that opinion is correct or not is not the issue to be determined here. The appeal is, as it must be, from the order, and not from the opinion. We may say, however, that if by its order the court intended to determine (as presumably it did and as stated in the opinion), that, "for the defendant to approach the crossing at the speed it was found by the jury he did, alongside of another automobile, also proceeding at the same or a greater rate of speed, while pedestrians were crossing the street, was, as a matter of fact, clearly negligence," we think that the evidence was sufficient to support that conclusion.

The order is affirmed.

We concur: SHAW, J.; JAMES, J.

SCHMOHL v. JOHN SIMPSON & CO.
(Civ. 2829.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919.)

CONTRACTS — 198(2) — CONSTRUCTION — BUILDING CONTRACT.

A contract to furnish all material and labor necessary to put in place ornamental plaster work according to specifications, which required waterproofing with a certain material, requires the builder do such waterproofing, in absence of evidence showing that such work was not a process customarily included in ornamental plastering.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by H. R. Schmohl against John Simpson & Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Haas & Dunnigan, of Los Angeles, for appellant.

Ferguson & Gahan, of Los Angeles, for respondent.

CONREY, P. J. By contract between the parties the plaintiff agreed to furnish and install all material and labor necessary to put in place all ornamental plaster and staff work according to plans and specifications on file for the Southern Counties building on the exposition grounds at San Diego. Under the

head of "Ornamental Plastering" in the specifications, it was provided that—

"The tops of all parapet walls, cornices, belt courses and the washes of all mouldings, sills, etc., shall be waterproofed with one (1) coat of Toch Bros. R. I. W., in which shall be imbedded one (1) thickness of coarse muslin and then covered with another coat of R. I. W."

By this action the plaintiff seeks to recover the sum of \$653.70 as the balance claimed to be due on the contract. At the trial it was stipulated that the work described in the foregoing quotation from the specifications was not performed by the plaintiff; that if by the terms of the contract the plaintiff was obligated to do said work, then the defendant would have been indebted to the plaintiff by reason of the contract in the sum of \$15.96, and that if the plaintiff was not by reason of said contract obligated to perform said work then the defendant was indebted to the plaintiff in the amount sued for herein. It was further stipulated that prior to the commencement of this action the defendant tendered to the plaintiff said sum of \$15.96, in full settlement of the contract, and that the plaintiff refused to accept the same. These stipulations, together with the contract and specifications, constitute all of the evidence in the case. Judgment was entered in favor of the plaintiff, and the defendant appeals therefrom.

It is sought to justify this judgment upon the ground that there is nothing in the contract to show that the plaintiff undertook and agreed to do that part of the work in question here and which it is stipulated that he did not do. In their brief counsel for respondent assert that the putting on of the described materials is a separate trade or business and not a part of the business of putting in place ornamental plaster and staff work, and that there is nothing in the contract to show that the material was to be supplied. A sufficient reply is that there is no evidence to show that the putting on of those materials is part of any separate trade or business, or not a part of the business of doing such work as that described in the specifications; and the contract itself provides that the plaintiff agreed "to furnish and install all material and labor necessary to put in place," etc. Not disputing the contention of respondent that the intention of the parties as expressed in the contract must govern, and that in the absence of express provision in the contract the plans and specifications cannot add to the terms of the contract, it seems clear to us that these principles have no application to the case. There being no evidence tending to show that the waterproofing was not a process customarily and usually included in the work of ornamental plastering, this fact and the specifications, taken together, fairly convey the

inference that the waterproofing was a part of the work which the plaintiff agreed to do.

The judgment is reversed and the trial court is directed to enter judgment, on the agreed case as stipulated, in favor of the plaintiff, for the sum of \$15.96, without interest and without costs; appellant to have judgment for his costs of this appeal.

We concur: SHAW, J.; JAMES, J.

VAN DEGRIFT v. MULLEN. (Civ. 2642.)

(District Court of Appeal, Second District, Division 1, California. July 8, 1919.)

1. CUSTOMS AND USAGES §12(1) — CONTRACTS—KNOWLEDGE.

In order to read a custom into an agreement, it is necessary to show that the party attempted to be bound had actual or constructive knowledge of the custom.

2. CUSTOMS AND USAGES §13—PRESUMPTIONS—WRITTEN INSTRUMENTS.

Where there is a statutory form (Civ. Code, § 2948) for a written instrument, it is logical to infer that parties making an agreement which is silent as to a form to be used had the legal form in view, rather than another form customarily used.

3. CUSTOMS AND USAGES §13—SUFFICIENCY OF EVIDENCE—MORTGAGE FORMS.

In purchaser's action to recover a purchase price installment, evidence that a mortgage form containing conditions not found in the statutory form (Civ. Code, § 2948) was generally used in the county, etc., held insufficient to show that parties contracted with reference to such custom or intended purchaser should execute such a mortgage, instead of statutory form, for balance of purchase price.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by S. E. Van Degrift against J. B. Mullen. Judgment for plaintiff, and defendant appeals. Affirmed.

Loeb & Loeb and W. A. Alderson, all of Los Angeles, for appellant.

Delphin M. Delmas, of Los Angeles, for respondent.

JAMES, J. The plaintiff was successful in this action, which was brought to recover judgment for a sum of money alleged to have been paid to the defendant on account of the purchase price of certain real property. The defendant has appealed from the judgment.

[1-3] In consideration of the payment to him of a certain sum of money, defendant issued to plaintiff a writing, which was subscribed by him, covering the terms of purchase of a certain tract of land. This writing contained the following paragraph:

"I agree to furnish an unlimited certificate of title vested in the buyer's name showing clear of all incumbrances and to accept for said real property the sum of \$11,700.00 net to me, to be paid in the following manner: The balance of \$11,050.00 Van Degrift Realty Co. agrees to pay as follows, one-fourth (¼) cash on delivery of deed, balance mortgage 1, 2 and 3 years at 7% interest, payable semiannually."

The preliminary payments were made in accordance with the terms stated, and the parties met together for the purpose of completing final papers, including the execution of a mortgage. The defendant then presented a mortgage which contained various terms, including those for the compounding of interest, the payment of street liens and assessments, insurance on the property, attorney's fees in case of foreclosure, a condition that the mortgage might determine upon default of any payments of the principal or interest, etc. The plaintiff presented and offered to execute a mortgage in the form prescribed by section 2948, Civil Code. This mortgage the defendant refused to accept, and announced that he would accept no other mortgage than that which he had prepared. This suit was then brought by the plaintiff to recover back the money already paid out under the agreement. The sole question presented is as to whether the defendant, under the terms of the agreement, had the right to exact from the plaintiff the execution of the mortgage in the particular form determined upon by the defendant. This form contained many conditions not mentioned in the Code section to which we have referred; in fact, nearly all of the particular conditions which we have noted it did contain constitute no part of the mortgage form prescribed in the section cited. However, it is the contention of the defendant that the contract was made with reference to a custom prevailing in the county of Los Angeles; that by that custom the form of mortgage offered by the defendant was the one generally adopted and in use. Several witnesses were examined and testified that the form prepared by the defendant was the one most generally in use, although it was admitted that the shorter or statutory form was found occasionally on the books of the county recorder. A printer of legal and commercial blanks testified that there were some five or more different forms furnished to the trade, but he did not dispute the statement made by the other witnesses to the effect that the long form containing conditions similar to those inserted in the mortgage by the defendant was the one most generally made use of. It will be noted from the paragraph which we have quoted from the agreement or writing signed by the defendant that no form of mortgage is referred to. In order to have read into an agreement a custom or practice it is necessary, not only to show that such custom

prevails, but that the contract was made with reference to the custom. Where no express words are relied upon as referring to the custom at the time of making the agreement, it must then be shown that the party attempted to be bound had knowledge, actual or constructive, of the custom itself. *Parsons on Contracts* (9th Ed.) vol. 2, p. 696; *Page on Contracts* (vol. 2) p. 926. We find no evidence quoted from which it would appear that the plaintiff had any actual knowledge of the existence of the custom as to the form of mortgage used, and we do not think that under the facts the plaintiff should be constructively charged with notice of any such custom. Where there is a statutory form for the execution of written instruments, then, if we are to look for a presumption in the construction of contracts, it would be logical to infer that the parties, making an agreement which was silent as to a form to be used, had in view the legal form and not some other form as to which the writing was silent. *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365. Our conclusion is that the evidence as here presented was insufficient to show that the contract was entered into having in view the custom prevailing in Los Angeles county as to the form of mortgage to be used. The judgment of the court as entered was therefore right.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

GUSTAFSON v. WASSON. (Civ. 2890.)

(District Court of Appeal, First District, Division 2, California. July 3, 1919.)

1. APPEAL AND ERROR ⇨934(1) — REVIEW — PRESUMPTION.

That the judgment was correct must, in the absence of satisfactory showing to the contrary, be assumed by the appellate court.

2. APPEAL AND ERROR ⇨757(1)—BRIEFS—SETTING OUT RECORD.

It is appellant's opening brief, and not his closing brief, in which, under Code Civ. Proc. § 953c, should be set out the portions of the record desired to be called to the court's attention.

3. APPEAL AND ERROR ⇨757(1)—BRIEFS—REFERENCES TO TRANSCRIPT.

References to pages of the transcript do not satisfy requirement of Code Civ. Proc. § 953c, that the portions of the record desired to be called to the court's attention be set out in the briefs.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by J. G. Gustafson against Louis Wasson. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Cowan and Carl Barnard, both of Santa Rosa, for appellant.

E. M. Norton, of Healdsburg, and J. R. Lepo, of Santa Rosa, for respondent.

HAVEN, J. [1] Defendant appeals, by the alternative method, from a judgment against him. In the appellant's opening brief it is stated that in the action the plaintiff claimed an easement to the flow of rainwaters in a certain ditch on lands of the defendant and damages caused by the overflow from the ditch on the lower lands of the plaintiff. An extremely condensed summary of the claims of the defendant is contained in the opening brief, and a stipulation between the parties is set forth in full. This stipulation provided for the continuance of the trial; that, upon performance of the conditions and agreements of the stipulation by the defendant the plaintiff by proper conveyance should release to the defendant the right to maintain the ditch mentioned in the amended complaint; that the defendant should pay plaintiff's costs, including a surveyor's charge; that the defendant should construct a new ditch and cause the easement in the same to be conveyed to the plaintiff, failing in which the defendant was to reconstruct, restore, and reconvey to the plaintiff the ditch mentioned in the amended complaint; that the plaintiff should release to the defendant all claims for possible damages; and that, if the defendant should fulfill the preceding terms of the stipulation, the action should be dismissed; otherwise that the plaintiff should not be bound by any of the stipulations and might proceed to trial of the cause in the same manner as if the stipulation had never been made. Following the stipulation in the appellant's opening brief are numerous statements of fact referring to pages of the reporter's typewritten transcript. From the brief it appears there were supplemental pleadings of some sort, but from nothing contained in the brief can it be ascertained what the original, amended, or supplemental pleadings were. The statement is made that the court, without the introduction of any evidence and without any proceedings other than certain admissions of both parties in open court, proceeded to enter judgment. There is no statement in the brief concerning the admissions which were made, nor what the appellant's claims are in regard to them. The opening brief wholly fails to meet the requirements of section 953c of the Code of Civil Procedure and rule 8 of the Supreme Court (176 Pac. ix). Because of the failure of the appellant's opening brief to show those parts of the record upon which he relied, the argument presented in the brief is of academ-

ic interest only. The appellant failed to show error on the part of the trial court, without which showing the judgment must necessarily be affirmed. "We are bound to assume, in the absence of satisfactory showing to the contrary, that the judgment of the trial court was correct." *Lutz v. Merchants' National Bank of San Diego*, 177 Pac. 158, 160.

The respondent rests on the failure of the appellant to comply with section 953c of the Code of Civil Procedure, and rule 8 of the Supreme Court, and in his brief no argument is presented upon the merits of the cause.

[2] In the appellant's closing brief the claim is made that section 953c of the Code of Civil Procedure does not expressly require that the portions of the record referred to be incorporated in the opening brief, and therefore it is stated that the portions of the record on which the appellant relies are printed in the closing brief.

The rules of the court provide for the appellant to file an opening brief to be answered by the respondent, and for one further brief to be filed by the appellant, the purpose of which is to enable the appellant to so answer new matter in the respondent's brief. If it were permissible for the appellant to disclose a part only of his case in his opening brief, and, after its insufficiency had been pointed out by the respondent, to set up his entire case in his closing brief, common fairness would require that the respondent be permitted to file another brief, which in turn would be replied to by the appellant, so that five or perhaps more briefs would be filed instead of the necessary three. The law does not permit this piecemeal presentation of the appellant's case. It is a familiar rule that appellate courts ordinarily will not consider new points made in the appellant's closing brief. *Wong Ah Sure v. Ty Fook*, 174 Pac. 64, 65. The same reasoning applies to a new record presented in the closing brief. It is to inform the respondent quite as much as it is to inform the court that the statute requires the appellant in his opening brief, to set up the parts of the record upon which he relies. "The purpose of the statute requiring the matters relied upon to be printed in the brief is not only for the benefit of the appellate court, but also for the benefit of the respondent." *Pasadena Realty Co. v. Clune*, 34 Cal. App. 33, 34, 166 Pac. 1025, 1026.

[3] The matters set forth in the closing brief are too incomplete to inform the court with regard to the relationship of the findings and judgment to the pleadings and what in the appellant's brief are designated as "minor stipulations." "Numerous references are made to the pages of the transcript filed, but it has been repeatedly held that the appellate courts will not examine the transcript documents in order to determine wheth-

er there is merit in the contentions made by the appellant. Many opinions of this court and the Supreme Court reiterate the rule. A collection of the cases so holding will be found grouped in the case of *Barker Bros. v. Joos et al.*, 171 Pac. 1085. Not having properly before us sufficient of the record to illustrate the various contentions made on behalf of the appellant, we are compelled to hold that no error is shown as against the judgment." *Borba v. De Mello*, 172 Pac. 1113, 1114.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRIT-TAIN, J.

ROUSH v. KIRKMAN et al. (Civ. 2845.)

(District Court of Appeal, First District, Division 1, California. July 8, 1919.)

1. REFORMATION OF INSTRUMENTS §44 — EVIDENCE—ADMISSIBILITY.

In proceedings to revise a written instrument, evidence of the agreement's purpose and of negotiations leading to its execution held admissible.

2. CONTRACTS §99(3) — MISTAKE — EVIDENCE—SUFFICIENCY.

Conflicting evidence held to sustain trial court's finding that a written instrument should be reformed upon ground of mutual mistake, although the parties to the contract had not met until they executed it.

3. GUARANTY §100 — BILLS AND NOTES — PAYMENT—REIMBURSEMENT.

Where the guarantor of a note, through an indorsee acting as his agent, paid the face value of a note to the payee, there was a payment precluding guarantor's subsequent recovery against the maker by means of suit by indorsee, in view of contract limiting guarantor's right of reimbursement to selection of nursery trees from maker's nursery at a stipulated price.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by O. V. Roush against J. A. Kirkman and others, who filed a cross-complaint against E. H. Miller and another. From a judgment for defendants, plaintiff and cross-defendants appeal. Affirmed.

Harris & Harris, of Fresno, for appellant Roush.

Short & Sutherland, of Fresno, for respondents.

WASTE, P. J. Plaintiff brought this action to collect a note for \$3,000 made by the defendants, who are engaged in the nursery business, to the First National Bank of Sanger, and which note was by the bank assigned to plaintiff. Defendants, answering, admit-

ted the execution of the note, and alleged that the note, as delivered, contained on its back a guaranty of payment by the cross-defendants, E. H. Miller and Herbert Askin. Defendants deny that the bank sold, assigned, or delivered the note to plaintiff, or delivered the same to any other person than Miller or Askin, deny that the plaintiff owns the note, and likewise deny that the note is unpaid, alleging that it has been fully paid by Miller and Askin.

By cross-complaint, by which said Miller and Askin are made cross-defendants, the defendants allege the making of an agreement of even date with the note, between themselves and the said Miller and Askin. In the agreement, which is set out in full, it is recited that the said cross-complainants are in need of certain money to carry on their nursery business; that said defendants and cross-complainants will obtain \$3,000 for that purpose from the First National Bank of Sanger, by means of the promissory note in litigation here, a copy of the note, together with the guaranty by Miller and Askin, being set up in the agreement; that, in consideration of the guaranty by Miller and Askin, defendants and cross-complainants agree to furnish "free gratis" to Miller and Askin 2,000 trees of any variety which they may choose, then growing in the nursery of defendants and cross-complainants. In the event the nursery people have no available funds with which to dig and properly deliver the trees to Miller and Askin, the agreement continues, Miller and Askin are to advance the same. Furthermore, in case the latter advance any money for payment of interest on the note, they "shall, at their option, select from said nursery stock so many trees as may be equivalent to the amount of money so advanced by them, allowing" the nursery people, defendants and cross-complainants, 20 cents per tree for each and every tree selected and taken by said parties, as therein provided. There is another stipulation to the effect that, if the nursery people pay the note, Miller and Askin shall be entitled to receive, and shall receive, 2,000 trees only, and shall have the option of purchasing more trees for their personal use at a stipulated sum. It is agreed that, if Miller and Askin are unable to accept the trees, the nursery people may continue to care for them until such time as, prior to August 1, 1916, Miller and Askin pay the sum of \$60 per 1,000 therefor. The latter are also given the right on default of the nursery people, to enter the premises and select and secure the trees to which they may be entitled.

After setting forth the contract, the cross-complainants allege that it was the agreement of the parties, and that they intended that the agreement should mean, and its legal consequences be, that if Miller and Askin

should advance any sums of money for the payment of the interest accrued, or the principal of the note, or for the digging and delivery of the trees, they "should reimburse themselves for such payment by selecting from the nursery stock of the cross-complainants so many trees as should be equivalent to the amount of money so advanced by them, at the rate of 20 cents per tree for each and every tree selected by the cross-defendants (Miller and Askin), and that the cross-defendants should be entitled to reimbursement for moneys so advanced in the manner above stated, and in no other manner; * * * that the cross-defendants should reimburse themselves for all payments made to the First National Bank of Sanger on account of the promissory note, described in the agreement or advanced to the cross-complainants as therein provided, only by the selection of nursery stock then and there owned by the cross-complainants as recited in the agreement; that the only option, or choice, intended to be given to the cross-defendants by said agreement was the option to select the varieties or kinds of trees to be taken"; that the words "at their option," hereinbefore quoted in referring to the agreement as pleaded, should have been omitted therefrom. The answers to the cross-complaint do not deny the execution of the agreement relative to the guarantee, but deny the alleged mutual mistake.

The trial court reformed the contract in accordance with the prayer of the cross-complaint. It found that the note was executed and delivered to the bank, bearing the indorsement and guaranty of Miller and Askin, in conformity with the real agreement of the parties; further, that Miller and Askin paid the same after maturity, and thereupon became entitled to select trees from the cross-complainants' nursery stock, which trees defendants have always been ready to and have offered to deliver. This appeal is by the plaintiff and the cross-defendants, Miller and Askin, from the judgment entered in favor of the defendants in accordance with the findings.

[1, 2] Appellants claim, first, that the evidence does not show a mutual mistake. "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." Civ. Code, § 3401. Evidence of the purpose of the agreement, and of the negotiations leading up to its execution, is admissible for the purpose of showing what the parties intended. *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983; *Horton v. Wiubigler*, 175 Cal. 150, 165 Pac. 423. From the testimony quoted by the appellants in their opening brief, it appears that respondents J. L. Kirkman and J. A. Kirkman, W. M.

Barr, cashier of the First National Bank of Sanger, to whom the parties went to negotiate the loan, and who was first requested to draw the contract, and Monte Kirkman, son of one of the respondents, each testified that the contract intended by all the parties to be executed was the contract as found and reformed by the court. In opposition to their evidence, we find only the testimony of Mr. Miller, one of the cross-defendants. His more or less positive denial as to the intention of the parties raised merely a contradiction in the evidence, which was passed upon by the trial court.

It is true, as argued by appellant, that the evidence making out the mistake to the satisfaction of the court must be clear and convincing. "But where the evidence which tends to prove fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we cannot reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this court. The only question which we have to decide in respect to the sufficiency of the evidence is whether that which tends to prove the alleged fraud or mistake, if standing alone without contradiction, would make out a prima facie case." *De Jarnatt v. Cooper*, 59 Cal. 703. "Where the very issue in the action is the mutuality of the mistake, the trial court is compelled to decide upon conflicting evidence; and if a mere denial of the defendant that he was mistaken is to suffice, it must result in every case that where such denial is made the plaintiff must fail of relief. Such, * * * however, is not the law." *Home & Farm Co. v. Freitas*, 153 Cal. 685, 96 Pac. 310.

It appears that at no time prior to the execution of the contract were all the parties thereto together. Appellant asserts therefore, that, since no contract was made before the date upon which the parties signed the written contract, there could have been no mistake, as claimed by defendants, and, furthermore, that the evidence of the mutuality of the mistake must relate to the time of the execution of the instrument. This contention has been decided adversely to appellant. *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796.

[3] The trial court found that the plaintiff, Roush, acted as the agent of Miller and Askin for the purpose of paying the note. The circumstances, briefly, under which the bank was paid, were: In the fall of 1915, which was after the maturity of the note Miller, one of the guarantors and cross-defendants, asked plaintiff to "buy the note for him,"

telling plaintiff where the note was. Plaintiff stated he would do so, provided Miller "would guaranty I [plaintiff] would not lose anything on it." This Miller did, and plaintiff went to the First National Bank of Sanger, and gave his personal check for \$3,300 to the bank, and recovered the note which was indorsed on the back, "Pay to the order of C. V. Roush without recourse on us. First National Bank of Sanger, by W. D. Mitchell, President." Plaintiff further testified that he bought the note at the request of Miller, and that the latter did not agree to repay, and had not repaid, the money he paid for it. The testimony of Roush to the effect that he bought the note "for" Miller and "at his request" is uncontradicted, and supports the court's finding as to plaintiff's agency.

The lower court found that the bank did not sell or deliver the note to plaintiff, and that the note has been fully paid by the cross-defendants Miller and Askin, by and through plaintiff, as their agent, and that such payment was made in conformity with the guaranty and contract heretofore set out. Appellant's contention in this regard is that, even under the agreement as reformed, Miller and Askin agreed to take their pay in trees, only, if they paid the note; that they were not payors or makers of the note, but were merely guarantors of performance by the respondents, who were the sole makers; that Miller and Askin were liable on their guaranty, and not on the note; that, even though plaintiff was agent for Miller, the latter had the right to buy the note and proceed against the respondents for collection. We do follow appellants so far. The contract was not between the bank and Miller and Askin, but between the latter and respondents. The question of liability to the bank was not involved in the agreement. The real subject-matter of the agreement was what should be done in the event Miller and Askin advanced any sums of money for or on behalf of respondents, for the payment of the account of interest which might accrue on the note, principal thereof, or the digging and delivery of the trees.

The court, having found that the money paid to the First National Bank of Sanger by plaintiff for the note was paid by him as the agent of Miller, one of the parties jointly liable on the guaranty, was correct in holding that the transaction amounted to a payment under, and in accordance with, the terms of the reformed contract.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

PEMBERTON v. ARNY. (Civ. 2908.)

(District Court of Appeal, Second District, Division 2, California. June 28, 1919.)

1. MUNICIPAL CORPORATIONS — § 861(2) — CHARTER — PLENARY CONTROL OVER ALL USES OF ITS STREETS.

A charter, giving a city "plenary control over all uses of its streets," authorizes a traffic ordinance regulating the manner in which vehicle drivers should turn street corners.

2. MUNICIPAL CORPORATIONS — § 592(1) — REGULATION OF USE OF STREETS — ORDINANCES — VALIDITY — CONFLICT WITH STATUTE.

A city ordinance requiring vehicle drivers to turn street corners as near the right-hand curb as possible is not invalid, because conflicting with the Motor Vehicle Act, requiring such vehicles to keep to the right of the center of intersecting highways, since the ordinance merely extends the statutory regulation.

3. TRIAL — § 256(12) — INSTRUCTIONS — LANGUAGE OF STATUTE — REQUESTS.

An instruction that an automobile driver, desiring to change his course, must first see that there is sufficient space, etc., in substantially the language of Motor Vehicle Act, § 20, subd. (j), held not error, in absence of a request to interpret the statutory language.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Amy Pemberton against Edward Arny. Judgment for plaintiff, and defendant appeals. Affirmed.

Phil M. Swaffield and Roland G. Swaffield, both of Long Beach, for appellant.

Charles W. Fourn and Ingle Carpenter, both of Los Angeles, for respondent.

SLOANE, J. In this appeal, which involves an automobile accident, we are satisfied that there can be no justification for setting aside the verdict and reversing the judgment on the ground of insufficiency of the evidence. The testimony was conflicting, but, if the jury believed the story as told by plaintiff and her witnesses, it was justified in finding both that defendant was guilty of negligence and that plaintiff was not guilty of contributory negligence, particularly if the traffic ordinance of the city of Long Beach and the instructions relating thereto were properly submitted to the jury's consideration. The only question requiring examination arises upon the admission and submission of the ordinance and instructions over defendant's objections.

The injury complained of occurred in the city of Long Beach, and was occasioned by the defendant, in the nighttime, driving his automobile to the right, around a corner, into an intersecting street, and running upon

the plaintiff on the crosswalk of the street into which defendant turned, at a point near the center of the crossing. The court admitted in evidence that portion of the traffic ordinance of the city of Long Beach which provides as follows:

"The driver of any vehicle, in turning to the right from one street to another, shall turn the corner as near the right-hand curb as possible."

In connection therewith the court gave the following instruction to the jury:

"The court instructs the jury that the violation of a city ordinance of itself constitutes negligence, and if such violation proximately contributed to the injury complained of, it warrants a recovery for plaintiff, unless you further find plaintiff guilty of contributory negligence; and if in this case you find that the defendant did turn his automobile to the right from Third street into said Atlantic avenue in the city of Long Beach, and did not turn his automobile as near the right-hand curb as possible, and that said negligence proximately caused the injury complained of, then you must find for the plaintiff, unless you should further find that plaintiff was guilty of contributory negligence, in which event you will find for the defendant."

Appellant assigns as error the admission in evidence of this ordinance and the giving of the instruction predicated thereon.

[1, 2] It is contended that the ordinance in question had been superseded by the state law known as the Motor Vehicle Act (St. 1913, p. 647, § 20, subd. [g]), and which covers the act of driving to the right around a corner from one street to another, in the following language:

"All vehicles approaching an intersection of a * * * highway, with the intention of turning thereat, shall in turning to the right keep to the right of the center of such intersection."

If appellant is correct in his contention that the city ordinance is in conflict with this provision of the state law, and that the state law controls, we think it clear that the admission of the evidence and giving of the instruction complained of would be prejudicial error. Under the state of the evidence the jury might well have reached the conclusion that the defendant had made the turn to the right of the center of the intersection, but that he had not made the turn as near the right-hand curb as he might have done.

The city of Long Beach is operating under a freeholders' charter, which gives it "plenary control over all uses of its streets." This language is broad enough to include the regulation of traffic thereon as to the manner of their use. We do not think there is anything in the context to limit the power to a determination of merely the kind or nature of the

use, as appellant contends. The ordinance in question was one which the city had power to enact under its charter, and unless it is in conflict with the state law on the same subject, or superseded by it, was properly presented to the jury in this case. The question as to the right of a municipality under a freeholders' charter to regulate street traffic as a purely "municipal affair" has not yet been specifically decided by the Supreme Court. It is not, however, necessary in this case to determine whether the statute or the ordinance controls, in the event of conflict, for the reason that under the rule laid down in *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724, *Ex parte Hoffman*, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75, *Mann v. Scott*, 28 Cal. App. Dec. 171, and by the Supreme Court in an opinion just handed down, affirming the decision last cited (182 Pac. 281), there is no necessary conflict arising from the mere fact that the municipal ordinance has added further and more exacting conditions than are prescribed by the state law. In affirming the decision of this court in *Mann v. Scott*, supra, the Supreme Court says:

"Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable. * * * In other words, we believe that by extending the operation of the act in terms to the traffic upon city streets, the Legislature did no more than to prescribe obviously necessary safeguards for travel upon such streets, viewed as part of the public highways of the state, in which all of the people of the state are essentially interested, and that it did not thereby intend to prohibit the enactment of such new and additional police regulations in furtherance of the purpose of the act as might appear reasonable and proper in a given locality."

The case of *Mann v. Scott*, supra, involved the provisions of the state law requiring that the driver of an automobile when passing a street car shall operate his automobile "with due care and caution so that the safety of passengers alighting from or boarding such car shall be protected, and for that purpose said vehicle shall be brought to a full stop if * * * necessary to attain the object." St. 1913, p. 648, § 20, subd. (k). The city ordinance there in question requires that the driver of an automobile must in all instances stop to enable passengers to safely alight from or board a street car, before passing the same. It does not attempt to minimize the protection which the state law prescribes, but simply extends and enlarges it. The con-

ditions in the present case are the same in principle; the city ordinance requiring, not only the precaution prescribed by the state law, of turning to the right of the center of the street intersection, but, further, that the turn shall be made as near as possible to the curb line of the street. We fail to see the force of the distinction between the two cases which counsel for appellant attempts to point out. In both instances the city ordinance increases the limitation placed by the state upon the driver's freedom of discretion in handling his machine. At any rate, such a variance as appears in the two laws involved in this case is upheld under the affirming opinion of the Supreme Court as quoted. We think the cases cited are authority for holding that the statute and ordinance involved here are not in conflict.

[3] Appellant has also taken exception to the action of the trial court in giving an instruction substantially in the language of subdivision (j) of section 20 of the Motor Vehicle Act of 1913 (Stats. 1913, p. 648), instructing the jury that the statute law of the state requires the driver of an automobile before changing his course "to first see that there is sufficient space for such movement to be made in safety." The language marked as quoted is the part of the instruction complained of. Appellant urges that the instruction goes beyond prescribing the degree of diligence to be used in looking for or investigating conditions, and makes the party responsible for actually visualizing the situation as it exists, before attempting to make a turn in the street. The answer is that the instruction follows the language of the statute in this respect, and there was no error in giving the instruction in the words of the law itself. *Wirthman v. Isenstein*, 28 Cal. App. Dec. 465; *Mt. Olive & S. Coal Co. v. Rademacher*, 190 Ill. 538, 60 N. E. 888. If the terms of the statute are ambiguous, and open to conflicting constructions, appellant might have asked the court to interpret it to the jury. But we do not understand that counsel base their objection on the ground of uncertainty as to the meaning of the words used. They insist that the meaning is all too apparent. We are not attempting to pass upon that point, but are satisfied that, in the absence of any request by appellant for an interpretation of the words as used in the legislative enactment, there was no error in incorporating the precise words of the statute in the instruction.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

¹ Rehearing granted by Supreme Court.

RANDOLPH et al. v. HUNT.
(Civ. 1938; Sac. 2773.)

(District Court of Appeal, Third District, California. June 25, 1919. On Rehearing in Supreme Court, in Bank, Aug. 21, 1919.)

1. HIGHWAYS ⚡177—AUTOMOBILES—SPEED—STATUTE.

Under St. 1915, pp. 406, 409, §§ 20, 22, automobiles must be driven on highways in a prudent manner, at a reasonable speed not exceeding 30 miles per hour.

2. HIGHWAYS ⚡184(3)—AUTOMOBILE ACCIDENT—SUFFICIENCY OF EVIDENCE.

Evidence that defendant's automobile, while running at a high rate of speed on a highway, overtook and killed a pedestrian, etc., made the driver's negligence a jury question.

3. HIGHWAYS ⚡184(2)—AUTOMOBILE ACCIDENT—BURDEN OF PROOF.

Where a defendant's automobile overtook and killed a pedestrian on a highway, defendant has the burden of proving deceased was guilty of contributory negligence.

4. APPEAL AND ERROR ⚡999(3)—NEGLIGENCE ⚡136(9)—JURY QUESTION—CONCLUSIVENESS OF FINDING.

Where reasonable minds may draw different conclusions on the question of negligence, the issue is for the jury and its finding conclusive.

5. HIGHWAYS ⚡184(3)—AUTOMOBILE ACCIDENT—JURY QUESTION.

Evidence regarding circumstances under which an automobile, traveling at high speed on a highway, ran down a pedestrian, *held* to make the pedestrian's contributory negligence a jury question, although he was on left-hand side of road.

6. HIGHWAYS ⚡184(1)—AUTOMOBILE ACCIDENT—COMPLAINT.

A complaint that an automobile, owned and occupied by defendant, ran down a pedestrian on a highway, is not fatally defective, in absence of a special demurrer for uncertainty, for failure to allege that defendant was either driving the car, or retained control of its operation, especially where complaint was regarded as sufficient upon trial and such issue was raised by answer.

7. MASTER AND SERVANT ⚡330(1)—PRESUMPTIONS—USE OF AUTOMOBILE.

An automobile is presumably operated for the owner's benefit.

8. MASTER AND SERVANT ⚡330(3)—AUTOMOBILE ACCIDENT—SUFFICIENCY OF EVIDENCE.

The presumption that an automobile was being operated for owner's benefit, although opposed by testimony that owner had loaned the car to the person who was driving it when a pedestrian on a highway was injured, *held* to warrant a jury finding in favor of presumption and against testimony.

9. HIGHWAYS ⚡183—AUTOMOBILE ACCIDENT—DUTY OF OWNER.

An automobile owner who lends his machine to another, but becomes a passenger in it, must, if possible, prevent the driver from operating the machine in a reckless manner.

10. APPEAL AND ERROR ⚡1066—HARMLESS ERROR—INSTRUCTIONS.

An abstractly erroneous instruction may be harmless when applied to the particular facts.

11. APPEAL AND ERROR ⚡1066—HARMLESS ERROR—INSTRUCTIONS.

Instruction that defendant automobile owner was liable for the negligent running down of a pedestrian on a highway, if he had not parted with right to control machine's operation, does not constitute reversible error, because implying that the right, instead of exercise, of control was vital question, where there was no evidence that defendant attempted to exercise any control over driver.

12. TRIAL ⚡187(1)—INSTRUCTION—CREDIBILITY OF WITNESS.

In an automobile accident case, an instruction that presumption the car was being used for owner's benefit is not destroyed by testimony that the car had been loaned to the driver unless such testimony is believed by the jury, etc., *held* not to erroneously assume the testimony mentioned was false.

13. TRIAL ⚡296(3)—INSTRUCTIONS—CONSTRUCTION WITH OTHER INSTRUCTIONS.

In an automobile accident case an instruction that defendant automobile owner's failure to control the machine's operation, if he had a right to do so, did not relieve him from liability, *held* not erroneous, in view of other instructions and evidence that defendant did not exercise control although he had the opportunity of doing so.

14. NEGLIGENCE ⚡72—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY.

An instruction that if deceased, who was struck by an automobile, was suddenly put in peril by defendant's fault, he might be excused for omitting some precautions or making an unwise choice, and running directly into danger while bewildered, *held* correct.

15. TRIAL ⚡295(6)—INSTRUCTIONS—CONSTRUCTING CHARGE AS A WHOLE.

In an automobile accident case an instruction that plaintiff could not recover unless the automobile driver had been employed by defendant automobile owner, *held* not reversible error, when charge was considered as a whole, because conflicting with other instructions allowing recovery if defendant did not attempt to restrain the reckless driving.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Carrie Belle Randolph and others, by Carrie Belle Randolph, their guardian ad litem, against Alvis G. Hunt. Judgment for plaintiffs, and defendant appeals. Affirmed.

John S. Partridge, of San Francisco, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellant.

Arthur C. Huston and Harry L. Huston, both of Woodland, for respondents.

BURNETT, J. There is substantial evidence justifying the following statement of the facts as made in the brief of respondents: The deceased, Samuel T. Randolph accompanied by his son, Ansel Randolph, was driving a cow south on the state highway leading from Woodland to Davis, in Yolo county. The country is level and the view unobstructed. The two Randolphs were in a buggy, and, because of the difficulty in thus driving the cow, the deceased left the vehicle and proceeded down the highway on foot, the son following immediately behind in the buggy. After going a short distance, an automobile horn was sounded, and a machine came along and passed them without accident, the buggy being on the right-hand side of the road, looking south, the cow on the right-hand side of the paved portion of the highway, and the deceased, Randolph, on the extreme east side of the road. This car did not belong to the defendant. After it passed, the elder Randolph started from the east side of the road toward the cow on the other side to continue driving her south. As he reached the left-hand portion of the paved highway, an automobile owned by the defendant, traveling at a high rate of speed, estimated to be not less than 40 miles per hour, passed the buggy in which young Randolph was sitting, and which was following along behind the cow and the elder Randolph. As it passed the buggy, an occupant of the automobile sounded an alarm by calling to Mr. Randolph, who was standing on the road facing south. Mr. Randolph, hearing the machine, possibly became confused; in any event, he jumped from the paved portion of the road easterly, supposing probably, that the automobile would pass down the pavement and between him and the cow. Almost simultaneously the automobile struck the deceased, throwing his body 34 feet from the point of contact with the machine. The automobile turned to the left with both brakes locked and continued between the paved portion and the highway for a distance of 10 posts, or about 80 feet. After passing 10 posts it collided with the fence bordering the highway, cutting 4 posts squarely in two and almost cutting the fifth one. It then traveled a distance of 35 posts, or about 250 feet, before it stopped, thus clearly indicating its great rate of speed at the time of the accident. Mr. Randolph lived about two weeks, dying on the 20th of April, and he left a surviving widow and 10 children, who are all respondents herein.

The foregoing facts reveal a case of negligence on the part of the driver of the auto-

mobile, which may be said to be the proximate cause of the death of Mr. Randolph.

[1, 2] The duty of a driver of an automobile in relation to the rights of others traveling upon the highway is set forth in sections 20 and 22 of the statutes of 1915, p. 397, and it is sufficient to say that they require that he shall drive the car in a careful and prudent manner, and at a rate of speed not greater than is reasonable and proper, and under no circumstances to exceed 30 miles per hour. In a case somewhat similar to this, the Supreme Court in *Raymond v. Hill*, 168 Cal. 475, 143 Pac. 748, construing the rule of reasonable precaution which the law enjoins, declared that it includes "the necessity of making certain that foot passengers are aware of the rearward approach of the vehicle, that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach, and, finally, that the vehicle is under such control as that it may be stopped promptly." The testimony of the witnesses for plaintiffs shows that none of these conditions was observed by the driver, and hence that he violated a duty he owed to the deceased and was chargeable with actionable negligence.

[3-5] Nor can it be maintained that the only rational inference is that deceased was guilty of contributory negligence. The burden, of course, was upon defendant to establish this defense. Where reasonable minds might draw different conclusions upon the question of negligence, the question is for the jury and its finding is conclusive. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513. The argument of appellant is based largely upon the assumption that the testimony of his witnesses is true and should have been accepted by the jury. His witnesses do indeed make a strong showing in favor of the contention that the only negligence in the case was that of the deceased, but a very different aspect is presented by the evidence of the plaintiffs, and we think it cannot be doubted that there is ground upon both of these questions for a rational inference adverse to appellant.

It may be added that the claim of contributory negligence by reason of the fact that deceased was on the east side of the highway is, in our judgment, without merit. It is, of course, true that a pedestrian has the right to use all parts of a road or street, being chargeable with the exercise of a reasonable degree of care, to be determined under all the circumstances of the case. In the *Raymond* Case it is said:

"It was legally permissible for the defendant to use the easterly or left-hand side of the highway as he undertook to use it, and no negligence could be predicated merely upon such use, it appearing that the roadway was of ample

width to permit that use with safety to pedestrians and a clear passage to approaching vehicles."

See, also, *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319. Herein there was a reasonable excuse for the presence of deceased on the east side; it is a fair inference that the traveled portion of the road was clear; that there was ample room for the appellant to pass without endangering or injuring anyone; that the driver did not sound the horn or give any warning of his approach until he passed the buggy; that deceased was not aware of his approach until the machine was virtually upon him; and that, under the stress of sudden peril, he was excusable for jumping as he did to escape the danger. *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94.

The case seems to have been tried with care, the fullest opportunity was given to both parties to support and vindicate their contentions, and no complaint is made of any ruling of the court as to the admissibility of evidence. Appellant does, however, assail the action of the court in overruling the demurrer to the complaint and in giving certain instructions to the jury. And these considerations will receive our attention.

[6] The complaint alleged:

"That on or about the 7th day of April, 1916, while the said Samuel T. Randolph was driving a cow on the public highway in the said county of Yolo, assisted by his son, Ansel Randolph, a plaintiff herein, who was at said time in a buggy drawn by a horse, an automobile owned and occupied by the defendant herein was, at said time, so carelessly and negligently driven on said public highway that it collided with the said Samuel T. Randolph, inflicting injuries which resulted in his death on the 20th day of April, 1916; that said automobile so owned and occupied by the said defendant was not driven in a careful manner, with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon said highway; that the same was not at said time operated or driven in a careful or prudent manner and at a rate of speed that was reasonable and proper, having regard to the traffic and use of the said highway; that at said time said automobile was operated and driven at such a rate of speed as to endanger the life and limb of the said Randolph; that by reason of the said negligence and carelessness of the said defendant in so operating and driving the said automobile the same collided with the said Randolph as aforesaid, inflicting injuries causing his death; that the death of the said Randolph was due to the negligence and carelessness of said defendant herein, as aforesaid."

There was no special demurrer to the complaint, but the contention of appellant is that a cause of action was not stated for the reason that the complaint does not allege that the automobile was operated by the defendant. The gravamen of the charge consists,

manifestly, in the speed and recklessness with which the machine was run. A material fact, therefore, was the responsibility of appellant for this want of care in the operation of the machine. Appellant, to be liable for the consequences of this misconduct, must have been driving either personally, or through his agent, or must have had the right to direct and control the movements of the machine. Hence it is claimed that there should have been an express averment to that effect, and that it was not sufficient to aver that appellant was the owner and occupant of the automobile. But the most that can be said is that there is a defective allegation of appellant's connection with the driving of the car. It does appear indirectly, rather by way of recital, it is true, that defendant operated and drove the car. This was sufficient in the absence of a demurrer for uncertainty. Moreover, the issue was directly tendered by the answer in the following averment: "But in that behalf this defendant alleges that the said automobile was not in the possession or control of this defendant but was at said time in the possession and control of one Evans Triggs." It may be added that no objection was offered to the introduction of evidence, and the complaint was treated at the trial as though it were sufficient. It is quite apparent, therefore, that appellant suffered no prejudice by reason of said defect, if we admit that it existed. The question is thoroughly considered in *Slaughter, Adm'r, etc., v. Goldberg, Bowen & Co.*, 28 Cal. App. 318, 147 Pac. 80, and *Boyle v. Coast Imp. Co.*, 27 Cal. App. 714, 151 Pac. 25, and each is decisive of the controversy here.

[7, 8] One of the important points in the case is whether there was in fact sufficient evidence to hold appellant responsible for the acts of the colored man, Triggs, in driving the car. We have already called attention to the averment of the answer in that respect, and we may state that the driver, appellant, and his son all testified substantially that Triggs borrowed the car to go to Sacramento in quest of employment, and that he invited appellant to go along to recommend him at a certain garage in said city. But, notwithstanding this testimony, respondents contend that there are two theories, upon either of which the verdict of the jury may be justified. The first is that the jury was warranted in rejecting the story as untrue, and holding that there was no such arrangement between Hunt and Triggs whereby the car was loaned to the latter. The second is that, if said car was borrowed, appellant did not part with control of it, and that it was his duty, as owner and occupant, to see that it was operated in a careful and prudent manner, and that he is responsible for the consequences of his violation of this duty.

As to the first of these contentions, it can-

not be said here that the jury was bound to accept the statement of said witnesses as true. Being the exclusive judges of the weight of the evidence and the credibility of the witnesses, if the testimony did not carry conviction to their minds they had the legal right to reject it. We must assume that they did not believe the story, and we cannot say, in the absence of any showing to the contrary, that the jury acted arbitrarily, or otherwise than in good faith and with an honest purpose. We would not be justified by the record in branding the statement of these witnesses as false, although there are certain circumstances that tend somewhat to discredit it, but we are not in a position to interfere with the jury's discretion in that particular.

But it is said by appellant that there was no evidence to the contrary, and therefore it was the duty of the jury to find upon this issue in his favor. It is not disputed that from the ownership of the automobile the presumption arises that it was being used for appellant's purposes. *West v. Kern*, 88 Or. 247, 171 Pac. 413, 1050, L. R. A. 1918D, 920; *McWhirter v. Fuller*, 35 Cal. App. 288, 170 Pac. 417. But it is claimed that this presumption was no longer of any effect, after the introduction of testimony by witnesses to the contrary, and that the jury could not legally be influenced by it in finding a verdict. It amounts to the contention that said presumption would be sufficient to support the verdict if there were no evidence to the contrary, but it is insufficient in the presence of adverse evidence. We cannot understand how a presumption can be thus changed in its character as evidence. If it is legally sufficient to support a verdict, it must be legally sufficient to create a conflict in the evidence. We may add that appellant's view is opposed to the law as provided in subdivision 2 of section 2061 of the Code of Civil Procedure, and as interpreted by the Supreme and Appellate Courts of this state.

In commenting upon a certain statement made by the Supreme Court in the case of *Adams v. Hopkins*, 144 Cal. 36, 77 Pac. 712, this court, in *Keating v. Morrissey*, 6 Cal. App. 171, 91 Pac. 680, said:

"The rule as thus stated is undoubtedly sound and applicable to all disputable presumptions of fact. In truth, their very characterization * * * as 'disputable presumptions' carries with it necessarily the right to controvert them by other evidence, and the complete exhaustion of their force when evidence has been introduced sufficient to destroy the verity of the facts for which, until then, the law, for reasons of expediency, makes them responsible vouchers. The presumption of a consideration is, indeed, enough to support the note, in the absence of evidence to the contrary. But in whom is vested, under our system, the exclusive province of determining when there is evidence to the contrary? There must be, as counsel will concede, a determination by somebody that there is in fact

'evidence to the contrary.' The fact that the record here seems to show 'evidence to the contrary' is not enough, so far as our power over the verdict and findings is concerned. It must have been 'evidence to the contrary' to which the proper tribunal has given such weight as to enable it to say that such 'evidence to the contrary' has overcome and dispelled the presumption."

It may be added that the Supreme Court declined to order the case up.

The same principle is declared in *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960; *Reclamation District No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277; *Estes v. Ballard*, 22 Cal. App. 344, 134 Pac. 361; *Pac. Portland Cement Co. v. Relnecke*, 30 Cal. App. 501, 158 Pac. 1041; *Phillips v. Huffaker*, 35 Cal. App. 531, 170 Pac. 431; *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *Osgood v. Los Angeles, etc. Co.*, 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497; *Collins v. Maude*, 144 Cal. 289, 77 Pac. 945; *Cody v. Market St. Railway Co.*, 143 Cal. 90, 82 Pac. 666; *Bellus v. Peters*, 165 Cal. 112, 130 Pac. 1186; *Lenninger v. Lenninger*, 167 Cal. 297, 139 Pac. 679; *Hitchcock v. Rooney*, 171 Cal. 285, 152 Pac. 913; *Pabst v. Shearer*, 172 Cal. 239, 156 Pac. 466.

Apt quotations might be made from all the foregoing decisions to the effect that a presumption is evidence; that it will produce a conflict with other evidence introduced to rebut it, and that it is for the trial court or jury to determine whether or not such evidence is sufficient to overcome the presumption.

We have been at pains to restate the doctrine and to cite the large number of decisions, because it is so earnestly contended by appellant that the rule is otherwise. In support of his contention he cites quite a number of cases, three of which we may briefly notice.

In *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78, the court of appeals declare:

"The automobile was owned by the defendant, and this fact was prima facie evidence of her responsibility for the manner in which it was driven. *Ferris v. Sterling*, 214 N. Y. 249 [108 N. E. 406, Ann. Cas. 1916D, 1161]; *Kellogg v. Church Charity Foundation of L. I.*, 203 N. Y. 191 [96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883]. The presumption growing out of a prima facie case, however, remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it."

It is to be observed, though, in that case that the evidence in opposition to the presumption was offered by the plaintiff himself, and, of course, he could hardly rely upon the presumption when he had vouched for the credibility of a witness who virtually

testified that there was no place for the operation of such presumption.

We find a similar situation in the case of *Brown v. Chevrolet Motor Co. of California*, 179 Pac. 697; the court citing as authority the *Potts Case*, supra, and another New York decision, *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540.

The more recent case is *Maupin v. Solomon*, 183 Pac. 198. Therein it seems to have been conceded by respondent, however, that the evidence against the presumption was "clear and convincing," and therefore it was just that he should not be allowed to urge the presumption. In support of the court's conclusion, quotation is made from *Savings & Loan v. Burnett*, 106 Cal. 514, 39 Pac. 922, as follows:

"Presumptions * * * are allowed to stand not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

But the limitation of this principle is correctly prescribed by the Supreme Court in the later decision of *People v. Milner*, supra, in an opinion written by the same justice. Therein it is said:

"By section 2061, subd. 2, of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the facts: (1) That a presumption is evidence; and (2) that it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of the proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled. *Savings & Loan Soc. v. Burnett*, 106 Cal. 514 [39 Pac. 922]. This is true. Against a proved fact, or a fact admitted, a disputable presumption, has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven; and, if not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption. In the *Burnett Case*, supra, both parties testified to a state of facts contrary to the presumption. It was like an admission; it relieved the question from conflict."

Such must be the rule if we are to give effect to the fundamental doctrine that clothes the jury with the authority to pass upon questions of fact. A case might arise, of course, where an appellate court would be justified in setting aside a verdict upon the ground that a jury had accorded too much

weight to a mere presumption, but, ordinarily, such error can only be corrected by the trial judge on motion for a new trial.

[9] Again, if the owner of an automobile lends his machine to another, and on invitation becomes a passenger therein, in the absence of any agreement to the contrary the owner has the right, and, indeed, it is his duty to prevent, if possible, the driver from operating the machine in a reckless and dangerous manner and in violation of law. He cannot sit idly by and refrain from remonstrance at least while knowing that the driver is thus endangering the lives of others. If he has the opportunity to restrain the driver, and fails to take advantage of it, he should be held responsible for the consequences. This is the just view, and it is supported by the authorities. The general rule is stated in 28 Cyc. 38, as follows:

"Where an injury is inflicted by the use or operation of a motor vehicle upon the public highway the owner thereof is liable to respond in damages therefor if the vehicle was being operated by such owner or was under his control. * * * In all cases where the owner is present he will be responsible for injuries sustained by third persons unless the operator disobeys instructions as the owner is in law in control of the vehicle."

We have an illustration of the principle in *Crittenden v. Murphy*, 178 Pac. 595, wherein it is said:

"The owner owes the duty to the traveling public to see to it that his car, when driven on the streets with his permission and for the purposes for which the car was purchased, should be driven carefully and with due consideration to their rights; and the owner should not in good conscience be allowed to disclaim his responsibility on the ground that the use thus contemplated and authorized by him is permissive only."

Viewing the case in the light of the admitted facts, we must conclude that it was apparent to Triggs and to appellant that the situation was dangerous to the elder Randolph. They saw a man driving a cow followed by a buggy. At a considerable distance they were aware of the peculiar condition. They had abundant opportunity to observe the presence of the Randolphs and to bring the car under control and to pass them without injury to any one. Under the circumstances, both the driver and the owner were properly chargeable with responsibility for driving at a great rate of speed and without proper control of the motor into this perilous situation. It is not unreasonable to infer that, if appellant had given proper direction to the driver, the accident would have been averted; and it is not unjust to hold the owner to this measure of responsibility.

We think the foregoing may be summed

up in these propositions: (1) The question of the alleged agreement with Triggs was submitted to the jury; it was resolved against appellant on conflicting evidence, and this finding cannot be reviewed by this court; (2) assuming the existence of the arrangement as claimed by appellant, there was nothing therein whereby appellant surrendered the right to control the car while he was a passenger therein; (3) the law imposed upon him the duty not to allow the driver to operate the machine in violation of the statute; and (4) under the circumstances it was his duty to direct and insist that the driver operate the machine with ordinary care and due regard to the safety of pedestrians.

Appellant attacks certain instructions given by the court, but we think the law was correctly given in the careful and comprehensive charge to the jury.

[10, 11] One of these is as follows:

"You are instructed that the defendant, Hunt, as the owner and occupant of this automobile, had the right to control the same, in the absence of some agreement or arrangement, express or implied, whereby he parted with such right of control at the time of the accident. Whether or not such an agreement or arrangement was made is a question of fact for the jury to determine. If you find from the evidence that the defendant, Hunt, had not parted with such right of control, and that the deceased was killed as the result of the negligent operation of the car, as alleged in the complaint, your verdict must be for the plaintiffs."

The principal criticism of the instruction is that it implies that the right of control, rather than the exercise of control, was the vital question. The instruction could not have been misleading, however, under the evidence. There was no showing that appellant did exercise, or attempt to exercise, any control over the driver. Hence his responsibility for the accident depended upon the question, after all, whether he had such right, or it was his duty to control or endeavor to control, the operation of the machine. Of course, an instruction is sometimes abstractly erroneous and yet perfectly harmless when applied to the facts of the particular case.

[12] We can see no valid objection to the following instruction:

"You are instructed that it is admitted by the pleadings that the defendant, Hunt, was the owner and one of the occupants of the automobile at the time of the collision. This is prima facie proof that the driver was engaged in the owner's service, and a presumption arises that the car was in use for the owner's benefit. Testimony that the automobile was loaned to Triggs does not, as a matter of law, destroy the presumption unless it is believed by you. The truth or falsity of this testimony is for you to determine. The jurors are the exclusive judges of the credibility of the witnesses and the weight

of the testimony. Therefore, if you do not believe that the said automobile was loaned to said Triggs, or in his possession, as claimed by the defense, then I instruct you that, if you find that the death of Randolph was the result of the negligent operation of the car, your verdict must be for the plaintiffs, unless you further believe that the deceased was guilty of contributory negligence."

This instruction assuredly does not assume that the testimony as to the car being loaned to Triggs was untrue, but, according to the requirement of the law, it directed the jury to determine whether it was true or false. It must be so that a presumption is not destroyed by other evidence not believed by the jury, or else the presumption is not evidence at all.

[13] Another instruction to the effect that appellant is not relieved from responsibility because he failed to exercise control of the machine, if he had such right, is criticised by appellant. But taken in connection with the other instructions, and in view of the evidence, it cannot be considered erroneous. There is no ground for the contention that appellant did exercise control or that he did not have the opportunity of so doing. Indeed, appellant relied entirely upon the positions that the driver was not negligent, but that, if he was, he was in complete control of the machine, and appellant was not, therefore, liable, and, furthermore, that deceased was guilty of contributory negligence. Upon this particular issue therefore, the only real question was whether appellant had the right to control the operation of the machine.

[14] The following was given:

"You are instructed that, if the deceased was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault. In such case, even if in bewilderment he runs directly into the very danger which he fears, he is not at fault."

As an abstract proposition this is vindicated by the authorities. *Braly v. Fresno City Ry. Co.*, 9 Cal. App. 417, 99 Pac. 400; *Blackwell v. Renwick*, supra; *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 66 Pac. 734; *Raymond v. Hill*, supra.

There was evidence making the instruction pertinent, and, being in the hypothetical form, it does not invite criticism.

[15] Complaint is made that some of the instructions are irreconcilably conflicting. But we are satisfied that, when the whole charge is considered, there is no just reason for concluding that the jury was misled.

This instruction was given:

"You are further instructed that the burden is upon plaintiffs to establish by a preponderance of the evidence that Triggs was a servant or employé of Mr. Hunt, and acting within the scope of his employment—that is, doing the business for which he was employed—before Mr. Hunt can be liable. If the plaintiffs have failed to establish to your satisfaction, as reasonable men, that Triggs was an employé of Mr. Hunt, and acting on Mr. Hunt's business at the time of the accident, then your verdict must be for defendant."

It might be contended with some plausibility that this instruction eliminated from the case the question of control by appellant by virtue of being the owner and occupant of the machine. Taken alone, the instruction virtually told the jury that plaintiffs could not recover in any event unless they established the fact that Triggs was acting as the servant of appellant. As we have seen, there was the other theory also available to respondents. But appellant has not complained of this instruction, as, indeed, he could not, since it is more favorable to him than he was entitled to. However, the instruction was understood, no doubt, as referring simply to the question of responsibility of appellant by reason of the agency of Triggs.

When so many instructions are given upon various phases of negligence, and addressed to all possible theories that can find support in the evidence, it is almost unavoidable that some uncertainty and some minor inconsistencies will appear. But we think there is no sufficient showing here to justify a reversal of the judgment. Indeed, we might assume that all the instructions were given at the request of appellant, since nothing appears to the contrary. It is, at least, quite manifest that the larger part of them was given at his instance.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing in Supreme Court.

PER CURIAM. In denying a rehearing in this case we deem it proper to say that we limit our approval of the opinion of the District Court of Appeal, on the question of the liability of the owner, to the first of the reasons assigned therein as cause for affirmance of the judgment; that is to say, the reason summarized therein as follows: "(1) The question of the alleged agreement with Triggs was submitted to the jury; it was resolved against appellant on conflicting evidence, and this finding cannot be reviewed by this court."

As to the soundness of the other reasons

set forth by the district court for the existence of such liability we express no opinion. The petition for rehearing is denied.

ANGELLOTTI, C. J., and SHAW, WILBUR, MELVIN, LENNON, and OLNEY, JJ., concur.

BARROW v. BARROW. (Civ. 2906.)

(District Court of Appeal, Second District, Division 2, California. July 2, 1919.)

1. DIVORCE \Leftrightarrow 130—EVIDENCE—SUFFICIENCY.

Conflicting evidence held to sustain the trial court's action in denying a divorce upon grounds of extreme cruelty, although ten witnesses testified for plaintiff against three for defendant, in view of Code Civ. Proc. § 2061, providing that the greater number of witnesses is not conclusive, etc.

2. DIVORCE \Leftrightarrow 239—FINDINGS—ISSUES.

In action for divorce and for division of alleged community property, where defendant denied the allegations as to community property, alleging the property to be his own separate property, a finding by the court that the property was defendant's separate property did not convert the cause of action for divorce to one to quiet title, but was a finding upon an issue invited by plaintiff by proper allegation in her complaint, which allegation was denied by the answer.

3. DIVORCE \Leftrightarrow 250—FINDINGS—MONEY LOANED BY WIFE TO HUSBAND.

In divorce suit, where divorce was denied plaintiff wife, findings were not erroneous in failing to refer to money loaned by plaintiff to defendant, since, if anything was due her and she had not slept on her rights, she had an adequate remedy for recovery thereof in an action at law.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Divorce action by Alice J. Barrow against James T. Barrow. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Appeal from order denying new trial dismissed, and judgment affirmed.

William Lewis, of Los Angeles, for appellant.

T. K. Kase, of Los Angeles, for respondent.

THOMAS, J. This is an action for divorce, for attorney's fees, for division of alleged community property, and for general relief, brought by plaintiff against defendant on the ground of extreme cruelty. The material allegations of the complaint were denied by defendant's answer. While admitting the formal parts of the complaint in his answer,

he denied, as aforesaid, all the material allegations contained therein as to community property—alleging this as his own separate property—and as to the alleged extreme cruelty. He also admitted that he had received from plaintiff money which was used by him in the improvement of his own property. Upon the issues thus presented, the court denied plaintiff's application for divorce, etc., refused to divide the said real property, and found that it was the separate property of defendant, subject to existing mortgages. There was a motion for new trial, which was denied by the court. From the judgment and order denying her motion for new trial, plaintiff appeals.

Appellant urges, in support of her contention that the judgment herein should be reversed, the consideration by this court of the following points, viz.:

(1) "Whether or not plaintiff proved the material allegations of her complaint, and, if so proven, was there shown by the evidence any just cause for the refusal to the plaintiff by the lower court of a decree of divorce as prayed?"

(2) "In the absence of a decree of divorce to either party, had the lower court jurisdiction, in a divorce action, to pass upon property rights of the parties thereto, i. e., to convert an action for divorce into an action to quiet title; and, if so, did the lower court err in not taking into consideration the money advanced by plaintiff to defendant for the erection of improvements upon the separate real estate of defendant, admitted by the pleadings and evidence, and also in not taking into consideration money borrowed during coverture for the purpose of erecting improvements upon other real estate of the defendant?"

(3) "Did the lower court err in denying plaintiff's motion for a new trial?"

[1] The answer to the first point is that, while it is shown from the record here that ten witnesses testified for plaintiff and but three for defendant, and that there was a conflict in the evidence, the trial court having settled that conflict in favor of the defendant, this court will not interfere. The courts "are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds." Section 2061, Code Civ. Proc.

[2, 3] The second proposition advanced is based upon a state of facts not borne out by the record here. There was no conversion of a cause of action for divorce to one to quiet title. All that the court did here was to find upon an issue invited by plaintiff herself, by proper allegation in her complaint, and which allegation was denied by the answer; said denial being not only supported by the evi-

dence of the defendant, but likewise by the evidence of plaintiff herself. *Allen v. Allen*, 159 Cal. 197, 113 Pac. 180; *Johnston v. Johnston*, 17 Cal. App. 241, 119 Pac. 403. There was no error in not referring in the findings to money loaned to defendant by plaintiff. If there is anything due her from defendant, and she has not slept upon her rights, she has an adequate remedy for the recovery of the same in an action at law.

The evidence amply supports the findings of the court. For these reasons, then, it inevitably follows that there was no error in denying plaintiff's motion for a new trial.

The appeal from the order denying plaintiff's motion for a new trial is dismissed, and the judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

BARROW v. BARROW. (Civ. 2962.)

(District Court of Appeal, Second District, Division 2, California. July 2, 1919.)

DIVORCE §169—JURISDICTION—HOMESTEAD RIGHTS OF WIFE.

A court, which had denied a wife's application for divorce, is without jurisdiction to restrain her from entering her husband's separate property, which she had selected for homestead purposes, pursuant to Civ. Code, §§ 1238, 1262, et seq.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Divorce action by Alice J. Barrow against James T. Barrow. From an order excluding plaintiff from defendant's dwelling house, she appeals. Order reversed.

William Lewis, of Los Angeles, for appellant.

Thomas K. Kase, of Los Angeles, for respondent.

THOMAS, J. This is an appeal from an order made by the lower court after a judgment, made and entered herein April 1, 1916, had been so made and entered, excluding the wife—appellant here—against whom the court entered such judgment, from the dwelling house of the husband, respondent here, which was decreed by the court in that action to be the separate property of this respondent. The order appealed from is as follows:

"Whereas, on the 1st day of April, 1916, the above-entitled court made and filed its findings of fact and conclusions of law herein, and gave and caused to be entered its judgment in the above-entitled action in favor of the defendant above named; and

"Whereas, said court then found, determined, and decreed to be the sole and separate property of James T. Barrow the real property hereinafter described:

"Now, therefore, motion having been duly made this day, after notice thereof was given as required by law, and good cause appearing therefor, it is ordered that Alice J. Barrow, plaintiff above named, forthwith vacate and abandon her occupation, use, and possession of the real property hereinafter described, and that she forthwith deliver the possession thereof to said defendant; and the said plaintiff, Alice J. Barrow, her attorneys, agents, representatives, and all others acting in aid or assistance of her, are hereby enjoined, restrained, and prohibited from further occupation, use, or possession of said real property and the improvements thereon, and all or any part thereof.

"The real property hereinbefore referred to consists of lots 278 and 279 of the Central Avenue Home Tract No. 2, in the city of Los Angeles, state of California, as per map recorded in Book 4, page 75, of Maps in the office of the county recorder of the county of Los Angeles, and the improvements thereon are known and numbered 1230 E. 57th St. and 1234-1236 E. 57th St., in said city of Los Angeles, state aforesaid.

"Further ordered that said plaintiff leave all furniture, bedding, and personal property of defendant in said house, and refrain from injuring or destroying any part thereof.

"Dated this 15th day of May, 1916.

"Fred H. Taft, Judge."

From the said judgment so entered an appeal was taken, which appeal has this day been decided contrary to the contentions of appellant there, who is likewise appellant here. See *Barrow v. Barrow* (L. A. No. 2903) 183 Pac. 364. The decision in that case, we think, disposes of the present appeal.

The plaintiff, appellant here, contends that the lower court erred in making the order appealed from, and for reversal thereof urges:

(1) "That the lower court, by its final judgment and decree denying a divorce and the entry thereof, lost jurisdiction of the action, and had no authority to make the order from which this appeal is taken."

(2) "That the order in question was made by the lower court without authority to make the same, by reason of the express prohibition of the statute providing that neither husband nor the wife can be excluded from the dwelling of the other."

(3) "That the premises in question having been selected by the wife as a homestead, in the absence of a decree of divorce the lower court had no authority in a divorce action to interfere with the homestead or the possession thereof."

We think there is merit in these contentions. The judgment to enforce which it is claimed by respondent that this order was issued was a final judgment, which left the parties, so far as the court was concerned,

in the same condition as when the action was commenced, namely, husband and wife. The marriage was not dissolved. True, the court found that the property described by plaintiff in her complaint was the separate property of the defendant. In such a case, however, the rights of the parties continue undisturbed. One of these rights is the right to file a declaration of homestead (Civ. Code, § 1262 et seq.); and the homestead may be so selected from the separate property of the husband (Civ. Code, § 1238). It follows, we think, that plaintiff having exercised her homestead right in the property involved, and the court having by said final judgment denied the divorce, the making of the order here in question was error; the court having lost its jurisdiction to make the same.

The issue presented by the pleadings in the divorce action on which the court found that the property involved was defendant's separate property, was not essential or necessary therein; but the finding, under the circumstances, was a proper one. This fact, however, in connection with an action for divorce, gave the court no more authority to issue the said order than it would have had, were the judgment entered in an independent action between husband and wife to quiet title.

The order appealed from is reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

FERNANDEZ v. ABURREA. (Civ. 2852.)

(District Court of Appeal, First District, Division 1, California. July 9, 1919. Rehearing Denied by Supreme Court Sept. 4, 1919.)

1. BASTARDS §37 — SUPPORTING CHILD — LIMITATIONS.

Father's obligation to support his illegitimate child is a continuing duty, against which statute of limitations does not run while child needs its father's support.

2. PARENT AND CHILD §3(1)—SUPPORTING CHILD—RELEASE.

A minor's right to support and maintenance by its father may not be limited or contracted away by the parents.

3. BASTARDS §17 — CONSTITUTIONAL LAW §145 — OBLIGATION OF CONTRACT — ENFORCING SUPPORT OF BASTARD.

A judgment requiring a father to support his illegitimate child, pursuant to Civ. Code, § 196a, does not impair contract obligations, in violation of Const. art. 1, § 16, because father had previously given mother a lump sum for an instrument releasing him from further obligations.

4. BASTARDS \Rightarrow 17½ New, vol. 12 Key-No. Series—ACTION TO ENFORCE SUPPORT—PARTIES.

Under the direct provisions of Civ. Code, § 196a, a mother may sue in her own name on behalf of her illegitimate child, to require the child's father to contribute to its support.

5. PARTIES \Rightarrow 76(1) — PLAINTIFF — WAIVING OBJECTIONS.

The objection that an action is not brought by the proper party plaintiff is waived by failure to raise the point by demurrer or answer.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mary Ardanaz Fernandez against Martin Aburrea. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. L. Brown, of San Francisco, for appellant.

Frank A. Duryea, of San Francisco, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff, under the provisions of section 196a of the Civil Code, against the defendant, the putative father, for the support of her minor illegitimate child. The trial resulted in a judgment in favor of the plaintiff for the sum of \$115, for the support of the child from the date of the filing of the action until the entry of judgment, and for the further sum of \$15 per month thereafter until the further order of the court. The defendant appeals.

The section of the Civil Code in question reads as follows:

"The father, as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections one hundred and thirty-eight, one hundred and thirty-nine and one hundred and forty of the Civil Code, in a suit for divorce by a wife."

[1] The action was commenced more than three years after the enactment of this section, and for this reason the defendant claims that it is barred by the provisions of section 338, Code of Civil Procedure. The obligation of a father to support his child, whether legitimate or illegitimate, is a continuing duty, against which the statute of

limitations will not run during the time that the child needs such care and support. Denham v. Watson, 24 Neb. 779, 40 N. W. 308.

[2, 3] Prior to the enactment of said section 196a the plaintiff and defendant entered into an agreement, by the terms of which the defendant claims that he was released of all obligations to the plaintiff and to their child. It provides that in consideration of the sum of \$325 the plaintiff discharges the defendant "of all obligations which he may have toward said Maria Ardanaz for her pregnancy and its consequences." Upon this purported release the defendant contends that to enforce section 196a of the Civil Code against him would be in violation of section 18, article 1, of the Constitution of the state, prohibiting the enactment of laws impairing the obligation of contracts. Assuming that this paper, which is in the form of a receipt, is broad enough to include within its terms an undertaking on the part of the plaintiff to relieve the defendant of any obligation devolving upon him at that time, or to which he might thereafter be subjected, to support his child, still it would have no binding force or effect, for it is settled law in this state that a minor's right to support and maintenance by his father may not be limited or contracted away by his parents. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42. And it follows that, the plaintiff being without power to release the defendant from his obligation to support his minor child, so much of the agreement between the parties as purports so to release him is void, and, consequently, created no contractual right between him and the plaintiff which could be impaired by subsequent legislation.

[4, 5] Defendant also attacks the complaint on the ground that the action was not brought by the proper party plaintiff. The institution of the action by the mother in her own name on behalf of the child is expressly authorized by the statute; but, even if it were not, the defendant having failed to take advantage of the point either by demurrer or answer, the objection will be deemed waived. Taylor v. Miller, 2 Lea (Tenn.) 153; Chase v. Jamestown St. Ry. Co., 15 N. Y. Supp. 35;¹ Bollinger v. Bollinger, 154 Cal. 695, 699, 99 Pac. 196.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 60 Hun, 582.

MITCHELL et al. v. KIM et al. (Civ. 2011.)

(District Court of Appeal, Third District, California. July 8, 1919.)

1. VENUE \S 22(1) — PERSONAL ACTIONS — PLACE OF TRIAL.

Under Code Civ. Proc. \S 395, providing that a personal action must be tried in the county in which the defendant or some one defendant resides, where there are several defendants residing in different counties, plaintiff has his election.

2. APPEAL AND ERROR \S 1024(3)—REVIEW—MOTION FOR CHANGE OF VENUE.

Where there was a direct conflict between the verified complaint and affidavits presented by plaintiffs and affidavits of one of the defendants as to whether parties joined as defendants, who resided in the county where action was brought, were joined for any purpose other than to lay the venue in that county, denial of motion for change of venue will not be disturbed.

3. VENUE \S 72—MOTION FOR CHANGE—SCOPE OF HEARING.

On motion for change of place of trial, the court will not go into the merits.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by A. N. Mitchell and another against C. L. Kim and F. M. Porter, copartners as Kim & Porter, and P. B. Cross. From an order denying a motion of defendant Cross for change of place of trial, he appeals. Affirmed.

Frank Freeman, of Willow, and Bacigalupi & Elkus, of San Francisco, for appellant.

W. T. Belleu, of Willow, for respondents.

OHIPMAN, P. J. Motion to change the place of trial. The motion was denied, and defendant Cross appeals from the order.

The action was commenced in the superior court of Colusa county. The motion was made "upon the grounds that defendant P. B. Cross is, and at the time of the commencement of the above-entitled action was, a resident of the city and county of San Francisco." It is alleged in the complaint that Kim and Porter, at the times mentioned in the complaint and at the commencement of the action, were copartners; that defendants became indebted to plaintiffs in the sum of \$4,960.01 "for the building and construction of a certain ditch and lateral work on what is known as Baker creek, in the counties of Glenn and Colusa, for the defendants," at their special instance and request and for their benefit; that said defendants promised and agreed to pay plaintiffs for said construction work as soon as it was completed; that said work has been completed, and demand made upon defendants to pay plaintiffs for

the same, but defendants have failed and refused so to do.

In support of the motion, defendant Cross made and filed an affidavit stating that at the commencement of the action he was a resident of the city and county of San Francisco; denied that he at any time ever entered into any transaction with plaintiffs, or either of them, for construction work, or any other kind of work, "to which said agreement or contract C. L. Kim or F. M. Porter, individually or as copartners, were a party to or associated with me." He further states:

"I believe, and therefore allege, that plaintiffs have joined said C. L. Kim and F. M. Porter as joint defendants, full knowing that they are in no way associated with me in any contract or transaction had by myself with them, and that they have so joined said defendants for the purpose, and for the purpose only, of attempting to keep the place of trial of the case in Colusa county, knowing full well that I am a resident of the city and county of San Francisco, and that they hoped thereby to perpetrate a fraud upon the court and upon the law, and that there is a dispute between said plaintiffs, the California Midland Realty Company, and myself over certain construction work, but that I have never had any dealings with said plaintiffs to which said defendants C. L. Kim or F. M. Porter were parties."

Defendant Kim made affidavit in which he stated that he had not at any time entered into any contract with or had any construction work done by plaintiffs to which said contract defendant Cross was a party; that he did not contract with nor employ plaintiffs, or either of them, to do any of the work set forth in the complaint; and denied that he was indebted to plaintiffs in connection with said work. He further states:

"I verily believe that I have been joined with said defendant P. B. Cross in order that plaintiffs could show in their pleadings that there were defendants residing in Colusa county, although said plaintiffs well knew that said P. B. Cross was not a resident of Colusa county, and that said plaintiffs well knew that they had no claim against me, but that they joined me herein as a defendant herein in order to permit a fraud upon the court."

Affiant also joins in the demand for a change of the place of trial. Defendant Porter made affidavit in like terms.

The complaint is verified by plaintiff Harlan, and in his affidavit he states that "he has read the complaint and knows the contents thereof; that the same is true of his own knowledge." The affidavit of H. J. Barceloux was filed and considered by the court. Affiant stated as follows:

"That he is a resident of Glenn county, California; is personally acquainted with the plaintiffs above named, and all the defendants above named; that he is personally acquainted with

the facts connected with the controversy between the plaintiffs and the defendants in the above-entitled action; that he has read the affidavits of said defendants herein, and is acquainted therewith; that wherein said affiants, and each of them, state that the said defendants had no dealings or transactions with the plaintiffs for the doing and performing of the work and labor set out and described in plaintiff's complaint, is untrue and false; that affiant was personally present when the said defendant hired and employed plaintiffs to do and perform said work and labor as set out in plaintiffs' complaint; and that pursuant thereof the said plaintiffs did do and perform the same in Colusa county and Glenn county, and the said defendants and each of them did promise to pay plaintiffs therefor."

[1] In a personal action, such as this, "the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action. * * * If any person is impliedly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county where he resides, his residence must not be considered in determining which is the proper county for the trial of the action." Code Civ. Proc. § 395. In such an action a defendant is entitled to have the action tried in the county of his residence; but where there are several defendants, if one defendant resides in one county and a codefendant in another county, the plaintiff may have the case tried in either county. *O'Brien v. O'Brien*, 16 Cal. App. 193, 116 Pac. 696; *Hellman v. Logan*, 148 Cal. 58, 82 Pac. 848.

The averments of the complaint, if true, furnish a complete answer to the charge made that Kim and Porter were made parties defendant for the purpose of imposing upon the court and to cause the venue of the action to remain in Colusa county. The averments of the complaint show unequivocally that all of the defendants were parties to the contract under which plaintiffs did the alleged work, and the effect of the verification of the complaint is that these averments are true. The affidavit of Barceloux is corroborative of these statements.

[2] It may be an open question whether or not a court would be authorized in any case to determine that the affidavits presented to it upon a motion of this nature would be sufficient to overcome the allegations of the complaint, or to permit those allegations to be determined by affidavit (*Lakeshore Cattle Co. v. Modoc Land, etc., Co.*, 108 Cal. 261, 41 Pac. 472); but, as was said in that case, and in *Bowers v. Modoc Land, etc., Co.*, 117 Cal. 50, 48 Pac. 979, it is sufficient to say that there is a direct conflict between the affidavits filed in support of the motion and in the verified allegations of the complaint and the affidavit of Barceloux. See *Quint v. Dimond*, 135 Cal. 574, 67 Pac. 1034. Under

these circumstances the decision of the court cannot be disturbed.

[3] A consideration of the issues presented by the affidavits in support of the motion would involve to a considerable degree the merits of the action. The court will not go into the merits of the action on a motion to change the place of trial. *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8; *O'Brien v. O'Brien*, 16 Cal. App. 193, 116 Pac. 696.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

BRUNER v. HEGYI. (Civ. 2143.)

(District Court of Appeal, Second District, Division 2, California. July 5, 1919.)

1. CONTRACTS \Leftrightarrow 282—CONSTRUCTION—"SATISFACTORY TO OWNER."

In action for tile work done under a contract providing work must be "satisfactory to the owner," evidence that tiling was done in a workmanlike manner, but that cracks developed, due probably to settling of building, sustains a recovery, since quoted words only required contractor to complete his work in a manner satisfactory to a reasonable man.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Satisfactory.]

2. EVIDENCE \Leftrightarrow 441(7) — PAROL EVIDENCE — ADMISSIBILITY.

An oral agreement that certain tile work for defendant's residence should be done according to a sample held inadmissible, as an attempt to vary and modify by parol a subsequent written contract governing the work.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by S. A. Bruner, doing business under the fictitious name and style of the S. A. Bruner Tile Company, against Gabor Hegyi. Judgment for plaintiff, and defendant appeals. Affirmed.

Marshall & Preston, of Los Angeles, for appellant.

Hollzer & Greenberg and Albert M. Norton, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in favor of plaintiff for \$810, and interest, for work performed and materials supplied in setting in place the tile work for defendant's residence.

[1] The agreement, which was in writing, executed by defendant and plaintiff, provides that the "work must be satisfactory to the owner." The court found that the tile furnished by plaintiff was of the best quality,

and that the work was done in a good, workmanlike manner. It seems, however, that after the tile was set in place, and through no defect in the workmanship or material, but probably because, as was intimated by one of the witnesses, the building contracted and expanded, the tile cracked or checked—became what is known to the trade as "crazed." For this reason the work was not performed to defendant's satisfaction. The court found, however, that it is the nature of all tile to craze; that the crazing of the tile on this job was not caused by any defects in the material or by any fault in workmanship; and that, though the work was not performed to defendant's satisfaction, it nevertheless was performed "reasonably satisfactorily," and was "a satisfactory piece of work."

Each of the court's findings is supported by evidence amply sufficient for the purpose. There are cases that hold that, where the contract requires the work to be done to the satisfaction of the person contracting for it, and the work is of a kind that involves fancy, taste, sensibility, or judgment, and no benefit passes under the contract unless the work be accepted, as where, for illustration, a portrait is to be painted, the promisee's refusal to pay for the work cannot be called in question, provided only that his refusal is in good faith and not from mere caprice. In cases of that character, the question is not whether the one complaining of the work ought to be satisfied, but solely as to the good faith of the dissatisfaction alleged. Where, however, as in this case, the work contracted for goes into a building, the fruits of the labor of the contractor being retained by the owner, the rule is that a stipulation in the contract to perform to the satisfaction of the owner calls for only such performance as is satisfactory to a reasonable person. It is sufficient if the contractor completes his work in accordance with the contract in such a manner that the owner, as a reasonable man, ought to be satisfied with it. *Gladding, etc., Co. v. Montgomery*, 20 Cal. App. 276, 279, 128 Pac. 790; *Bryan Elevator Co. v. Law*, 31 Cal. App. 204, 160 Pac. 170; *Erickson v. Ward*, 268 Ill. 259, 107 N. E. 593, Ann. Cas. 1916B, 497; *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398; *Handy v. Bliss*, 204 Mass. 513, 90 N. E. 864, 134 Am. St. Rep. 673.

[2] The claim of a prior oral agreement that the tile should be according to sample furnished by plaintiff was clearly an attempt to vary and modify by parol the terms of a written contract. This, of course, is not permissible. *Gladding, etc., Co. v. Montgomery*, supra. Moreover, the court found that the tile furnished by plaintiff actually was according to the sample furnished.

We find no error in the record, and think the judgment should be affirmed. It is so ordered.

We concur: SLOANE, J.; THOMAS, J.

PEOPLE v. DREVOIR. (Cr. 473.)

(District Court of Appeal, Third District, California. July 9, 1919. Rehearing Denied by Supreme Court Sept. 4, 1919.)

1. ESCAPE §9—INFORMATION—SUFFICIENCY.

Where evidence shows defendant and a fellow prisoner in a county jail assaulted a deputy sheriff and escaped, etc., an information against defendant for aiding the other prisoner to escape is not fatally defective for failure to allege that defendant knew his companion was in legal custody.

2. CRIMINAL LAW §564(1)—VENUE—SUFFICIENCY OF EVIDENCE.

Evidence that defendant assisted a fellow prisoner while both were confined in a certain county jail, etc., held to sufficiently establish the venue in a prosecution for aiding a prisoner to escape.

3. CRIMINAL LAW §1172(1) — REVERSIBLE ERROR—REQUESTED INSTRUCTIONS.

In a prosecution for aiding a prisoner to escape, refusing a requested instruction that defendant must have known the prisoner was in legal custody, etc., is not reversible error where the fact was so apparent that defendant must have known it.

4. ESCAPE §5—AIDING ESCAPE—LEGALITY OF CONFINEMENT.

In a prosecution for aiding a prisoner to escape, it is immaterial whether accused knew that the custody of the prisoner was legal.

5. CRIMINAL LAW §322—PRESUMPTIONS—IMPRISONMENT—LEGALITY.

There is no presumption that a prisoner in a county jail is illegally restrained.

6. ESCAPE §11—INSTRUCTIONS.

In a prosecution for aiding a fellow prisoner to escape, an instruction held to give defendant the benefit of every principle of law to which he was entitled.

7. ESCAPE §10—EVIDENCE—SUFFICIENCY.

In a prosecution for aiding a fellow prisoner to escape, evidence that accused and his companion assaulted a deputy sheriff, that both escaped from jail, and that only accused was recaptured, etc., held to sustain a conviction against defendant's explanation that he was aiding sheriff to prevent the other prisoner from escaping.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

A. R. Drevoir was convicted of aiding a prisoner to escape, and from the judgment and an order denying new trial he appeals. Affirmed.

James T. Matlock, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of the county of Tehama for aiding one Patrick Riley (with sundry aliases) to escape from the custody of Deputy Sheriff C. A. Lange of said county. The information sets forth with much particularity the facts and circumstances attending the crime charged, showing that on January 21, 1919, said Riley was confined in the county jail of said county on a commitment for the crime of forgery.

"That the said A. R. Drevoir on or about the 21st day of January, 1919, at and in the county of Tehama, state of California, and prior to the filing of this information, and at a time when the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, was attempting to escape from said jail, and while he was struggling with the deputy sheriff, C. A. Lange, who was then trying to restrain him from escaping, did willfully, unlawfully, and feloniously grapple with the said C. A. Lange, and pull him away from the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, and by so doing did permit and cause the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, to escape from the said county jail in the city of Red Bluff, and by means thereof the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, did then and there escape and go at large whithersoever he would."

A demurrer for insufficiency of facts was overruled, and defendant went to trial. He was found guilty, and judgment of conviction was accordingly entered. He appealed from the judgment and from the order denying his motion for a new trial. The objections urged in supporting the appeal are: (1) There is no allegation in the information setting forth that the defendant had knowledge that the prisoner whom the defendant was assisting to escape was in legal custody, for which reason, it is contended, the demurrer should have been sustained; (2) that the venue was not proved; (3) that the court erred in modifying, and giving as modified, an instruction requested by defendant; (4) "that there is no evidence which shows any criminal intent or liability, in the light of the evidence and all the circumstances in the case, on the part of the people, but what is flatly contradicted."

Section 109 of the Penal Code provides as follows:

"Any person who willfully assists any * * * prisoner confined in any prison or jail, * * * or any person in the lawful custody of any offi-

cer or person, to escape, or in an attempt to escape from such prison or jail, * * * is punishable as provided in section 108 of the Penal Code."

[1] 1. In support of defendant's first point, the case of *State v. Lawrence*, 43 Kan. 125, 23 Pac. 157, is relied upon. In reviewing that case the court stated that the acts set forth fully, and sufficiently showed that an offense had been perpetrated by one Spencer, for which he was duly committed to the county jail until the day fixed for the examination; that under the warrant the under-sheriff took the prisoner into custody, "and placed him in charge of a guard until the prisoner could be taken to and confined in the county jail"; that while he was in charge of the guard the defendant, Lawrence, "unlawfully and feloniously aided and assisted him to escape"; that it sufficiently appeared that the prisoner was in lawful custody,

"But, while it alleges that the defendant aided in the escape, it fails to charge that he had knowledge that Spencer was in legal custody, and does not set out the acts done which aided the prisoner to escape. In the absence of these allegations, the information was defective, and the motion to quash was properly sustained. An indispensable ingredient of the offense sought to be charged is the knowledge of the accused that the person assisted was in legal custody; and unless this knowledge is alleged, or the acts charged to have been done by the defendant necessarily imply knowledge, an offense is not adequately pleaded."

The court points out many things which might be done by a person which in fact might aid a prisoner in an escape without any criminal intent. As, for example, to entertain one for a night without knowing that he was a fugitive criminal, or to overtake one on the highway and innocently give him a ride. But, continued the court:

"If the acts done by way of assistance were alleged, as they should be, they might be of such a character that guilty knowledge would necessarily be inferred, and an express allegation of such knowledge might not be essential. For instance, if the defendant had furnished a prisoner confined in the jail instruments which only could have been intended to facilitate an escape, or had broken the prison door, or had forcibly assaulted or obstructed an officer who had a prisoner in charge, an express allegation of knowledge that the prisoner was in legal custody might not be necessary; but where the acts done are in their nature innocent, such knowledge should be stated. * * * In the present case the prisoner was not in jail, nor yet in the immediate charge of one known as a public officer. He was in charge of a private individual, designated for the time-being as a guard, and hence there was a still greater necessity that the acts done by the defendant to aid in the escape, or that the defendant had knowledge that Spencer was in legal custody, should be alleged."

We have stated somewhat fully the opinion of the court in the Lawrence Case for the reason that it shows quite clearly that knowledge on the part of the defendant need not in all cases be alleged.

What are the facts here? The escaping prisoner was in jail and in the custody of deputy sheriff Lange. Defendant was also a prisoner in the same jail. Riley, the prisoner, attacked the deputy sheriff in an effort to escape from the jail, and defendant joined in the assault, and by his aid the prisoner escaped. Defendant also escaped, but was later captured by the deputy sheriff. We think that the acts alleged were sufficient to lead to the irresistible inference not only that the prisoner Riley was in legal custody, but that defendant had knowledge of the fact when he aided in the escape. The case is quite similar to the examples given in the case of *State v. Lawrence*, supra, illustrating when, and under what circumstances, the direct charge of knowledge by the defendant that the prisoner was in legal custody need not be stated in the information or indictment.

[2] 2. We think the venue sufficiently appeared. The record shows that the prisoner had a preliminary examination before a magistrate in Red Bluff, Tehama county, state of California, and that he was committed to the county jail in that county, and was in the immediate keeping of the deputy sheriff at the said county jail, and it was in that jail that both the defendant and prisoner were being confined when the assault upon the deputy sheriff was made, and both the prisoner and defendant escaped, the latter only being recaptured.

Tehama county is a legal subdivision of the state, and its boundaries are prescribed by statute. Part IV, tit. II, Pol. Code. Red Bluff is the county seat of Tehama county, and is so recognized. Section 3975b, Pol. Code. While the direct question usually put to the prosecuting witness, "Did these acts take place in Tehama county, state of California?" or its equivalent, was not asked of any witness, the fact, we think, sufficiently appears that they did so take place.

[3] 3. Defendant requested an instruction that, before the jury can convict the defendant, they must believe beyond a reasonable doubt the facts charged in the information, that defendant was legally committed "to await a trial upon a charge of forgery, and was in legal custody"; that defendant "unlawfully and feloniously aided the said Patrick Riley to escape; and that the said defendant did grapple with said C. A. Lange, and pull him away from the said Patrick Riley, and by so doing did permit and cause said Patrick Riley to escape from the said county jail in the city of Red Bluff, and by means thereof the said Patrick Riley did then and there escape"; concluding as follows: "And that said defendant had knowledge that the said Patrick Riley, alias Jack

Brennan, alias Jack Hayes, was in legal custody." The court gave the instruction, striking out the concluding sentence.

The court instructed the jury "that the basis of the offence is found in section 109 of the Penal Code, which provides as follows: Any person who willfully assists any * * * prisoner confined in any prison or jail, * * * in an attempt to escape from such prison or jail, * * * is punishable," etc. The court also gave the following instruction: "Before you can convict the defendant of the crime charged in the information, you must believe that the defendant doing whatever he did do, if anything, to assist Jack Brennan to escape, acted knowingly and with intent to then and there assist Jack Brennan to escape, and that said Jack Brennan did escape, and that he was assisted in said escape by the defendant." Then follows the said instruction requested by defendant.

For the reasons, among others, advanced in support of the sufficiency of the information, we do not think the court erred. The fact that the prisoner was in legal custody was fully proved, and was so apparent that defendant's knowledge of the fact could not have been a matter of doubt or uncertainty in defendant's mind. They were fellow prisoners in the county jail, and in the custody of a person known to be the deputy sheriff. Defendant's knowledge that the prisoner was in legal custody may well have been inferred from all the facts and circumstances without direct evidence that he knew the fact. It was held in *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190, that a departure from an unlawful imprisonment or custody is not an escape, within the meaning of the law; and that one who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape.

[4-6] In the present case the prisoner was shown to have been legally committed to jail and was there being held in legal custody. Whether or not defendant knew this fact is immaterial, for he could not justify his assistance in the prisoner's escape only, if at all, by showing that the prisoner was being illegally confined. There is no presumption that a prisoner held in a county jail is being illegally restrained. The presumption, if presumption could be indulged, is that the officer who has him in custody and is confining him in jail is acting in obedience to some duty developed upon him and under legal process. The prisoner was in legal custody and in the county jail. The jury were told substantially in the language of the statute that "any person who willfully assists any person confined in any prison or jail in an attempt to escape from such prison or jail is punishable," etc.; also that before the jury

can convict the defendant they must be 'eved from the evidence beyond a reasonable doubt that defendant "feloniously and unlawfully aided the said Patrick Riley to escape," etc. The instruction gave defendant the benefit of every principle of law to which he was entitled for the guidance of the jury. Defendant's ignorance of the fact that the prisoner had been legally committed to the custody of the sheriff and was in jail under lawful process cannot shield him from the consequences of his acts, unless it appeared as the fact that the prisoner was not thus held.

[7] 4. Defendant's fourth point is without merit. The only controverting testimony came from defendant himself, who testified that his intention was to aid the officer in preventing the prisoner's escape. In view of the fact that defendant also tried to escape, his explanation is unworthy of credence.

The judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

McEWEN v. NEW YORK LIFE INS. CO. (Civ. 2640.)

(District Court of Appeal, Second District, Division 1, California. July 9, 1919. Order of Modification July 25, 1919. Rehearing Denied by Supreme Court Sept. 4, 1919.)

1. INSURANCE §646(3)—ANSWERS IN APPLICATION—PRESUMPTIONS—BURDEN OF PROOF.

Answers to questions contained in a life insurance application are presumably true, and defendant insurance company has the burden of proving the contrary.

2. INSURANCE §665(3)—TRUTH OF INSURED'S DECLARATIONS—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain jury finding that an answer in a life insurance application regarding the date applicant had last consulted a physician was true.

3. APPEAL AND ERROR §195 — RESERVING GROUNDS FOR REVIEW — QUESTIONS NOT RAISED BELOW.

Where defendant insurance company amended its answer, so as to allege false representations by insured, without objection by plaintiff, and evidence was received on the issue without objection, the point that the incontestable clause of the policy eliminated such defense cannot be first raised on appeal.

4. INSURANCE §586—BENEFICIARY—VESTED INTEREST.

Where a life insurance policy authorizes insured to change the beneficiary, the beneficiary ordinarily has no vested interest in the policy until insured's death.

5. EVIDENCE §276—DECLARATIONS AGAINST INTEREST.

In a beneficiary's action on a life policy, which authorized insured to change his bene-

fiary, statements made by insured, inconsistent with his representations to defendant insurer, are ordinarily admissible as declarations against the insured's interest.

6. GIFTS §10 — INSURANCE §586 — LIFE POLICY—GIFT.

A life policy, which authorized insured to change his beneficiary, may be given to the beneficiary, so as to give her an absolute vested interest in the policy while insured is still living.

7. EVIDENCE §276 — DECLARATIONS AFTER PARTING WITH INTEREST.

Where a life policy, authorizing an insured to change his beneficiary, is given by insured to the beneficiary, statements made by insured inconsistent with his representations to defendant insurer are inadmissible in an action by the beneficiary on the policy.

8. INSURANCE §665(3)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain jury finding that insured's statement in his life insurance application that he had never spat blood was true.

9. INSURANCE §297—APPLICATION—INTOXICATING LIQUORS.

Where a question in a life insurance application regarding applicant's daily consumption of wines, spirits, or malt liquors was answered by "No daily habit—occasional beer," the response is not a representation that applicant did not drink whisky, but merely that he did not use it daily.

10. INSURANCE §297 — INTOXICATING LIQUORS—"EXCESS."

In a life insurance application, in question whether applicant had ever used intoxicating liquors to "excess," the quoted word is largely a matter of opinion, depending upon the individual's capacity, etc.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Excess.]

11. INSURANCE §668(7) — INTOXICATING LIQUORS—EXCESSIVE USE.

Whether insured used intoxicating liquors to excess, contrary to his representation to the insurer, is a question of fact for the jury.

12. INSURANCE §665(3)—EVIDENCE—SUFFICIENCY.

In an action on a life insurance policy, conflicting evidence held to sustain jury findings that the insured was not addicted to the daily use of intoxicating liquors and had never used them to excess.

13. INSURANCE §668(6)—INSURED'S REPRESENTATIONS—LAW OR FACT.

The materiality of representations made by a life insurance applicant presents a question of law and not of fact.

14. INSURANCE §669(7)—LIFE POLICY—INSTRUCTIONS.

In action on a life policy, an instruction that insured's representation regarding his previous diseases and accidents was false, if a certain accident not mentioned in the applica-

tion occurred and had a tendency to affect his length of life, *held* prejudicial error, because allowing the jury to disregard the false answer, if they considered it did not affect deceased's longevity.

15. APPEAL AND ERROR \Rightarrow 1068(1)—**HARMLESS ERROR—INSTRUCTIONS.**

Any error in instructing the jury that their verdict depended on whether statements made by insured were false, instead of charging that any one false statement would avoid the policy, *held* not ground for reversal, where the jury found all the statements true.

16. TRIAL \Rightarrow 349(2)—**SPECIAL VERDICT—REFUSING INTERROGATORIES.**

Since the court may refuse to submit questions for a special verdict, under Code Civ. Proc. § 625, error cannot be predicated on its refusal to submit certain requested interrogatories.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Rachel A. McEwen against the New York Life Insurance Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

See, also, 23 Cal. App. 694, 139 Pac. 242.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles (Paul H. McPherrin, of Los Angeles, of counsel), for appellant.

Murphey & Poplin, of Los Angeles, for respondent.

SHAW, J. On a former appeal had in this case by defendant, the judgment in favor of plaintiff was reversed. A second trial was had, which likewise resulted in a judgment in favor of plaintiff, from which, and an order denying its motion for a new trial, defendant has again appealed.

The action was instituted by the mother of Charles B. McEwen, deceased, to recover the amount of an insurance policy on his life, issued by defendant on July 7, 1910, upon a written application made therefor by deceased on June 29, 1910. The insured, who was 28 years of age, died on November 20, 1910. Defendant's action in resisting payment of the policy is based upon the alleged ground that the insured procured the issuance of the policy by means of fraud, concealment, and misrepresentations made by him in answer to written questions propounded to him by the defendant, the truth of which answers it believed, and upon the faith thereof accepted the application and issued the policy. In the answer to the complaint it is alleged that the answers to the following questions were and are untrue:

(1) "What is your occupation? (Full details.) A. Proprietor of collection agency."

(2) "How long have you been engaged in your present occupation? A. Ten years."

(3) "What was your previous occupation? A. Cattle business."

(4a) "What is your daily consumption of wine, spirits, or malt liquors? A. No daily habit—occasional beer."

(4b) "Have you at any time used any of them to excess? A. No."

(6) "Have you ever raised or spat blood? A. No."

(7) "What illnesses, diseases, or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.) A. Typhoid pneumonia. One attack in 1891; duration two months; severe; complete recovery."

In addition to these questions, the answers to which are alleged to be untrue, defendant, after the first trial and on April 6, 1915, filed an amendment to its answer, wherein it alleged that the answers to the following questions were also untrue:

(8) "How long since you consulted or have had the care of a physician? A. 1891; Dr. Thomas, Bucyrus, Ohio."

(9) "If so, for what ailment; name and address of physician? A. Typhoid pneumonia."

At the close of the questions and answers McEwen stated in writing:

"I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers; that they are each written as made by me; that each of them is full, complete, and true."

In addition to a general verdict, the jury were instructed to render special verdicts as to the truth of the answers given to the foregoing questions numbered 1, 4a, 4b, 6, and 7, and also the answers given to questions numbered 8 and 9, referred to as being contained in the amended complaint, each and every one of which answers are conceded by counsel for both parties and the trial court to have been material representations. In response to another question, which we will designate as 10:

"What do you find the facts to be with relation to the use of wines, spirits or malt liquors by the deceased?"

—they answered:

"He was not an habitual drinker. We find no evidence to show that the deceased did indulge in wines, spirits, or malt liquors to excess, prior to application for insurance; therefore said deceased's answers were full, complete, and true."

By their general verdict the jury found in favor of plaintiff.

[1-3] 1.¹ In response to question 8, "How

¹ The court, by an order of modification dated July 25, 1919, inserted this paragraph in place of subdivision 1 of the opinion as originally written, which subdivision was by such order stricken out.

long since you consulted or have had the care of a physician?" McEwen's answer was, "1891; Dr. Thomas, Bucyrus, Ohio;" and in response to question 9, "If so, for what ailment; name and address of physician?" the answer was, "Typhoid fever." The verdict that the answers to these questions were true is attacked by appellant upon the ground that the evidence is insufficient to support the same. The declarations made by the appellant in response to the questions are presumed to be true, and hence the burden was upon defendant to prove the contrary. The only evidence adduced on the part of defendant tending to overcome the presumption so attaching to the answers given by McEwen, was the testimony of one Hosick to the effect that McEwen, after an occasion when he was said to have been drunk, told him that he had been under a doctor's care ever since, and the testimony of Dr. Garrett that on August 18, 1909, McEwen stated to him, while acting in the capacity of medical examiner for an accident insurance company, that he (McEwen) was under treatment from Dr. Taylor, which fact of being under Taylor's treatment McEwen also stated in the notice of an injury sustained which he gave to the accident insurance company. It thus appears that, in determining the issue, all that the jury had before it was the declaration of McEwen made in his application to defendant, to which a presumption of its truth attached, and subsequent inconsistent declarations therewith made by McEwen. We cannot say that in considering the evidence thus adduced the jury was not warranted in finding the subsequent declarations insufficient as evidence to overcome the presumption of truth attaching to the answers made by McEwen in his application for the policy. In this connection respondent insists that, even though it should be conceded the answers to questions 8 and 9 constituted material false representations, appellant is in no position to avail itself of the defense based upon such fact, for the reason that the policy provides that "this policy shall be incontestable after one year from its date of issue, except for nonpayment of premium." The alleged false answers to these questions were, by an amendment made to the answer, pleaded as a ground of contest some five years after the policy was issued. No objection, however, was interposed by plaintiff to the filing of the amendment, nor any motion thereafter made to strike it out, nor objection made to the introduction of evidence upon the issue so raised. Hence, if there was merit in plaintiff's contention, she is in no position upon this record, where she appears as respondent, and in the absence of any objection on her part to the proceedings had thereunder, to

now for the first time, on appeal by her opponent, raise the objection.

[4-7] 2. As alleged in the original complaint plaintiff sought to recover upon the sole ground that she was named as the beneficiary in the insurance policy. Nevertheless, as held on the former appeal (23 Cal. App. 694, 139 Pac. 242), she, by virtue of such fact, since the insured by the terms of the policy reserved the right to change the beneficiary, had no vested interest therein until his death, and therefore statements made by deceased which were inconsistent with the representations to defendant were competent evidence upon the ground that they were declarations against interest. Upon going down of the remittitur, plaintiff filed an amendment to her complaint, the effect of which, if the allegations thereof were found true, rendered the evidence incompetent. This amendment was that in July, a few days after the issuance of the policy, McEwen made a gift thereof to plaintiff, named as beneficiary therein. At the trial, for the purpose of showing the falsity of applicant's answers to the inquiry as to his use of wine, spirits, or malt liquors, evidence was received showing that on October 22, 1910, in the trial of a case wherein McEwen was charged with committing a criminal offense, he testified in extenuation of the act that he was at the time of its commission intoxicated, and that up to about 10 days prior to the giving of the testimony he was a heavy drinker and drank liquor to excess, resulting at times in a condition of prolonged intoxication. Having admitted this evidence, the court directed the attention of the jury to the fact that it was a declaration made by the insured after the alleged gift of the policy to his mother, which evidence, if they found the allegation as to the gift of the policy to be true, they should disregard; otherwise, they should consider it in arriving at their verdict.

In so instructing the jury, appellant, while conceding that a life insurance policy may be the subject of a parol gift, insists the court committed prejudicial error. Its contention is that, since the donee was named as beneficiary in the policy, with power of revocation reserved to the insured, together with the right to designate a new and different beneficiary, the policy could not be deemed the subject of gift to her, since she took it subject to the provision contained therein that the insured might change the beneficiary; that the purported gift vested her with no right other than what she theretofore had, which was an interest in expectancy only. We are not in sympathy with this ingenious argument. Prior to the alleged gift, the mother, named as beneficiary therein, had no vested interest in the policy. Her interest was merely one of expectancy, and subject to the power of the insured to name

another to receive the benefits thereunder. The evidence as to the making of the gift is very meager, and entirely consistent with the fair inference that the policy was handed to her as the beneficiary therein named, as the then party interested, for safe-keeping only, and not with the purpose or intent of vesting her with a donee's interest or rights other than those which she had as beneficiary. Assuming, however, that the evidence was sufficient to show a gift of the policy was made to the mother, she by virtue thereof and in addition to her expectancy acquired an absolute vested interest therein. Notwithstanding the power of revocation reserved in the policy, he by making the gift surrendered it and divested himself of all right to exercise such power. Had he, after making the gift, substituted the name of his sister for that of his mother, named as beneficiary therein, and at his death a contest arose between the two as to who was entitled to the proceeds of the policy, such contest would involve no question in which the insurance company was concerned, and, upon trial of the issue between mother and sister, the mother, conceding the gift to have been made, could not have been deprived of her rights thereunder because of the fact that the policy contained the power of revocation.

In their argument counsel for appellant lay much stress upon the statement of this court made in deciding the case of *Waring v. Wilcox*, 8 Cal. App. 317, 96 Pac. 910, which involved the right of the insured to change the beneficiary in a policy which contained a clause similar to the one under consideration. In that case it was found by the trial court that the insured delivered the policy to his mother, named therein as beneficiary, with the intent and purpose that it should belong to her and be her property. Thereafter, at his request, she gave the policy back to him, and he, exercising his right so to do under the terms of the policy, designated another as beneficiary. In the course of its opinion the court said:

"Nor can we attach any importance to a finding that the policy was delivered with the intent that it should become the property of the original beneficiary; for it contained the reserved right of substitution and vested no right other than one to receive the benefit in the event the insured did not elect before his death to change the beneficiary. 'It was a part of the contract, as entered into in the beginning, that the assured, of his own free, unrestrained will, might at any time make the substitution he desired.'"

While in that case the policy had been given to the beneficiary with the intent that it should be her property, it was thereafter by her given back to the insured with the purpose and intent that it should be his property, vesting in him all the rights which he originally had, among which was the right to

substitute another as beneficiary. The statement that no importance should be attached to the finding that the policy was delivered to the mother with intent that it should become her property should not be construed of general application, but as applicable to the facts presented in that case. It cannot be deemed an authority for holding that, by reason of the power of revocation and right to change the beneficiary named in an insurance policy, the insured may, after making a completed gift thereof to the beneficiary so named, designate a new beneficiary therein, thus rendering the gift null and of no effect.

Our conclusion is that an insurance policy containing the provision under consideration may be the subject of a gift to the beneficiary named therein, whose interest in expectancy, by virtue of the gift, is changed to an absolute interest (in the donee) without qualification, and thereafter the donor, in the absence of some act again vesting him with title, has no power or control over the policy. The interest of the donee, though named as beneficiary, is not by virtue of such fact, but the qualified interest is merged in the absolute interest due to the completed gift. Since there was evidence, though meager, tending to prove the allegation, it was not error on the part of the court to give the instruction of which appellant complains.

[8] 3. The only evidence tending to show the falsity of McEwen's answer, "No," to question 6, "Have you ever raised or spat blood?" is a statement made by him to Dr. Garrett to the effect that he had, following an injury from being kicked or struck in the chest by the foot of a mule, spat blood. The representation made to the insurance company must, in the absence of sufficient proof to overcome the presumption, be deemed to be true, and we cannot say that it is overcome by an inconsistent statement therewith made by McEwen. As to the special verdict rendered in response to this question, no ground appears for complaint, since the jury, in weighing the inconsistent declarations, decided in favor of the one presumed to be true, as against one as to which no such presumption existed.

[9] 4. In response to question 4a, "What is your daily consumption of wine, spirits, or malt liquors?" the answer was, "No daily habit—occasional beer;" and the reply to question 4b, "Have you at any time used any of them to excess?" was, "No." The verdict that the answers to these questions were true is attacked by appellant upon the ground that it is contrary to the evidence, in support of which contention counsel quote extensively from the record. A review of the voluminous testimony touching the subject could serve no purpose; suffice it to say that as to 4a the question was not whether

McEwen had used liquor at all, but assumed as a fact that he did use them. The inquiry is directed solely to the extent of his daily consumption of such beverages. Hence, conceding that, as shown by the evidence, he did at times, varying in intervals of two to four weeks, drink both beer and whisky, such fact is not inconsistent with his answer, "No daily habit—occasional beer." The response made cannot, as urged by appellant, be construed as a representation that he never drank whisky at all; but, as we interpret the question and answer, it was simply a statement to the effect that he was not addicted to its daily use.

[10-12] The reply to question 4b is that he never at any time had used such liquors to excess. No court, so far as we are advised, has undertaken to define what constitutes the excessive use of alcoholic spirits. The cases of *Mallick v. Chicago Guaranty Fund Life Society*, 119 Mich. 151, 77 N. W. 690, and *Brignac v. Pacific Mutual Life Ins. Co.*, 112 La. 574, 36 South. 595, 66 L. R. A. 331, involved different questions and cannot be deemed authority in support of appellant's contention. The meaning of the word "excess," as here used, is largely a matter of opinion, depending upon the capacity of the individual and liberality of view entertained upon the subject by the individual, whose opinion might again be governed by the time, place and occasion. *Clinton v. State*, 64 Tex. Cr. R. 446, 142 S. W. 591; *Biermann v. Guaranty Mutual Life Ins. Co.*, 142 Iowa, 341, 120 N. W. 963. In the absence of any standard of measurement, the question is one of fact to be determined by the jurors, whose conclusion, as stated, would depend largely upon their views as to what constitutes excess in the use thereof. It cannot be determined upon the quantity used, because of the fact that an amount which might affect one individual would not be noticeable upon another. The most of the testimony bearing upon the question was given by witnesses from Daggett, near which place it appears deceased was engaged in the operation of a mine, and from which he, from two to four weeks, went to Daggett, at which times he concededly drank more or less whisky and beer. There is little testimony touching the quantity of his libations. Apparently he did not drink sufficiently to interfere with his transaction of business and it fairly appears that there was a conflict of evidence as to the effect upon him of that which he did drink. Under the circumstances shown, we cannot say that the jury, upon the testimony as to his habits of drinking at Daggett, were not justified in their verdict that he did not drink to excess. It appears from the testimony of two witnesses, James Hosick, a police officer of the city of Los Angeles, and a Mrs. Skinner, that McEwen did drink to an extent that resulted in his

being drunk, and both of them go into details as to one particular occasion. As to the testimony of those two witnesses, the court instructed the jury that if they believed the same they should find that the applicant's answer to the question was false, but instructed them that the one particular instance referred to would not necessarily justify a verdict that the answer was false; that as to that, if they found their evidence true, they should consider whether or not it was a voluntary intoxication, or an incident where others who were with him succeeded in getting him intoxicated for purposes of their own, in which case they should not consider such act alone as justifying a finding that his answer was false, but that—

"If you find from the evidence * * * that the deceased was in the habit of using wine, spirits, or malt liquors, and that had persisted for some time, and that he had on more than one occasion used them to excess, then you should find that the representations herein are false."

This last instruction was certainly as fair as defendant could ask, and it is apparent from the verdict that the jury did not believe the testimony of Hosick and Skinner as to repeated acts of drunkenness on the part of McEwen to which they testified. We cannot say that the verdict of the jury that the answers of McEwen to questions 4a and 4b are not justified by the evidence.

[13] 5. In answer to questions 1 and 2 McEwen stated that he was proprietor of a collection agency, in which business he had been engaged for 10 years. These questions called for full details, and, considering the sufficiency of the evidence to justify the verdict, we must bear in mind that McEwen certified that—

"I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers; that they are each written as made by me; that each of them is full, complete and true. * * *"

At the date of making the application for the insurance, McEwen's chief business appears to have been that of mining. According to plaintiff's testimony, he went to New Mexico in 1904 and was there about a year, and in 1906 he went to Old Mexico, where he was engaged in the brick business and a part of the time in mining. When he returned from Old Mexico in 1906, he engaged in mining near Daggett, and a part of the time prospecting near Fallbrook. He continued in the mining business near Daggett until July, 1909. The evidence shows that he never had an office and was not connected with a collection agency; and while there is some evidence that he made collections for his

father, a groceryman, and at times for others in a desultory way, it could in no sense be said that he was or had been for 10 years engaged in such occupation. Indeed, it clearly appears from the evidence that he not only was not the proprietor of a collection agency in any sense of the term, but that during the 10 years preceding the making of the application, and particularly from 1904 to July, 1909, he was engaged largely in mining and business other than that of collecting. In arriving at its verdict upon the answer given to this question, the court instructed the jury that it was to determine whether or not the statement made was substantially true.

"By substantially true does not mean somewhat true, partially true, on the one hand, nor does it mean true in every possible and immaterial respect, on the other. It means true without qualification in all respects material to the risk."

Considering the character of this evidence, we think it apparent that the jury, under the instruction, believing it was its province to determine whether or not the representation was true "in all respects material to the risk," determined that it was immaterial, and therefore, notwithstanding the falsity of the answer shown by the evidence, rendered their verdict upon such theory. The court did not as to this question, as it did in others, determine the question of the materiality of the answer, but by this instruction clearly submitted to the jury the question of its materiality. The giving of the instruction as to this question was erroneous, since, as stated on the former appeal, "the materiality of the representations was a question of law for determination of the court and not the jury."

[14] 6. In response to question 7, "What illnesses, diseases, or accidents have you had since childhood?" McEwen answered, "Typhoid pneumonia; one attack in 1891; duration two months; severe; complete recovery." It conclusively and without contradiction appears from the evidence that in July, 1909, just a year prior to making the application for the policy, McEwen, at his mine near Daggett, was injured by being struck or kicked in the chest by the foot of a mule, as a result of which his back was strained and one rib broken; that, owing to total disability caused by the injury, he received from an accident insurance company the sum of \$25 per week for a period of 16 weeks, amounting in all to \$400. The character of the injury was such that it completely rendered him unfit for doing any business whatsoever; that he raised purulent matter and stated to Dr. Garrett that he spat blood, the cause of which, as stated by McEwen and determined by the doctor, was the injury received in this accident, the effect of

which was for a time to seriously impair his health. The question not only called for a statement of diseases from which he had suffered since childhood, but as well accidents to which he had been subjected, and from which he had suffered. The answer was in effect that he had had no accidents. Notwithstanding the serious nature of the injury suffered from this accident, which disabled him for a period of nearly 4 months, he concealed from the company all knowledge thereof; the effect of his answer being that he had suffered no such injury from the accident as that shown. That the information was material and suppressed in bad faith admits of little doubt. *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. Law, 587, 9 Atl. 768, 60 Am. Rep. 661; *Metropolitan Life Ins. Co. v. Brubaker*, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267; *Bryant v. Modern Woodmen of America*, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. (N. S.) 826, 21 Ann. Cas. 365; *McCollum v. New York Life Ins. Co.*, 124 N. Y. 642, 27 N. E. 412; *Cooley's Briefs*, vol. III, p. 2109; *Civ. Code*, §§ 2561, 2579. The trial judge appears to have recognized the facts concerning the accident were undisputed. It is impossible to reconcile the verdict of the jury, to the effect that the answer to this question was true, save and except upon the theory that the injury sustained at the time, however severe and serious in character it may have been, did not in the minds of the jurors tend to increase the risk assumed by defendant in insuring McEwen's life. This conclusion, no doubt, was due to an instruction given by the court, which we deem clearly erroneous. The court, after referring to the accident which the evidence established, stated to the jury:

"No mention is made of this by the deceased in this application. If you find from the evidence that the deceased was struck or kicked by a mule, and that as a result of the injury so received, he was disabled for a number of weeks, and unable to continue his occupation from July 2, 1909, to August 26, 1909, that he was not able to continue in his occupation during that period, that the injury was such as it might have a tendency to affect the longevity of the deceased, then you will find that the answer to that question was false."

In view of the uncontradicted evidence, it is impossible to conceive of the jury reaching the verdict rendered, except upon the hypothesis that the accident and resultant injury therefrom did not "have a tendency to affect the longevity of the deceased." Not only was the instruction erroneous, but it was clearly prejudicial to defendant, in that, except for it, the verdict must, upon the evidence, have been a negative answer. The opinion of the jury upon the question as to whether the in-

jury affected his longevity had nothing to do with the truth of the answer. By asking the question as to accidents, the company fixes its estimate of its importance, and the applicant agrees thereto. Had the answer been true, the information would have afforded means for the company to determine whether the life of one so injured was a desirable risk.

"It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury." *Jeffries v. Economical, etc., Ins. Co.*, 22 Wall. 47, 22 L. Ed. 833; *Hubbard v. Mutual, etc., Ass'n*, 100 Fed. 726, 40 C. C. A. 665.

Certainly, considering the nature of the injury sustained by the applicant, the information was material to the company, and it may well be that, had the company received information from the applicant that within the year he had sustained injuries to his chest, resulting in one rib being broken, his back strained, and as a result of which he spat blood and purulent matter, and on account of which he received from an accident insurance company \$25 per week for a period of 16 weeks, it would not have assumed the risk upon his life. Indeed, it may be that the injury thus received was the latent cause of his death. For this error, if for no other, we feel that the judgment and order should be reversed.

[15] 7. Appellant complains of the fact that the court throughout the instructions told the jury that their verdict depended upon whether or not they found the "statements" made were false; whereas, the court should have instructed the jury that, if they found any one of the statements false, their verdict should be in favor of the defendant. Since, however, the jury found all of the statements true, the defendant could not have been prejudiced by reason of the instruction given, even if it be conceded erroneous.

[16] 8. Since the court might in its discretion have refused to submit any questions to the jury for a special verdict, no error can be predicated upon the fact that the court refused to submit to the jury certain interrogatories requested by the defendant. Section 625, Code Civ. Proc.; *Pigeon v. Fuller*, 156 Cal. 691, 105 Pac. 976.

There are other alleged errors; but, in view of what has hereinbefore been said, we deem it unnecessary to discuss them.

For what we conceive to be errors, herein discussed under subdivisions 5 and 6, the judgment and order denying defendant's motion for a new trial are reversed.

We concur: CONREY, P. J.; JAMES, J.

MENEFFEE et al. v. OXNAM et al.
(Civ. 2918.)

(District Court of Appeal, Second District, Division 2, California. July 5, 1919.)

1. JOINT ADVENTURES §4(1) — DUTY OF JOINT ADVENTURERS.

The tendency of modern decisions is to regard the rights of joint adventurers, as between themselves, as practically governed by the rules fixing the rights of partners, and, the relation between joint adventurers being fiduciary in character, each must be held strictly to account to his coadventurers, and will not be permitted to enjoy any unfair advantage.

2. JOINT ADVENTURES §4(1) — RIGHTS OF PARTIES—FRAUD.

The failure of one of several joint adventurers in an enterprise, looking to the purchase of property, to share with his coadventurers any secret advantage given by their vendor for inducing the purchase, is such a breach of confidence as amounts to a constructive fraud, and will entitle his coadventurers either to rescind the contract, or to maintain an action for damages against either or both parties to the secret understanding.

3. JOINT ADVENTURES §4(1)—FRAUD OF CO-ADVENTURER—DAMAGE.

Where one party to a joint adventure, which contemplates the purchase of property, receives an advantage which he does not share with his coadventurers, it is not necessary that those adventurers, complaining of the breach of faith, should have been actually injured; for, while it is a general rule that fraud without injury is no ground for relief, it is unnecessary for the defrauded party to show more than a slight injury, and the very breach of confidence causes injury.

4. JOINT ADVENTURES §8—BREACH OF CONFIDENCE—COMPLAINT.

A complaint by all but one of the parties to a joint adventure, seeking a rescission of contract of purchase on the ground that one of them did not share with his coadventurers the profit from a secret agreement, which he made with the vendor of the property which was purchased, held to sufficiently allege damage under the liberal rule of Code Civ. Proc. § 452.

5. JOINT ADVENTURES §7—CONTRACTS—RESCISSIION.

Where a vendor of property, which was acquired by joint adventurers, by secret agreement gave one of them an advantage not shared by the others, the vendor was a party to the constructive fraud as much as the adventurer receiving the benefit, and hence upon discovery those adventurers not parties to the agreement were entitled to rescind.

6. JOINT ADVENTURES §7—CONTRACTS—RESCISSIION—DELAY.

While parties must promptly rescind on discovery of the facts entitling them to the relief, joint adventurers cannot be held remiss for failing to rescind a contract of purchase until

they learned that one of their number was benefited by a secret agreement between himself and the vendor of the property which they acquired.

7. JOINT ADVENTURES ⇐7—CONTRACTS—RESCISSION—NOTICE.

Where joint adventurers, because of the existence of negotiations between the executrix of their vendor and themselves, delayed for five weeks in giving notice of election to rescind the contract, after discovery that one of their number was given advantage of a secret profit, such delay in giving notice of rescission was not unreasonable.

8. CONTRACTS ⇐270(1)—RESCISSION—DELAY—SUIT.

Where plaintiffs' delay in commencing action, after giving notice of their election to rescind the contract, in no wise damaged defendant, the delay is no ground for denial of relief.

9. CONTRACTS ⇐266(2)—RESCISSION—RETURN.

Where, in an action to rescind a contract, a return in specie of all the property received by the plaintiff is rendered impossible by reason of his having parted with a portion of it before discovery of fraud, *held*, under Civ. Code, § 3408, that rescission will not be denied, where there is a return of all property on hand with compensation in money for the remainder.

10. JOINT ADVENTURES ⇐8—CONTRACTS—RESCISSION—ACTION—COMPLAINT.

A complaint by joint adventurers, seeking rescission of the contract for purchase of a mining claim, *held* not open to demurrer on the ground that there was not an offer to return some of the bullion extracted from the claim while adventurers were in possession, and before they discovered the fraud which entitled them to rescind.

11. JOINT ADVENTURES ⇐8—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint by joint adventurers seeking to rescind a contract for purchase on ground that the vendor gave one of them an advantage not shared by the others, *held* to state a cause of action and to be good against demurrer.

12. PLEADING ⇐34(1)—CONSTRUCTION—COMPLAINT.

Under Code Civ. Proc. § 452, a complaint should be liberally construed with a view to substantial justice, and the liberal spirit is carried into Const. art. 6, § 4½; hence a complaint, though not a model pleading, is not open to special demurrer, where the facts pleaded disclosed the cause of action.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. B. Menefee and others against Mamie Oxniam, as executrix of the estate of T. H. Oxniam, deceased, and W. T. MacDonald, as to whom the action was dismissed before trial. From a judgment for defendant sustaining a demurrer to the amended complaint, plaintiffs appeal. Reversed, with directions to overrule the demurrer.

Dell A. Schweitzer, of Los Angeles, Harry W. Elliott, of Corona, and Schweitzer & Hut-ton, of Los Angeles, for appellants.

George W. Dryer and Mulford & Dryer, all of Los Angeles, for respondents.

FINLAYSON, P. J. Judgment was entered against plaintiffs upon a demurrer to their third amended complaint. The demurrer was general and special. This appeal is from that judgment.

The complaint shows plaintiffs' case to be substantially as follows: On November 5, 1913, T. H. Oxniam, since deceased, as party of the first part, and these three plaintiffs and defendant MacDonald, as parties of the second part, entered into a written contract whereby Oxniam agreed to sell to plaintiffs and MacDonald an undivided four-fifths of a mine then owned by Oxniam, upon these terms: The parties of the second part, four in number, were given the right to purchase the undivided four-fifths for \$20,000. This \$20,000 was to be paid in two years, as follows: A promissory note for \$7,500, executed by MacDonald, payable on or before October 31, 1915, was to be given to Oxniam, and the balance, \$12,500 was to be paid out of the net proceeds from the mining property which, it was agreed, should be worked by the four purchasers. It further was agreed that the purchasers, plaintiffs and MacDonald, should deposit the sum of \$22,500 in bank. Of this sum, not less than \$15,000 was to be expended by the purchasers in the installation of a new cyanide plant, repairs to the mill, and installation of additional equipment, the balance, if any, to be used as working capital. It also was agreed that, after Oxniam had received from the profits of the mining operations all of the balance of the \$20,000 left after subtracting MacDonald's note for \$7,500, and after plaintiffs and their associate, MacDonald, had received \$30,000 from the proceeds, then, but not before, Oxniam should be entitled to profits on the undivided one-fifth that he retained.

Before entering into the contract with Oxniam to purchase the undivided four-fifths, it was agreed between plaintiffs and MacDonald that if they made the contract with Oxniam they would operate the mine as equal and joint owners and equal active partners. All the details of the purchase and the negotiations leading up to the contract with Oxniam were left to MacDonald. Plaintiffs relied upon MacDonald's honesty and upon his becoming equally interested financially with them in the purchase. Oxniam knew MacDonald represented plaintiffs, and that he was acting for them as an equal partner.

Prior to and in anticipation of the execution of the contract to purchase from Oxniam the undivided four-fifths, MacDonald, notwithstanding he and plaintiffs were coadven-

turers in the purchase of the property, entered into a secret side agreement with Oxnam, whereby Oxnam agreed with MacDonald that if the operation of the mine did not produce sufficient profits to enable the latter to pay his note to Oxnam for \$7,500 within the two years, he should have the right to reconvey to Oxnam his one-fifth interest in the mining property, and Oxnam would thereupon return his note to him. This secret side agreement between Oxnam and plaintiffs' joint associate, MacDonald, was entered into "in consideration of plaintiffs signing the said contract"—the contract of purchase that plaintiffs and MacDonald made with Oxnam. Had plaintiffs known of the secret agreement between their associate, MacDonald, and Oxnam, they would not have entered into the contract of purchase with Oxnam. The existence of this secret side agreement was not discovered by plaintiffs until August 11, 1915, when MacDonald informed them of it.

Plaintiffs and MacDonald entered into possession of the mining property and operated it. Its operation, however, proved unprofitable. MacDonald has never paid any part of his note to Oxnam. In operating the property plaintiffs expended, in all, \$32,894.27, of which \$22,500 was expended in installing the new cyanide plant and as otherwise provided in their contract with Oxnam; \$4,486 was expended in other improvements, which have become a part of the property, and the balance in operating expenses.

Oxnam died February 16, 1915. Thereafter letters testamentary were issued to the defendant and respondent, Mamie Oxnam, who is now the sole defendant, the action having been dismissed as to defendant MacDonald on plaintiffs' motion.

Upon discovering the secret side agreement between Oxnam and MacDonald, plaintiffs, claiming to have been defrauded thereby, and that they had been damaged by reason of the expenditures they had made under their contract with Oxnam during the time when they had no reason to believe the contract tainted with fraud, entered into negotiations with the executrix and her legal advisers, in an endeavor to effect a settlement of their claim for damages. These negotiations, extending over a period of about seven weeks, proving ineffective, plaintiffs served upon the executrix a notice of rescission, and about two weeks thereafter presented to her, as executrix, their verified claim for \$32,841.66, the moneys so expended by them under their contract of purchase with defendant's testator. The claim having been retained by the executrix for more than 10 days without being allowed, this action was commenced.

We shall first consider whether the complaint states a cause of action and is good as against the general demurrer.

[1, 2] It is of no consequence whether appellants and their associate, MacDonald, ever became partners, in any strict sense of the

term, nor what may be the respective rights and obligations of mining partners, *inter sese*. Appellants and MacDonald were joint adventurers in a common enterprise—an enterprise that contemplated the purchase of the undivided four-fifths of the mine and the operation of the property, not only for ultimate profit, but as a means of paying to their vendor the balance of the purchase price over and above the \$7,500 that MacDonald was to pay pursuant to the terms of his promissory note to their vendor.

The tendency of the modern decisions is to regard the right of joint adventurers, as between themselves, as governed practically by the same rules that govern the relations of partners. 15 R. C. L. 500. The relation between joint adventurers is fiduciary in its character. The utmost good faith is required of each in his dealings with the others. Each will be held strictly to account to his coadventurers. He will not be permitted to enjoy any unfair advantage, or any greater rights than he and his coadventurers are entitled to under the terms of their agreement or understanding. The mere fact that he is intrusted with the rights of his coadventurers imposes upon him the duty of guarding their rights equally with his own. In accordance with the principles of good faith and confidence governing the relations of joint adventurers, a coadventurer may not conceal his interest or his profits from his associates in the enterprise. None will be allowed to obtain by secret agreement any advantage over the others. The consent of each to the joint adventure is usually given, and the money of each obtained, on the understanding and belief that the funds, interest, and aid of each are and will be given to the enterprise within the bounds agreed upon. The failure of one of the several joint adventurers, in an enterprise looking to the purchase of property, to share with his coadventurers, any secret advantage given by their vendor for inducing the purchase by the other coadventurers, is such a breach of confidence as amounts to constructive fraud, and will entitle his coadventurers either to rescind the contract, or to maintain an action for damages for fraud and deceit against either or both parties to the secret understanding, or to have the coadventurer receiving the benefit account to his associates in the enterprise. 15 R. C. L. 500-503; 23 Cyc. 452, et seq.; Noble v. Fox, 35 Okl. 70, 128 Pac. 102, 43 L. R. A. (N. S.) 933, and note; Jeffress v. Phillips, 31 Okl. 202, 120 Pac. 916; Gilpin v. Netograph Mach. Co., 25 Okl. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477; King v. White, 119 Ala. 429, 24 South. 710; Kennah v. Houston, 15 Wash. 275, 46 Pac. 236; Grant v. Hardy, 33 Wis. 668; Lind v. Webber, 36 Nev. 623, 184 Pac. 461, 135 Pac. 139, 141 Pac. 453, 50 L. R. A. (N. S.) 1046, Ann. Cas. 1916A, 1202; Hambleton v. Rhind, 84 Md. 456, 36

Atl. 597, 40 L. R. A. 216, and note; *Humburg v. Lotz*, 4 Cal. App. 438, 88 Pac. 510; *Richards v. Fraser*, 122 Cal. 456, 55 Pac. 246; *Id.*, 136 Cal. 460, 69 Pac. 83; *Llewelyn v. Levi*, 157 Cal. 31, 106 Pac. 2, 19; *Denis v. Gordon*, 163 Cal. 427, 125 Pac. 1063; *Lomita L. & W. Co. v. Robinson*, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106; *California, etc., Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595.

As a rule, cases of the character now under consideration are cases where the perfidious joint adventurer, by a secret side agreement, has gained some profit, either in money or property, in which his coadventurers will be held entitled to share. Such was the case in *Lomita L. & W. Co. v. Robinson*, *supra*. Or they are cases where the unfaithful coadventurer, by a secret agreement with the vendor of the joint adventurers, has received his share of the property purchased gratuitously, or for less than the amount contemplated by his agreement with his associates. This was the case in *Noble v. Fox*, *supra*. Here, however, MacDonald did not receive any secret commission, or any advantage, either in money or property, of such a nature that his coadventurers can share therein; nor was he to receive his undivided interest in the mine gratuitously. However, we think the case clearly falls within the principle announced in the cases cited *supra*.

[3] In actions of this character it is not necessary that the parties complaining of the breach of faith on the part of their coadventurer should allege or prove that they have actually been injured by his breach of their confidence. Unquestionably it is the general rule that fraud without injury is not ground for relief, either in law or equity; though even under this general rule the injury need not be of such a nature that it can be accurately measured in money, but it will suffice if the defrauded party has been but very slightly prejudiced. *Spreckels v. Gorrill*, 152 Cal. 383, 388, 92 Pac. 1011. Though it is the general rule that fraud without at least some slight injury is not ground for relief, this general rule is not an obstacle to recovery in cases of the kind here under consideration, even though there be a total absence of injury to the complaining party. That is, where one occupies a fiduciary relation to the plaintiff, and, acting in co-operation with the defendant, he abuses the confidence of the plaintiff, his associate in a common enterprise, by entering into a secret agreement with the defendant, the general rule that fraud without injury is not ground for relief is not applicable, and the plaintiff will be entitled to relief whether he has been injured or not. Both law and equity have a most tender regard for the rights of a complaining party growing out of a fiduciary relationship. So that, where any abuse of that relation is discovered, the complain-

ing party is entitled to relief, whether any actual damage be established or not. In this class of cases the question is not whether the breach of confidence has resulted in profit to the unfaithful coadventurer, or whether it has resulted in injury to his joint adventurers, but whether there has been a breach of confidence on the part of the fiduciary. The great solicitude of the courts has been rather wholly to avoid any recognition of a principle that, in the hands of avaricious and cunning men, might be turned to their own account, than to inquire whether the complaining party has suffered any actual disadvantage. The rule that a coadventurer must act with utmost good faith, and in all things be faithful and loyal to his associates and to the purpose of the enterprise, is not intended to be remedial of actual wrong, but preventive of the possibility of it, and it matters not that there is no fraud meditated and no injury done. *Henninger v. Heald*, 52 N. J. Eq. 431, 29 Atl. 190, affirmed 53 N. J. Eq. 694, 35 Atl. 1130.

[4, 5] But even if, in cases of this character, it were necessary to show injury in order to entitle the complaining party to relief, we think the complaint, if "liberally construed, with a view to substantial justice between the parties" (section 452, Code Civ. Proc.), does show injury to plaintiffs. Under the terms of the contract of purchase made by MacDonald and plaintiffs with Oxnam, the four purchasers were to receive an undivided four-fifths of the mine. The complaint alleges that it was agreed between MacDonald and appellants, before making their contract of purchase with Oxnam, that if they entered into the contract with Oxnam the four would own and operate the property "as equal joint owners and equal active partners," and that appellants relied upon MacDonald "becoming equally interested financially" with them "in the purchase of the said mining property." Under the terms of the contract of purchase each of the four associates was to be liable for the payment of some money, whether the venture proved to be profitable or otherwise. MacDonald was to pay \$7,500 upon the maturity of his note to Oxnam, and each of the three appellants was to be liable for his share of the \$22,500 that was to be advanced for the installation of the new cyanide plant, the purchase of the other and additional equipment, and the working capital. The complaint does not allege whether, according to the agreement between the four purchasers, MacDonald was to furnish any part of this \$22,500. But whether he was or not, it certainly was understood that, on or before the maturity of his note to Oxnam, he was to pay at least the face of that note, \$7,500. In other words, though the complete understanding between MacDonald and appellants is not disclosed by the complaint, nevertheless, whatever it may

have been, MacDonald, whether the enterprise proved a losing or a profitable venture, whether the mining property proved valuable or valueless, was to pay \$7,500 at least, and, possibly, a part of the \$22,500; and each of appellants was to pay his share of the \$22,500—regardless of how the venture terminated. In short, the agreement between the four joint adventures, whatever it may have been in its entirety, required of each the payment of a sum of money, win or lose. But, by reason of the secret side agreement between Oxnam and MacDonald, the latter, if the venture proved unprofitable, was to be relieved of the payment of his agreed share of the purchase price, to the extent, at least, of the sum evidenced by his note—\$7,500—upon his reconveying to Oxnam his share of the purchased property—an undivided one-fifth of the mine. This secret side agreement was therefore unquestionably one of considerable advantage to MacDonald, and, of course, a corresponding disadvantage to the vendor, Oxnam, who, in the event that his mine proved worthless after the efforts of the four joint purchasers to work it profitably, was not to receive the \$7,500 which the contract between him and his four vendees contemplated that he should receive in any event, upon the maturity of the note executed to him by MacDonald. It is a reasonable inference, therefore, that if Oxnam had not made this prior, secret side agreement with MacDonald, he could have afforded to make, and, possibly, might have made, with the four coadventurers and purchasers, an agreement more advantageous to appellants. It is alleged in the complaint that Oxnam gave MacDonald the secret side agreement "in consideration of plaintiffs signing the said contract," i. e., the contract of purchase that appellants and MacDonald made with Oxnam. The only reasonable inference from this allegation is that Oxnam, deeming his secret side agreement with MacDonald of advantage to the latter, concluded he could make it a means whereby to secure the execution by appellants of the contract of purchase that finally was made, by using MacDonald as a decoy to get his coadventurers into the deal upon terms satisfactory to Oxnam, that is, upon the terms set forth in the contract of purchase as finally made. Any such trick as that is a fraud; and if it resulted in a contract of purchase less advantageous to appellants than they otherwise would have secured, it worked an injury to them.

By entering into the written contract of purchase, along with his coadventurers, MacDonald, in effect, represented to them that he was purchasing an undivided interest upon the terms in that contract set forth. This representation, inferable from the fact that he agreed to become one of the joint purchasers upon the terms and conditions set forth in the written contract of purchase,

may well have been a substantial inducement to his coadventurers to join with him in their contract with Oxnam. Appellants left it to MacDonald to carry on the negotiations for the purchase of the property. We cannot read the complaint without being impressed with the idea that MacDonald was the leader in the joint enterprise, and that appellants, his coadventurers, placed great reliance upon his judgment and faith in their proposed venture. For this reason MacDonald, by joining with appellants in the purchase of the property, thereby may have, and possibly did, lead his associates to believe that his confidence in the outcome of their enterprise was such that he was willing to obligate himself to the extent of \$7,500 at least, whether the venture proved profitable or otherwise. For this reason the mere fact that MacDonald executed the contract of purchase as a joint purchaser with appellants afforded ample basis for the allegation that, had appellants known of the secret side agreement, they would not have entered into the contract with Oxnam to purchase the property.

In view of the failure of the complaint fully and completely to set forth the understanding between appellants and MacDonald, we have assumed that MacDonald was to put up some part of the \$22,500 that was to be advanced to purchase the new cyanide plant, etc., thus assuming the situation to be that which is the most favorable to respondent. However, from certain facts appearing upon the face of the contract of purchase itself, as well as from facts alleged in the complaint, we are disposed to surmise that the understanding between the four joint adventurers was that MacDonald was to give his note for \$7,500, but was not to be obligated to pay any further sum, and that each of his three associates was to put up, in cash, a similar amount; thus making the total amount of cash to be advanced by the three appellants equal the sum of \$22,500—the amount that the purchasers agreed was to be advanced to purchase the new cyanide plant, etc. If this assumption be correct, then, if MacDonald continued unconditionally obligated to pay his note for \$7,500, as contemplated by the contract of purchase made by himself and coadventurers with Oxnam, each of the four would be obligated for \$7,500, or one-fourth of \$30,000. This surmise comports with that provision of the contract whereby it is provided that Oxnam was not to receive any of the profits from the mine until the four purchasers had taken out of the profits, if any there might be, not only the balance of what was denominated the purchase price (\$12,500), but the further sum of \$30,000. In other words, we are inclined to the supposition that, according to the agreement between the four coadventurers, whatever that agreement in its entirety may have been, each of them was to obli-

gate himself to Oxnam in an equal amount, and each was to pay his share whether any profits were received from the mine or not, except that MacDonald, instead of being required to make an immediate payment of his share, \$7,500, was not to pay his pro rata until the maturity of his note. This assumption accords with the allegation of the complaint that appellants relied upon MacDonald becoming "equally interested financially with the plaintiffs in the purchase of the said mining property." If this be so, then the effect of the secret side agreement between Oxnam and MacDonald would be this: MacDonald, as well as Oxnam, without paying or becoming obligated for any sum whatever, but at appellants' risk and expense and on the strength of the \$22,500 to be advanced by appellants, would receive the benefit of all development work to be done on the mine; so that, if the mine proved to be valuable, MacDonald, as well as Oxnam, without incurring any risk, but at appellants' expense, would have his undivided one-fifth demonstrated to be a valuable interest, and, if the mine turned out to be valueless, he and Oxnam would lose nothing beyond their fleeting expectations of valuable mining interests, while appellants would be out \$22,500. However, irrespective of whether or not we have conjectured correctly the nature of the agreement between MacDonald and his three associates, the result of this appeal must be the same. For this much is certain: MacDonald, according to the contract of purchase, was to be obligated for at least \$7,500, and this sum, according to the understanding evidenced by the contract of purchase, he was to pay in any event, whether the venture proved to be a winning or a losing proposition; but, according to his secret side agreement with Oxnam, unknown to his associates—a secret agreement entered into "in anticipation of the execution of the contract of purchase" and "in consideration of plaintiffs signing the said contract" of purchase—MacDonald was not to pay even that \$7,500, in the event that it should turn out that the mining operations did not return a profit sufficient to enable him to pay his note out of his share of the profits. This for reasons already stated, was a fraud upon his joint adventurers—a fraud that entitled them to rescind their contract with Oxnam as an alder and abettor in the consummation of that fraud.

Respondent suggests that Oxnam never became a partner of appellants; that, therefore, there was no fiduciary relation between him and them; and that, consequently, he is not liable, his secret side agreement with MacDonald notwithstanding. This, clearly, is non sequitur. MacDonald, as a coadventurer of appellants, occupied towards them a confidential relation that demanded of him the utmost good faith in all his dealings with, or on behalf of, his associates in the

common enterprise, and precluded him from making, for the advantage of himself or Oxnam, the secret side agreement, the making of which was a breach of his duty to appellants and a fraud upon them. Oxnam, knowing all the facts, aided and abetted him in the consummation of this fraud. Oxnam, therefore, was as much guilty of this constructive fraud as was MacDonald. *Lomita L. & W. Co. v. Robinson*, supra; *King v. White*, supra. "Persons united for a common purpose must be loyal to that purpose and to each other. None may * * * secure an unfair advantage over those interested with him. * * * Those aiding him in procuring an advantage may, in equity, be held liable with him for the fraud." 23 Cyc. 455. For this reason Oxnam's contract with appellants was tainted with fraud, upon the discovery of which appellants were entitled to rescind the vitiated contract. *Noble v. Fox*, supra.

Though notice of appellants' election to terminate their contract with Oxnam was given to respondent as executrix, and this action to obtain a judicial decree of rescission and be restored to the status quo is an appropriate remedy, it is claimed by respondent that appellants lost their right of rescission by failure to assert it promptly. There seems to be some confusion in the minds of respondent's counsel in regard to the precise nature of the fraud of which appellants complain. Respondent's counsel say that, if the secret side agreement between MacDonald and Oxnam affected the operation of the mine to any appreciable extent, appellants could not have gone on with their operations for a year and nine months without having their suspicions aroused. But clearly this is not an action where appellants are complaining of any fraudulent misrepresentations as to the character or value of the mining property. What they complain of is the disloyalty of their coadventurer, MacDonald, in concealing from them the fact that their common vendor, Oxnam, was willing, if the mining operations did not prove profitable, to take back MacDonald's share of the undivided four-fifths agreed to be conveyed to the four associates, and relieve him from all obligation to pay the \$7,500 which, by the contract of purchase and his promissory note, he had obligated himself to pay as his share, or at least as a part of his share, of the entire purchase price, regardless of how the joint enterprise eventuated.

[6] It no doubt is the general rule that one seeking to rescind a contract must exercise the right promptly upon discovering the facts which entitle him to rescind. Here the fact relied upon as giving the right to rescission is the existence of a secret contract between respondent's testator and appellants' coadventurer, MacDonald. In the nature of things, that fact, hidden in the secret recesses of the hearts of MacDonald and Oxnam,

could not be discovered until one or the other in some manner communicated it to the outside world. Appellants are not chargeable with remissness because they did not discover the fact until it was communicated to them by MacDonald on or about August 11, 1915.

[7] While it is true that appellants did not give notice of rescission until about seven weeks after the discovery of the secret agreement, the delay was the result of indulgences extended to them by respondent, who, by countenancing negotiations with appellants in their endeavor to effect a compromise and settlement of their claim, necessarily led appellants to refrain from giving that notice of rescission which is a necessary prelude to a contest in court for a judicial decree of rescission. Notice of rescission has been held to be within reasonable time if given within two months after the discovery of the fraud. *Hill v. Wilson*, 88 Cal. 92, 97, 25 Pac. 1105.

[8] It is claimed that sufficient diligence was not shown in bringing the suit after the notice of rescission. It does not appear when the original complaint was filed. On the other hand, it does appear that any delay which there may have been in bringing the suit after the discovery of the secret agreement and the notice of rescission was, or could have been, at all injurious to respondent or the estate which she represents.

[9, 10] Respondent's contention that the complaint fails to show that appellants offered to restore to Oxnam, or to his estate, everything of value received by them under the contract, is not tenable. The complaint specifically alleges not only that appellants and MacDonald have executed and delivered to the heirs of Oxnam a quitclaim deed to the mining property, as requested by the representatives of the estate, and have turned over to the representatives of the estate the possession of the mine, personal property, supplies, and equipment, but that appellants have actually restored and returned "everything received under or by virtue of said contract of purchase or mining operations." It is true that it appears, inferentially, that appellants disposed of bullion from the mine. They allege that they spent \$5,908.18 for repairs, supplies and operating expenses, "over and above all moneys received by them, * * * for the bullion receipts or other proceeds of said mining business." Respondent contends that the receipts for the bullion may have been less than its reasonable market value, and cites *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868, to support her claim that a sufficient offer to restore the status quo has not been shown. In view of the express allegation that appellants actually have restored to the estate of T. H. Oxnam, deceased, everything of value received, we must conclude that they either repurchased the bullion and returned it to Oxnam's estate, or else that its value is less than any balance that appel-

lants may be entitled to recover. Where, in an action of this character, a return in specie of all the property received by the plaintiff is rendered impossible by reason of his having parted with a portion of it before discovery of the fraud, the requirements of justice are satisfied by a return of the property on hand with compensation in money for the remainder. *Basye v. Paola Min. Co.*, 79 Kan. 755, 101 Pac. 658, 25 L. R. A. (N. S.) 1302, 131 Am. St. Rep. 346; *Wright v. Dickinson*, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602; *Henninger v. Heald*, supra; *Spreckels v. Gorrill*, supra, 152 Cal. 392, 394, 92 Pac. 1011; *Civ. Code*, § 3408. If, after allowing respondent's claim for the reasonable market value of all ore and bullion that appellants may have sold, if any, there is still a balance due appellants, no express offer to return, in money, the actual value of such ore or bullion is necessary. The equities of the parties may be fully adjudged without such unnecessary circumlocution. "One who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain." *Richards v. Fraser*, supra; *Matteson v. Wagoner*, 147 Cal. 739, 744, 82 Pac. 436.

[11] For the foregoing reasons we think the complaint, considered as a whole—that is, read as though the matters erroneously stricken therefrom had remained in—states a cause of action, and that it is good as against respondent's general demurrer.

[12] Nor do we think the complaint vulnerable under the attack by the special demurrer. It is true it is not a model pleading, stating in ordinary and concise language the facts constituting the cause of action. Still it is not fatally uncertain in any of the particulars pointed to by the special demurrer. We readily can see from the facts pleaded that, by more direct allegations of certain facts that seem clearly inferable from the facts alleged, as well as from the facts disclosed by the terms of the contract of purchase, appellants easily might have avoided any attack on the ground of uncertainty. However, we think the complaint sufficient if its allegations be liberally construed, with a view to substantial justice, as is required by section 452 of the Code of Civil Procedure, whereby the old common-law rule that a pleading must be construed most strongly against the pleader has been abrogated and superseded by the more liberal rule of the statute. *Estate of Wickersham*, 153 Cal. 603, 96 Pac. 311. In recent years great changes have been wrought by the Code in the rules for the construction of pleadings. For sufficiency of the facts pleaded, courts look to substance, not to form. The basic principle of the Code Procedure is that the administration of justice should not be embarrassed by technicalities, strict rules of construction, or useless forms. This liberal spirit has even been carried into the Constitution. Section 4½,

art. 6. The Code requires not only a liberal construction, with a view to substantial justice between the parties, but also that the court shall disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ. Proc. § 475. Construing the complaint in the light of these liberal provisions, we think it impregnable to the attack made upon it by this demurrer.

Many of the particulars as to which the demurrer charges uncertainty are matters that lie peculiarly within respondent's or her testator's knowledge, as, for instance, the facts immediately connected with the secret side agreement between MacDonald and Oxnam, also the facts connected with the time within which appellants' verified claim should have been presented. As to such facts respondent cannot be heard to complain that appellants have not alleged them with sufficient certainty.

Nor do we think the court was justified in granting respondent's motion to strike out certain parts of the complaint. Many of the allegations stricken out were relevant and material. For example, the allegations that the secret side agreement was entered into "in anticipation of" the execution of the contract of purchase, and that it was entered into "in consideration of plaintiffs signing the contract of purchase," were certainly material. The allegation that the secret side agreement was entered into "in anticipation of" the execution of the contract of purchase tends to show the connection between the two agreements, and that Oxnam and MacDonald were conspiring to bring about the execution of the contract of purchase by using MacDonald as a decoy. So, also, the allegation that the execution of the contract of purchase was the "consideration" for the secret side agreement tends to show the use of MacDonald as a decoy to induce appellants to enter into a contract that otherwise they possibly would not have made.

The judgment is reversed, and the court below directed to overrule the demurrer to the complaint, with leave to defendant to answer.

We concur: SLOANE, J.; THOMAS, J.

**U. S. FIDELITY & GUARANTY CO. v.
RENO ELECTRICAL WORKS.**
(No. 2376.)

(Supreme Court of Nevada. Sept. 5, 1919.)

**1. PLEADING §312 — VARIANCE BETWEEN
PLEADING AND INSTRUMENT REFERRED TO.**

In an action by subcontractor against the surety on contractor's bond, the fact that the bond denominated the subcontractor as the elec-

tric works, while the complaint named it as the electrical works, is immaterial under Rev. Laws, §§ 5080, 5081, the variance probably being due to a mere clerical error.

2. CONTRACTS §34 — ADOPTION — EXECUTION.

Parties may adopt a written contract, and thus make it as binding as though formally executed by both, without signing it; and hence in an action by subcontractor against the surety on the contractor's bond, brought after complete performance by subcontractor, the fact that the written subcontract was not executed is no defense.

3. JUDGMENT §113 — DEFAULT — NOTICE OF SUBSEQUENT PROCEEDING.

Where defendant was in default, the fact that the court made findings and entered judgment without notice is no ground of objection, for after default it would be a useless thing to require service of notice on defendant.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by the Reno Electrical Works against the U. S. Fidelity & Guaranty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Harwood & Tippet, of Reno, for appellant.
LeRoy F. Pike, of Reno, for respondent.

DUCKER, J. This is an action upon a bond executed by the defendant surety company, appellant here, to secure subcontractors, laborers, and materialmen for labor performed and material furnished in the erection, construction, alteration, or repair of a public building or structure.

The second amended complaint alleges substantially that a contract was entered into for the construction of a public building; that thereafter the contractors entered into a contract with plaintiff as subcontractor for the furnishing of material and labor, and for certain construction in connection with said public building; that the plaintiff has performed the conditions of this contract, and there is nothing owing to plaintiff from the contractors on said contract, except the sum of \$509.50, still unpaid, though demand has been made of said contractors, who refuse to pay the same.

The complaint further alleges the completion of said public building, and its acceptance within 90 days of the commencement of this action; that a joint and several bond was executed to the trustees of the public building by appellant, conditioned that the contractors would satisfy all claims and demands incurred in the construction of said building, whereby a cause of action accrued to the benefit of plaintiff against defendant under the laws of this state. It is also alleged that plaintiff has been compelled to employ counsel to prosecute the action, and

that the sum of \$250 is a reasonable sum to allow plaintiff as counsel fees in the action. A copy of the contract with plaintiff and a copy of said bond are attached to and made a part of the complaint, marked "A" and "B," respectively.

Defendants demurred to the second amended complaint on the ground that it failed to state a cause of action. It was overruled by the court, and, the defendant having failed to answer within 10 days limited by the order, its default was entered and judgment rendered in favor of plaintiff, according to the prayer of the complaint.

Defendant appeals from the judgment, and assigns as error: (1) That judgment is contrary to law; and (2) that the court erred in making its findings of fact and conclusions of law and in entering judgment, because the same were made and entered without notice to defendant.

It is claimed that the findings and judgment are not sustained by the pleadings, and are therefore contrary to law. This alleged error lies in the fact that the plaintiff is named in the complaint as the Reno Electrical Works, whereas in the attached copy of the contract the subcontractor is named Reno Electric Works; and also in the fact that the copy of the contract is not signed, and does not purport to be signed, by either Reno Electrical Works or Reno Electric Works.

[1] In respect to the first phase of the question, the difference in the names, at the most, is an immaterial variance. The references in the complaint to the contract show that Reno Electrical Works, Reno Electric Works, and subcontractor are the same entity. The indorsement on the copy of the contract "Reno Electrical Works" tends strongly to indicate that the word "Electric" in the body thereof is a clerical error. Appellant could not possibly have been misled in this respect, and the court was authorized, not only by the general rule of law concerning immaterial variances, but by the liberal statutory rule, in finding the fact in conformity with the pleadings. Sections 5080, 5081, Nev. R. L. The contention that the judgment is contrary to law because the copy of the contract annexed to the complaint is not signed by respondent is untenable.

[2] Parties may adopt a written contract, and thus make it binding as though formally executed by both, without signing it. The copy of the contract is signed by the contractor, and respondent's assent to it is shown by a full performance of its conditions. "If a person accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and to be bound by them." 6 R. C. L. p. 642; Bloom v. Hazzard, 104 Cal. 313, 37 Pac. 1037; Memory v. Nie-

pert, 131 Ill. 623, 23 N. E. 431; Story on Contracts (5th Ed.) § 509.

It appears from the allegations of the complaint that the contract alleged therein was acted upon by the parties—by the respondent in finishing the work required by the contract, and by appellant in paying more than two-thirds of the contract price for such work. The contractual relation is evidenced by these mutual acts, and makes the contract binding on each of the parties, if neither had signed it.

[3] The court did not err in making findings and in entering judgment without notice to appellant.

Appellant was in default, and notice of subsequent proceedings is nowhere required by statute or rule of court. After default a defendant cannot be heard to contest the subsequent proceedings, and certainly it would be a useless thing to require notice of any to be served upon him. *Norris v. Campbell*, 27 Wash. 654, 68 Pac. 339.

Judgment affirmed.

COLEMAN, C. J., and SANDERS, J.,
concur

ESCALLE v. MARK. (No. 2385.)

(Supreme Court of Nevada. Sept. 4, 1919.)

1. STATUTES ⇨184 — CONSTRUCTION — PURPOSE—INTENT.

In construing a statute the legislative intent controls, and in seeking the intent the evil sought to be remedied should be ascertained.

2. FRAUDULENT CONVEYANCES ⇨47—BULK SALES LAW—PURPOSE.

The main purpose of the Bulk Sales Law is to protect wholesalers.

3. FRAUDULENT CONVEYANCES ⇨172(1) — BULK SALES LAW—CONSTRUCTION—"VOID."

Bulk Sales Law, declaring certain sales "void," does not preclude the seller from recovering the purchase price of a sale made in violation of its terms; "void," as used in the statute, meaning "voidable."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Void.]

Appeal from District Court, Washoe County; Geo. A. Bartlett, Judge.

Action by Peter Escalle against Frank Mark, also known as Frank Marks. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Platt & Sanford, of Carson City, for appellant.

Robert Richards, of Carson City, for respondent.

COLEMAN, C. J. This action was instituted by plaintiff, who is respondent here, to recover from the defendant (appellant) the balance of the purchase price of a one-half interest in and to a hotel and saloon business conducted by plaintiff in Reno, and a like interest in the stock, fixtures, furnishings, furniture, and appurtenances thereof. Judgment was rendered in favor of the plaintiff, and from an order denying defendant's motion for a new trial, and the judgment, an appeal has been taken.

[1-3] The only point urged upon our consideration as a reason why the judgment and order appealed from should be reversed is that prior to the making of the sale section 2 of the "Bulk Sales Act" (Stats. 1907, p. 209; Rev. Laws 1912, § 3900) was not complied with. That section reads:

"Whenever any person shall bargain for or purchase any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, for cash or on credit, and shall pay any part of the price, or execute and deliver to the vendor thereof or to his order, or to any person for his use, any promissory note or other evidence of indebtedness, to give credit, whether or not evidenced by promissory note or other evidence of indebtedness, for said purchase price or any part thereof, without at least five days previously thereto having demanded and received from the said vendor or his agent the statement provided for in section 1 of this act, and verified as there provided, and without notifying also at least five days previously thereto, personally or by registered mail, every creditor as shown upon said verified statement when said proposed sale or transfer is to be made, and the time and conditions of payment, and without paying or seeing to it that the purchase money of said property is applied to the payment of bona fide claims of the creditors of the vendor as shown upon said verified statement, share and share alike, such sale or transfer shall be fraudulent and void."

Section 1 of the act provides:

"It shall be the duty of every person who shall bargain for or purchase any portion of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, for cash or on credit, before paying to the vendor or his agent or representative, or delivering to the vendor or his agent or representative, any part of the purchase price thereof or any promissory note or evidence therefor, to demand of and receive from such vendor or agent, or if the vendor or agent be a corporation, then from the president, vice president, secretary, or managing agent of such corporation, a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor to whom said vendor may be indebted, together with the amount of the indebtedness due or owing or to become due or owing by said vendor, to each of the

said creditors, and it shall be the duty of the said vendor or agent to furnish such statement, which shall be verified."

To be more specific, it is contended that because of the failure of the defendant to demand and receive from the plaintiff, five days previous to the consummation of the sale, the sworn statement provided for in section 1 of the act in question, and give five days' notice of such proposed sale to the creditors of the vendor, the sale was and is absolutely null and void, and that for this reason the plaintiff cannot recover the unpaid amount of the purchase price.

It is true that the statute says that when there is a failure to comply with section 1 of the act the sale shall be "fraudulent and void"; but did the Legislature mean that a sale should be absolutely "void" as between the parties, regardless of the fact that no creditor was prejudiced thereby? We think not. It is a cardinal rule of statutory construction that the legislative intent controls (*Worthington v. District Court*, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916A, 696, Ann. Cas. 1916E, 1097), and in seeking the intention of the Legislature in enacting a certain law we must ascertain the evils sought to be remedied. This court, speaking through Hawley, J., in *Ex parte Siebenhauer*, 14 Nev. 365, said:

"The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the Legislature to enact it. The entire subject-matter and the policy of the law may also be invoked to aid in its interpretation, and it should always be construed so as to avoid absurd results"—citing *Roney v. Buckland*, 4 Nev. 45; *State ex rel. Keith v. D. & V. T. R. R. Co.*, 10 Nev. 155; *Silver v. Ladd*, 7 Wall. 219 [19 L. Ed. 138]; *State v. Judge*, 12 La. Ann. 777; *State v. Mayor*, 35 N. J. Law, 196.

It was said in *Columbia & P. S. Co. v. Brailard*, 12 Wash. 22, 40 Pac. 382:

"It is doubtless true that the word 'void,' when used in a statute, does not mean absolutely void for every purpose, and in determining its meaning in a given case regard must be had to the subject-matter of the statute, its scope, purpose and effect."

See, also, *Colburn v. Wilson*, 24 Idaho, 94, 132 Pac. 579; *Thompson v. Esty*, 69 N. H. 55, 45 Atl. 566.

It is said:

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object." 36 Cyc. 1110.

It was also said by this court in *Ex parte Siebenhauer*, supra, 14 Nev. at page 369:

"In order to reach the intention of the Legislature, courts are not bound to always take the words of a statute either in their literal or ordinary sense, if by so doing it would lead to any absurdity or manifest injustice, but may in such cases modify, restrict, or extend the meaning of the words, so as to meet the plain, evident policy and purview of the act, and bring it within the intention which the Legislature had in view at the time it was enacted. *Gibson v. Mason*, 5 Nev. 285; *Reiche v. Smythe*, 13 Wall. 164 [20 L. Ed. 566]; *Burgett v. Burgett*, 1 Ohio, 480 [13 Am. Dec. 634]; *McIntyre v. Ingraham*, 35 Miss. 52; *Camp v. Rogers*, 44 Conn. 291; *Castner v. Walrod*, 83 Ill. 178 [25 Am. Rep. 369]; *Fisher v. Patterson*, 13 Pa. St. 338; *Bishop on Statutory Crimes*, § 212."

See, also, 36 Cyc. 1111.

In *Goldfield Con. M. Co. v. State*, 35 Nev. 178, 127 Pac. 77, it was said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278. And see *State v. McKenney*, 18 Nev. 189 [2 Pac. 171]; *State v. Kruttschnitt*, 4 Nev. 178."

In the light of these rules of construction, let us ascertain what evil the Legislature sought to remedy by enacting the Bulk Sales Law. 12 Ruling Case Law, § 54, at page 525, states that the Bulk Sales Law has but one aim, namely, "to prevent a sale of goods in bulk until the creditors of the seller have been paid in full." It is common knowledge that the main purpose of the law is to protect the wholesaler. Prior to the passage of the law, it was a common practice for retailers to sell their stock of goods in bulk, pay no one, and leave the man who sold them the goods without recourse. Such practices became so disastrous to the wholesalers that they were driven to the necessity of procuring legislation which would afford them protection against unscrupulous retail merchants. The Bulk Sales Law is the result.

"The object of this act was, no doubt, to protect wholesale merchants particularly against fraudulent sales by retailers; but the act by its terms protects all creditors of merchants alike." *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889; *Eklund et al. v. Hopkins et al.*, 36 Wash. 179, 78 Pac. 787.

This being the purpose of the law, how can it be successfully urged, as contended by appellant, that we should hold that such a sale as here in question was absolutely void?

It is true that the statute says a sale shall be void when the terms of the act are not complied with; but to our minds, when construed in the light of the purpose of the statute, it was clearly the intention of the Legislature that the sale should be voidable only. It is not pointed out what protection would or could be afforded any one by placing any other construction upon the law.

But all rules of construction aside, it seems to us that no other conclusion can be reached, from a reading of the entire act itself, especially section 4 thereof (Rev. Laws, § 3911). This section provides that, if the vendor produces and delivers a written waiver of the requirements of the act as to notice to creditors, from at least a majority in number and amount of his creditors, the provisions of the act shall not apply. If it was the purpose of the Legislature in enacting the law to protect any but creditors, the section just referred to is a most remarkable one. In fact, we cannot escape the conclusion, from a consideration of this very section, that the sole purpose of the law is to protect creditors. If such was not the intention, the Legislature would never have embodied section 4 in the law, because it would manifestly have made the act inconsistent in its operation. Such seems to have been the conclusion reached by the Supreme Court of New Jersey, in considering the effect of a similar provision in the Bulk Sales Law of that state, in the case of *Dickinson v. Harbison*, 78 N. J. Law, 97, 72 Atl. 941. The court in that case said:

"The body of the act, as will be observed, declared that a sale should be void as to creditors unless certain things were done by the purchaser. . . The proviso, however, speaks of the sale as 'such voidable sale.' The word 'void' was used in the sense of voidable. The proviso itself shows that the sale was a nullity only when attacked by creditors within a certain period."

So in our statute the "body of the act" provides that a sale which is made without first complying with certain terms thereof shall be "fraudulent and void," while section 4 says such requirements may be waived by creditors.

Many cases may be found growing out of the bulk sales statutes of various states, wherein the word "void" is construed to mean "voidable"; such construction invariably being reached upon the theory that such was the evident intention of the law-making bodies. To quote from all of them would unnecessarily lengthen this opinion, and we content ourselves with the following extracts:

"The phrase 'fraudulent and void as to creditors' relates to attaching creditors who seek to set aside the vendee's title, which, until set aside, is a valid title. As between the parties to the sale, the title passed to the vendee, and

it remains in him until it is vacated by a creditor of the vendor upon proceedings instituted for that purpose, or until the vendee disposes of the property. Though the word 'void' is used in the statute, in legal effect, it means voidable at the instance of an attaching creditor." *McGreenery v. Murphy*, 76 N. H. 338, 82 Atl. 720, 39 L. R. A. (N. S.) 374.

"The question whether in a statute the term 'void' is used with entire technical accuracy, or only in its less strict meaning as 'voidable,' is frequently one of difficulty. In many statutes the word is used in its strict technical sense, and in many it is used in the sense of voidable. In view of the subject-matter of this statute, the conditions of the law prior to its passage, the abuse which it aims to correct, and the manifest difficulty of any other view, we are of the opinion that the Legislature intended to place the kind of sale named in the statute into the class of sales theretofore existing as fraudulent and for that reason voidable by creditors, unless the conditions therein prescribed were complied with; or, in other words, it is intended to create another instance of a sale which the creditors might avoid as being fraudulent and for that reason against their rights. But it was not the intention of the statute that this kind of sale should stand upon any different footing from that of the general class to which it was added. The sale is voidable like the other kinds of sales which are commonly called void as against creditors, and the right of the creditor in this sale is similar in its nature to the right of the creditor in such other sales. Such an interpretation of the statute seems to us reasonable, and in accordance with the general principle of law applicable to the subject-matter. See, in this connection, the language used by Knowlton, C. J., in giving the opinion of the court in *Squire v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322." *Kelly-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297.

"Knowlton, C. J. * * * A sale made in violation of the statute is void only as against creditors, and, if the vendor's debts are paid, the sale cannot be interfered with. A purchaser, to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statutes, if he pays his debts." *Squire v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322.

"But since the decision in *State v. Richmond* [26 N. H. 232], this term 'void' is perhaps seldom, unless in a very clear case, to be regarded as implying a complete nullity, but is to be taken in a legal sense, subject to large qualifications in view of all the circumstances calling for its application and the rights and interests to be affected in a given case." *Brown v. Brown*, 50 N. H. 552.

"It is doubtless true that the word 'void,'

when used in a statute, does not always mean absolutely void for every purpose; and in determining its meaning in a given case regard must be had to the subject-matter of the statute, its scope, purpose, and effect." *Columbia Co. v. Brillard*, 12 Wash. 22, 40 Pac. 382.

"The question involves the construction of a clause of our revenue law: * * * 'Provided further, that in all cases where the owner of land sold for taxes shall resist the validity of such tax title, such owner may show and prove fraud committed by the officer selling the same, or the purchaser to defeat the same; and if fraud is so established such sale and title shall be void.' This controversy involves the construction of the * * * clause just quoted. * * * The word 'void' has, with lexicographers, a well-defined meaning: 'Of no legal force or effect whatsoever; null and incapable of ratification.' Webster's Dict. But it is sometimes, and not infrequently, used in enactments by the Legislature, in opinions by courts, in contracts by parties and in arguments by counsel, in the sense of 'voidable'; that is, capable of being avoided or confirmed. *Id.* The word 'void,' when used in any of these instruments, will therefore be construed in one sense or the other, as shall best effectuate the intent in its use, which will be determined from the whole of the language of the instrument and the manifest purpose it was framed to accomplish. Or, as the same rule has been more extendedly stated: 'It is the duty of the court to ascertain the meaning of the Legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the courts are satisfied that the literal meaning of its words would extend to cases which the Legislature never designed to include in it.' *Leases, etc., v. Blougher*, 14 Pet. 178 [10 L. Ed. 408]. This rule is broader than the one first stated, for it would justify restraining the meaning of a word to narrower limits than its import; whereas, to restrain the word 'void' to the meaning of 'voidable,' is to give it one of its not unfrequent accepted significations." *Van Shaack v. Robbins*, 36 Iowa, 201.

See, also, *Southern, etc., Co. v. Barr* (Tex. Civ. App.) 148 S. W. 845; 12 R. C. L. 525; *Newman v. Garfield* (Vt.) 104 Atl. 882; *Oregon, etc., Co. v. Hyde*, 87 Or. 163, 169 Pac. 791; *Benson v. Johnson*, 85 Or. 677, 165 Pac. 1001, 167 Pac. 1014.

For the reasons given, it follows that the order and judgment appealed from must be affirmed.

It is so ordered.

SANDERS and DUCKER, JJ., concur.

SALSBERY et al. v. CONNOLLY.
(No. 2383.)

(Supreme Court of Nevada. Sept. 5, 1919.)

1. VENUE ~~§~~42 — CHANGE — STATUTE.

Rev. Laws, § 5015, relating to change of venue, is mandatory, and a proper application for a change must be granted.

2. VENUE ~~§~~61 — CHANGE — TIME.

Under Rev. Laws, § 5015, providing for change of venue upon application made before the time for answering has expired, a stipulation made by attorneys, pursuant to district court rule No. 27, extending defendants' time to answer, did not extend the time to apply for a change of venue.

3. VENUE ~~§~~61 — STIPULATION — CONSTRUCTION—"MOVE."

A stipulation extending defendants' time to appear, demur, answer, or "move" did not extend the time to move for a change of venue as a matter of right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Move.]

4. VENUE ~~§~~56—CHANGE—STATUTE.

Rev. Laws, § 5015, subd. 1, authorizing court on motion to change place of trial in certain cases, does not authorize court to change the venue at any time before trial, in a case where defendant has filed no seasonable written application.

Appeal from District Court, Esmeralda County; J. Emmett Walsh, Judge.

Action by John Connolly against John Salsberry and the Kawich Cattle Company. From an order denying change of venue, defendants appeal. Affirmed.

Hugh Henry Brown, of Tonopah, for appellants.

Hoyt, Gibbons, French & Henley, of Reno, for respondent.

DUCKER, J. This is an appeal from an order of the district court in and for the county of Esmeralda, denying appellants' demand and motion for a change of venue. The action is for a dissolution of partnership and an accounting, and the complaint was filed in the district court of said county on July 16, 1918. On the same day the complaint and summons was served on the defendants in the county, and on July 26, 1918, the following stipulation, signed by the respective attorneys, was filed:

"It is hereby stipulated, by and between the parties hereto, that the defendants shall have, and are hereby given, to and including Wednesday, July 31, 1918, in which to appear, demur, answer, or move in the above-entitled cause."

On July 31, 1918, the defendants served and filed a demand and a motion for a change of venue to Nye county, Nev., sup-

ported by an affidavit of the defendant John Salsberry. The change of venue was sought upon the ground that the action seeks the recovery of an interest in real property located entirely in Nye county, and that at the time the action was commenced both of the defendants resided in Nye county. The application was made under that part of the provisions of section 5015 of the Revised Laws of Nevada which reads as follows:

"If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of the parties, or by order of the court, as provided in this section. The court may, on motion, change the place of trial in the following cases:

"1. When the county designated in the complaint is not the proper county."

Section 5011 of the Revised Laws provides:

"Actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this act:

"1. For the recovery of real property, or an estate, or interest therein, or for the determination in any form of such right or interest, and for injuries to real property."

Section 5014 provides, in part:

"In all other cases [cases designated in preceding sections] the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action."

[1] When the facts are shown to exist as to the locus of the real estate and the purpose of the action, or the residence of the defendant as designated in either of the two preceding sections, and the demand for a change of venue to the proper county is seasonably and properly made in accordance with section 5015, the court in which the action is commenced is compelled to grant the application. The statute is peremptory. *Williams v. Keller*, 6 Nev. 144; *Clarke v. Lyon County*, 8 Nev. 181.

We need not examine that phase of the case wherein the contention lies that Nye county is the proper county for trial by reason of the situation of the real estate claimed to be involved in the action, for it appears by the affidavit of the defendant Salsberry, made in support of the demand and motion, which is uncontradicted, that the residence of the defendants was in that county when the action was commenced. This, under the statute, is sufficient ground for the application for a change of the place of trial.

In ruling on the application the trial court held that the time given defendants by stipulation to appear, demur, answer, or move did not extend their time to demand or move for a change of venue, and that the same was not filed within the statutory time fixed by said section 5015. The ruling and order of court are assigned as error by the appellant and he contends:

(1) That the time to file a demand for a change of venue was enlarged by the stipulation extending the time to answer.

(2) That the statute does not prescribe any fixed period for filing a motion for a change of venue, and it may be filed at any time, provided the moving party is not guilty of unreasonable delay.

(3) That if the statute does prescribe a fixed period for filing a motion for a change of venue, then the time to file the motion was enlarged by the stipulation extending the time to move.

[2] The statute, by the term "before the time for answering expires," fixed a definite time in which the defendants could make a demand for a change of the place of trial, and that time, by reason of the service of summons upon them in the county in which the action was commenced, was within 10 days from such service. No other construction can be placed upon the language used. The written stipulation, made by the attorneys under the authority of rule 27 of the district court rules, extended the time for defendants to answer the complaint, to and including July 31, 1918, but did not, in this regard, likewise change the time for them to make a demand for a change of venue.

Counsel for appellants contends that the statute fixing the time for a demand for a change and the stipulation must be read together, and, when we so read, the legal effect is to extend the time for making a demand as well as the time to answer, and relies largely for the force of this contention upon the rule adopted by a majority of the federal courts in cases of removal of causes pending in the state courts. The federal statute (Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435) provides that, whenever any party is entitled to remove any suit "from a state court to the Circuit Court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." That a stipulation extending the time to answer extends the time for removal is held by a majority of the federal courts, but there is ample and well-reasoned authority to the contrary in those courts. See *Velle v. Manufacturers' Accident Indemnity Co. of the*

United States (C. C.) 40 Fed. 545; Foster on Fed. Prac. (5th Ed.) p. 1817.

There is no diversity of opinion among the state courts which have had occasion to pass upon the effect of a stipulation extending time to answer. They hold that it does not extend the time to make a demand for a change of venue. In *Peterson v. Carlson*, 127 Minn. 324, 149 N. W. 536, the court, in passing on the question, said:

"It is contended that the stipulation extending the time for answering *ipso facto* extended also the time for making a demand for a change of venue. We cannot so hold. There is simply no connection between the making of an answer and the making of a demand for a change of venue, and a stipulation extending the time for one could not by any permissible construction extend the time for the other."

In the case of *Irwin v. Taubman*, 26 S. D. 450, 128 N. W. 617, the court, in construing a statute the same as the one under consideration in connection with a written stipulation for extension of time to answer, held that it did not extend the time within which the defendant could demand a change of venue. The court said:

"In our opinion the Legislature did not intend, by the use of the term 'before the time for answering expires,' to include such time as might be stipulated by the parties for answering. * * * To give the language of the statute the construction contended for by appellant leaves it too vague and uncertain as to the time when the application should be made. We cannot presume that this change in the phraseology, made in 1909, was not intentional and not for a purpose. The reason that may have suggested itself to the Legislature for this change, substituting the words 'before the time for answering expires' for the words 'before answer,' was to limit the time definitely, in order that no misunderstanding might arise as to when the motion for the change should be made, in analogy to the ruling in the federal courts."

In the Iowa case (*Donisthorpe v. Lutz*, 155 Iowa, 379, 136 N. W. 233) cited by appellants the statute fixing the time for a motion for a change of venue is entirely different from the Nevada statute, and prescribes that the defendant shall file his motion for a change before any pleading is filed by him.

To consider the statute and rule 27 of the district court with the stipulation made by its authority in *pari materia*, as appellant does, would cause the statute in effect to read "before the time for answering expires or within which it may be extended," a meaning inconsistent with its plain and positive terms. The rules adopted by the Supreme Court for its own government and the government of the district court have the force and effect of statutory provision, as declared by this court, but they cannot be "inconsistent with the Constitution or laws of the state." If found so, they must give

way to the Constitution or laws, as the case may be. The statute simply measures the time within which the demand may be made by a certain standard, for the purpose of requiring the application to be made at an early and definite period of the proceedings, to the ultimate end that the parties may, with reasonable certainty, be speedily informed of the place of trial. This salutary purpose ought not to be frustrated by any constrained construction of the statute or of rules and stipulations.

[3] It is urged that, if the words "to answer" in the stipulation had not the effect to extend the time for the demand, that part stipulating time to move did; but we do not so view it. If the term "move" can be construed to include more than ordinary motions to pleadings and the like, and to extend to motions for change of venue, generally regarded as dilatory motions, it certainly cannot be held to include a demand for a change of venue as a matter of right. We are of the opinion that the term was intended to include neither a motion nor demand for a change of venue, and that the defendants, failing to make a demand for a change within the time prescribed by statute, waived their right to do so.

We are asked by counsel for appellant to apply the principle of estoppel. If respondent's counsel had entered into a written stipulation in terms giving appellant an extension of time in which to make a demand for a change, this contention would receive consideration; but, as no such stipulation is before us, the question of estoppel is not involved.

[4] Can a motion for a change of venue, on the ground that the county in which the action is commenced is not the proper county, be made effectively at any time, and without making a seasonable written demand, if there has been no unreasonable delay? It seems that this question has been decided adversely to appellant's contention by this court in *Elam v. Griffin*, 19 Nev. 442, 14 Pac. 582. The court said:

"The defendants are residents of Eureka county, and are sued in an action of debt in the district court of Lincoln county. Upon their motion, the place of trial of the action was changed to the county of their residence, but no demand in writing therefor was made, as contemplated by section 3043, Gen. Stat. The object of the demand is to allow the plaintiff an opportunity of voluntarily correcting his error by amendment, stipulation, or otherwise, without the expense and delay of a motion. [Citation.] By omitting to make the demand, respondents waived the right to have the case heard in Eureka

county, and the action became triable in Lincoln county. [Citations.] Order reversed and cause remanded."

Section 3043 of the General Statutes, referred to in the opinion, has been re-enacted in identical language in section 5015 of the Revised Laws. No demand in writing was made in *Elam v. Griffin*, supra, but there can be no difference in effect between a failure to make the demand, and the failure to make it within the time prescribed by law, as in the present case.

It is obvious that the Legislature intended to require a written demand as a prerequisite to a motion for a change of venue, upon the ground that the action is not commenced in the proper county. We must construe the statute so as to give effect, if possible, to all of its parts; and to allow another construction would nullify the provision requiring a demand, and attribute to the Legislature the performance of an idle ceremony in enacting it.

The right of a defendant to have a cause tried in the county of his residence is an absolute right, which he may exercise within a given time. A defendant is at once informed by the service of summons whether the county in which the action is instituted is the county of his residence, and it is the policy of the law to require him to make his election within the definite time prescribed, and in default thereof the right to a change of venue on this ground is waived.

If he were permitted by motion, under subdivision 1 of the section, to exercise this statutory privilege at any time before the trial of the cause, a demand in writing would serve no purpose whatever. Subdivision 1 is designed only to enable a defendant to obtain an order of the court removing the action after a proper and seasonable demand has been made. *Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981.

The New York authorities cited by appellant, construing a statute somewhat similar, hold generally that "the demand may be dispensed with in a proper case; but we are not inclined to this view, both from our construction of the statute and the former decision of this court. In the case of *Barclay v. Supreme Lodge*, 34 Cal. App. 426, 167 Pac. 701, also cited, the application was granted solely upon the conveniences of witnesses. It is therefore not in point."

The order of the district court is affirmed.

COLEMAN, C. J., and SANDERS, J., concur.

UNION BANK v. MANDEVILLE.
(No. 2325.)

(Supreme Court of New Mexico. Aug. 12,
1919.)

(Syllabus by the Court.)

1. TRIAL \Leftrightarrow 382—MOTION FOR JUDGMENT—
ADMISSIONS.

A motion for judgment in a case tried to the court, made by defendant at the close of plaintiff's testimony, upon the ground that there was not sufficient evidence to "prove the allegations of the complaint," calls for a declaration of law, and admits all the facts proven by, and all reasonable inferences that could be drawn from, the evidence.

2. TRIAL \Leftrightarrow 382—MOTION FOR JUDGMENT—
NATURE—RULING.

A motion for judgment in a case tried to the court, made by defendant at the close of plaintiff's testimony, upon the ground that there was not sufficient evidence to "prove the allegations of the complaint," is in the nature of a demurrer to the evidence, and is governed by the same rules as a like motion made for an instructed verdict in a jury trial, and does not authorize the court to weigh the evidence, nor regard the case as submitted upon the facts proved by the plaintiff, and should be overruled, if, assuming the truth of all facts proven and all reasonable inferences that can be drawn from the evidence, it can be said the plaintiff made out a prima facie case.

Appeal from District Court, Doña Ana County; Medler, Judge.

Suit by the Union Bank against William B. Mandeville. Judgment for defendant on defendant's motion at close of plaintiff's testimony, and plaintiff appeals. Reversed and remanded, with instructions to grant a new trial.

This suit was brought by appellant against appellee (hereinafter referred to as plaintiff and defendant) in the district court of Doña Ana county to recover certain sums of money alleged to have been received by defendant for use and benefit of plaintiff and wrongfully appropriated to his own use while president of plaintiff bank. At the close of plaintiff's testimony a motion for a judgment for defendant, upon the ground that there was no evidence to establish plaintiff's claim, was sustained by the court, from which judgment the plaintiff appeals.

Wade & Taylor, of Las Cruces, for appellant.

Mark B. Thompson, of Las Cruces, for appellee.

BRICE, District Judge. It is agreed in the brief of each of the parties that there are but two questions to be reviewed here, to wit: (1) Did the plaintiff make out a prima facie

case? (2) Did the court err in refusing to require the defendant to testify, on the ground that his testimony would tend to incriminate him? From the view we take of the case it will be necessary to determine only the first issue named, viz.: Did the plaintiff make out a prima facie case?

That part of the motion made by the defendant at the close of plaintiff's testimony, and upon which the judgment of the court sustaining same was based, is as follows:

"Comes now the defendant, at the close of plaintiff's case, and moves for judgment for the defendant, upon the ground that no evidence sufficient to prove the allegations of the complaint has been adduced before the court."

Other grounds for judgment were embodied in the motion, but were not made the basis of the judgment sustaining the motion, nor are they contended for in this court. We therefore do not decide whether or not the commissions sued for can be recovered by the bank, should it appear that its contract with Hand was usurious or illegal.

[1] The motion of defendant at the close of the plaintiff's testimony called for a declaration of law, and not for findings of fact from the evidence introduced in the case. It was in the nature of a demurrer to the evidence, admitting all the facts that the evidence tends to prove and every reasonable inference that could be drawn therefrom. It is governed by the same rules as a motion made for an instructed verdict under like circumstances in a case tried to a jury.

Appellee states in his brief:

"Further than this, the court was not required to believe any witness, and, if he chose to disregard the testimony of any or all the witnesses, under the decisions of this court his verdict will be sustained. 'The verdict of a jury will not be disturbed on appeal, when it is supported by any substantial evidence.'"

Authorities are cited to support the proposition he quotes. We refer to the above erroneous views of counsel, which probably account for the error of the court. However, the case was not submitted upon the evidence of the plaintiff for determination on the facts. Had the motion been overruled, the defendant could still have introduced testimony in his own behalf. The motion, as we have stated, is governed by the same rules that apply to demurrers to the evidence.

"A motion for a declaration of law or for judgment is of the nature of a demurrer to the evidence, and calls only for a declaration of law." Vincent v. Means, 184 Mo. 842, 82 S. W. 96; First National Bank v. Bank, 152 Ill. 298, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247.

"In considering and deciding a demurrer to plaintiff's evidence in a case tried to the court, the same rule obtains as in cases tried to a jury. The court cannot weigh conflicting evidence, nor

regard the case as though submitted by the defendant on plaintiff's showing, but must consider as true all portions of the evidence which tend to prove the allegations of the petition." *Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. 1036; 38 Cyc. 1945.

[2] If there was substantial evidence to support a judgment for the plaintiff, the motion should not have been sustained; and we will review the evidence, assuming the truth of all facts proven and all reasonable inferences that can be drawn from the evidence, and determine whether or not, from such facts and inferences, the motion for judgment for the defendant could upon any proper theory have been sustained. Under these rules, we find the facts which could have been found to be as follows:

The defendant was president of the plaintiff bank during the time of the transactions upon which the suit is based. The plaintiff was a banking corporation, transacting its business at Las Cruces. The defendant loaned one Hand \$8,000 in behalf of the bank, under an agreement with Hand to pay defendant a commission of 2 per cent., or \$160, besides 10 per cent. interest on the loan. This money was taken out of a part of the proceeds of the loan, and placed to defendant's credit on the books of plaintiff, and used by defendant. There are other transactions of like character that it is unnecessary to go into. This money, under the above facts, would legitimately belong to the bank, and would be wrongfully appropriated to the use of the defendant while acting as its president and in control of its affairs.

"As a general rule it is a breach of good faith and loyalty to the principal for an agent, while the agency exists, so to deal with the subject-matter thereof, or with information acquired during the course of the agency, as to make a profit out of it himself in excess of his lawful compensation; and if he does so he may be held as a trustee, and may be held to account to his principal for all profits, advantages, rights, or privileges acquired by him in such dealings, whether in performance or in violation of his duties, and be required to transfer them to his principal upon being reimbursed for his expenditures for the same, unless the principal has consented to or ratified the transaction, knowing that the benefit or profit would accrue or had accrued to the agent, or unless with such knowledge he has allowed such agent to change his condition so that he cannot be put in statu quo. The application of this rule is not affected by the fact that the principal did not suffer any injury by reason of the agent's dealings, or that he in fact obtained better results; nor is it affected by the fact that there was a usage or custom to the contrary." 2 C. J. 697.

The above authority sets out the general principles, and the case of *Whitehead v.*

Lynn, 20 Colo. App. 55, 76 Pac. 1120, applies them to the case being considered, from which we quote:

"As to the second cause of action, if we accept the testimony of plaintiff—which we do for the purpose of this ruling—*Whitehead* was her agent, authorized to loan her money to the borrower, *Brooks*. Under this agency *Whitehead* loaned him \$700 of her money; he agreeing to pay as interest therefor 2 per cent. per annum for three years, payable in advance, and 8 per cent. per annum * * * to be evidenced by the note. He gave the note as agreed, and paid the 2 per cent. for three years, amounting to \$42, to *Whitehead*, who retained it. *Whitehead* never advised his principal that he had collected such interest. *Whitehead* was the agent for the plaintiff, according to her testimony, in making this loan, and any interest that the borrower agreed to pay for the loan belonged to her. *Whitehead* was not at liberty to make a profit for himself in this transaction by taking a part of the interest."

See, also, *Cartwright v. Trust Co.*, 23 N. M. 127 et seq., 167 Pac. 436.

The fact that defendant called the 2 per cent. he retained in this case "commissions" would not affect the right of the plaintiff to recover.

The cause should be reversed and remanded, with instructions to grant a new trial; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

HOLTON v. JANES. (No. 2162.)

(Supreme Court of New Mexico. Aug. 6, 1919.)

(Syllabus by the Court.)

1. DAMAGES §206(1) — PHYSICAL EXAMINATION—RULING.

In a personal injury case, where plaintiff had voluntarily exhibited an injury to his head to the jury for inspection, and the defendant moved the court to compel plaintiff to submit to a physical examination of his head by physicians named by defendant, *held*, it was error to deny defendant's request.

(Additional Syllabus by Editorial Staff.)

2. EVIDENCE §9 — JUDICIAL NOTICE — IMPAIRMENT OF VISION—EXPERT EXAMINATION.

It is a matter of common knowledge, of which courts will take notice, that the question of the impairment of vision is capable of exact demonstration by expert examination.

Appeal from District Court, Curry County; McClure, Judge.

Action by R. T. Holton against John N. Janes. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to award defendant a new trial.

Patton & Bratton, of Clovis, for appellant.
Rowells & Reese, of Clovis, for appellee.

MERRITT C. MECHEM, District Judge. This is an action to recover damages for personal injuries. The only error assigned, which will be considered, is that which challenges the correctness of the refusal of the trial judge to require the appellee to submit to a physical examination.

The appellee claimed to have received numerous injuries to different parts of his body, and among others to his head. As to the wounds in his head he alleged in his complaint:

"That the wounds, bruises, and fractures inflicted upon plaintiff's head have greatly damaged, injured, and weakened the eyesight of plaintiff, thereby making it difficult for plaintiff to see and discern objects at any considerable distance; that all of said injuries, bruises and wounds have caused and are still causing the plaintiff intense pain, and bodily and mental suffering, and permanently injuring plaintiff."

On direct examination the appellee testified:

"Q. How did this bruise on your eye or head affect you? A. This side of my head (pointing to left side of head) and eye. I can't see out of my eye half as good after it was hurt."

After asking him about his teeth, he was further questioned about his head as follows:

"Q. You say the accident knocked a hole in your head? A. Yes, sir.

"Q. What part of your head? A. Right here (indicating left side of head).

"Q. Is there any indication there? A. Yes, sir.

"Q. What part of your head, let the jury see it? (Plaintiff exhibits head to jury.)"

On cross-examination appellee testified:

"Q. You say your eyesight has been affected from the wound in your head—weak or affected? A. My left eye has been affected."

After appellee had rested his case, appellant moved the court to compel the appellee to submit to a physical examination. The request was limited to an examination of the parts of his body he had exhibited to the jury for examination. Appellant also suggested the names of three licensed physicians, who he said were immediately accessible and would make the examination without delaying the trial. This action the court overruled, and defendant excepted. No reason was given by the court in support of the ruling.

An examination of the cases will show that the courts have uniformly held that, where a plaintiff in a personal injury suit voluntarily exhibits the injured part of his body to the jury for inspection, the portion of his body so exhibited becomes an exhibit in the case, like any other object or thing introduced in evidence, and the opposite

party has the right to make such inspection of it as will enable him to explain, criticize, or impeach its value as evidence, and to that end have it examined by experts. Winner v. Lathrop, 67 Hun, 511, 22 N. Y. Supp. 516; Haynes v. Town of Trenton, 123 Mo. 326, 27 S. W. 622; Chicago, Rock Island & Pac. Ry. Co. v. Langston, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 611; Houston & Texas Central R. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 966, 2 L. R. A. (N. S.) 386; Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; Booth v. Andrus, 91 Neb. 810, 137 N. W. 884.

In Chicago & N. W. Ry. Co. v. Kendall, supra (Circuit Court of Appeals, Eighth Circuit), the court said:

"In the present case we are not dealing with an application for a surgical examination in advance of the trial. Here the plaintiff at the trial voluntarily exhibited his knee in open court for inspection. Having done this, it was beyond his power to arrest the investigation. The defendant and the court were entitled to employ any agency in its examination which would aid in the determination of the issue on trial. It is universally held that, where an inanimate object is produced upon the trial of a case, it is subject to any legitimate examination and test which will elucidate the matter in dispute. It may be submitted, for example, to chemical treatment, or to examination by the microscope. Simply looking at the plaintiff's knee with the eye of a layman furnished little aid in determining its condition. He himself maintained that there were no external evidences of injury. Whether there were hidden elements could only be discerned by the skill of a surgeon, and the defendant and the court were as much entitled to turn the eye of a surgeon upon the plaintiff's knee as they would have been to look at a blood stain through a glass. Having exhibited his knee to the jury, it became a part of the evidence in the case, and the mere accident that the thing exhibited was part of a human body could only qualify, and not defeat, the right of complete investigation. Chicago, Rock Island & Pac. Ry. Co. v. Langston, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 611; Haynes v. Trenton, 123 Mo. 326, 27 S. W. 622."

In each of the cases above cited, whether, as in this case, the trial judge assigned no reason for his refusal, or placed it on a lack of power, the refusal to compel the plaintiff to submit to a physical examination under circumstances analogous to those in this case has been held reversible error.

In the cases of Chicago, Rock Island & Pac. Ry. Co. v. Langston, supra, Houston & Texas Central R. Co. v. Anglin, supra, Chicago & N. W. Co. v. Kendall, supra, and Booth v. Andrus, supra, the defendants requested that the examination be made by experts of their own selection, and no criticism is made of the procedure in those cases in this regard. In the case of Booth v. Andrus, supra, the point was specifically passed

on, and the right of defendant to experts of his own selection affirmed. There seems to be no valid reason why, if a defendant may employ experts in other cases and have the benefit of their special knowledge in presenting his case, he may not do the same thing in personal injury cases. In that respect the accepted procedure differs from that in those cases where a physical examination is requested before the trial.

[2] It is a matter of common knowledge, of which courts will take notice, that the question of the impairment of vision is capable of exact demonstration by expert examination, and in this case when the plaintiff put his head in evidence and permitted the jury to examine it, unless the eye which he complained of as being injured was put out, the jury could in no manner determine the extent of the injury to it if any, but with the aid of experts the matter was capable of exact determination.

For the reasons stated, the cause is reversed and remanded, with instructions to award appellant a new trial; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

STATE v. FOSTER. (No. 2299.)

(Supreme Court of New Mexico. Aug. 4, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §519(4) — INVOLUNTARY CONFESSION—EVIDENCE.

The evidence in this case reviewed, and held, that the confession made by appellant was involuntary.

2. CRIMINAL LAW §519(4) — CONFESSION — "PERSONS IN AUTHORITY."

A cattle inspector and the owner of the cattle appellant was accused of stealing held to be "persons in authority," within the rule excluding a confession of a defendant in a criminal case, where the confession is induced by promises of immunity made by persons in authority.

Appeal from District Court, Chaves County; McClure, Judge.

Otis Foster was convicted of larceny of cattle, and he appeals. Reversed and remanded, with instructions to grant a new trial.

L. O. Fullen, of Roswell, for appellant.
Carl H. Gilbert, Sp. Asst. Atty. Gen., for the State.

MERRITT C. MECHEM, District Judge.
The appellant appeals from a conviction of

larceny of cattle. His confession of the crime to Lee J. Richards, a cattle and hide inspector, and to W. A. Hamilton, the owner of the stolen cattle, was introduced by the state over appellant's objection, that the same was involuntary, having been induced by promises of immunity made by both Richards and Hamilton. The court was of the opinion that there was a conflict in the evidence whether the confession was voluntary or involuntary, and let it go to the jury, under an instruction that if they believed that the confession was voluntary they could consider it in arriving at their verdict, but if they believed that it was involuntary they should not so consider it. This action of the court is assigned as error.

[1] The undisputed facts in the case are: That the appellant, learning that he was under suspicion, went into hiding. That his mother went to a neighbor, H. C. Hammond, and asked him to see what could be done in appellant's behalf. Hammond called on Richards and asked him to see Hamilton, and see if Hamilton would be inclined to deal leniently with the appellant, if the appellant would come in and tell all he knew about the case. Richards told Hammond that he (Richards) would see Hamilton, and if Hamilton would help the appellant, Richards would bring Hamilton to Hammond's house at a named hour, and that if they came Hammond could inform appellant that Hamilton would help the appellant, if he would come to Hammond's house and meet them, and tell them all he knew about the case. Hammond so informed the appellant, and when, according to the arrangement, Richards and Hamilton came to his house, Hammond sent for the appellant, who came in, met Richards and Hamilton, and confessed. There is a conflict in the testimony whether or not, at the time appellant confessed and immediately prior thereto, Richards and Hamilton promised him immunity. Richards denies that they did. The appellant testified that they made him the promises immediately before he confessed. Hamilton did not appear as a witness in the case.

But we believe the court misapprehended the conclusive effect of the facts leading up to the making of the confession, for it was established by the testimony of all the witnesses, including Hammond, that the confession was brought about by Richards telling Hammond that he (Richards) would see how Hamilton felt about the matter, and, if Hamilton would not push the case, Richards would bring Hamilton to Hammond's house for a meeting with appellant, and that Hammond could tell appellant that, if they came, appellant could understand that Hamilton would not prosecute him. Richards, just before leaving the stand, testified as follows:

"Q. And do you know you arranged a meeting? A. Yes, sir.

"Q. And you conveyed the impression, by what you said and what you did, to Hammond, that if the boy did come up there with Hammond that he could know that it was all right and that Hamilton was not going to prosecute him. Didn't you? A. Well that was—appeared to be kinder the understanding.

"Q. Well, appeared to be; you was there, and your old brain works. You know what you did; that was what happened, wasn't it? A. Well, we went over there two or three times.

"Q. Well, just answer the question, Mr. Richards; you know that the arrangement was made, and that was the understanding that when the boy showed up there and told about this thing that Hamilton, the owner of these cattle, and you, as far as you could, was going to help the boy; now, wasn't that the arrangement? A. Well, yes, in a way it was.

"Q. Well, in a way it was; wasn't the way, not in way; wasn't that the arrangement? A. That was the agreement between us and Hammond; we made no agreement with the boy, and had no conversation with the boy.

"Q. But you did make an agreement with Hammond, and Hammond had talked with you for the boy, didn't you? A. Yes, sir."

At another point in his examination Richards testified:

"Q. Were you requested by Hammond to get anything in the nature of a promise on the part of Hamilton—as to what he would do, any definite or specific promise as to what he would do, if the boy would talk and tell what he knew? A. Well, that was the nature of it; it was to get Hamilton and see Hamilton's feelings in the case, and I don't suppose that, if Hamilton had said, 'No, I am going to prosecute the boy to the full limit, every way, don't matter whether he talks or don't talk,' I don't suppose there ever would have been any meeting made between us and the boy; but, as I said before, Hamilton felt like there might be somebody else interested in it, and the boy said he wanted to tell the facts of the case, but he did not say what the facts were, or did not lead us to believe what the facts were in any way."

There was no necessity of Richards repeating to appellant the promises, theretofore conveyed to appellant by Hammond, to make the inducement complete. The promises communicated to appellant by Hammond were confirmed by both Richards and Hamilton, by their going to meet the appellant, pursuant to the arrangement they made with Hammond, and of which the appellant had notice. The appellant's confession was involuntary, and the court erred in admitting it.

[2] Appellee insists that, even though the confession was involuntary, the promises which induced it were not made by persons in authority. But the question must not be whether the persons making the promises were persons in authority—that is, capable of performing their assurances of immunity,

but were they in such a situation that the person confessing might reasonably consider them as persons able to afford him aid? 1 Bishop's New Criminal Procedure, 1234. That the appellant in this case had abundant reason to believe that the owner of the cattle and a cattle inspector had it in their power to do him very considerable favors, in the situation he was in, is not to be seriously questioned.

There is no more convincing evidence to the ordinary man than a confession of guilt, and where a confession is admitted, under an instruction to the jury to determine whether it is voluntary or involuntary, and to consider it in the former case, or in the latter case to reject it, the probabilities are, unless the confession was extorted under circumstances calculated to arouse sympathy for the defendant, that the average jury will consume but little time in determining the question of whether the confession was voluntary or involuntary, but will in the great majority of cases say the prisoner has confessed, and therefore is guilty beyond a reasonable doubt.

The judgment of the lower court is reversed, and the cause is remanded, with instructions to grant appellant a new trial; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

SPRINGER v. WASSON. (No. 2308.)

(Supreme Court of New Mexico. Aug. 11, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §—714(5)—STIPULATED FACTS AT TRIAL—REVIEW.

A statement of a material fact, appearing in the briefs of both parties and admitted to have been of stipulation in the trial of the case in the district court, will be treated as a stipulated fact in this court, although not appearing in the transcript.

2. EXECUTION §—302—REDEMPTION—VALIDITY OF SALE—ESTOPPEL.

The redemption of real estate from an execution sale by a judgment debtor estops him from questioning the validity of such sale.

3. EXECUTION §—320—TITLE OF PURCHASER AT SALE—PRIMA FACIE PROOF.

Title in the purchaser of real estate purchased at an execution sale as against the execution debtor is prima facie proven by the introduction in evidence of a valid judgment, an execution issued thereon and return showing a sale, and the sheriff's deed duly executed.

4. RECORDS ⇐17(2, 3, 9) — RESTORATION OF LOST RECORDS—EVIDENTIARY VALUE.

The district court has, independently of the statute, the power to restore its lost records either before or after judgment; and such restored records will have the same force, effect, and evidentiary value as the originals, if existing.

5. RECORDS ⇐17(9)—RESTORATION OF LOST RECORDS—COLLATERAL ATTACK—PRESUMPTION.

In a collateral proceeding, an order and judgment of the district court restoring its lost records cannot be successfully attacked upon the ground that a party to such suit had not been served with notice of such motion and given an opportunity to contest the same, in the absence of evidence of such facts; but the presumption will be indulged, when so attacked, that the order and judgment were entered with due regard to the proper practice and procedure.

6. APPEAL AND ERROR ⇐1054(1)—REGULARITY OF SALE—AFFIDAVITS OF OFFICERS—HARMLESS ERROR.

It is error for the court to admit in evidence affidavits of officers and others tending to prove the regularity of a sale under execution; but, no evidence of irregularities appearing in the record, and there being sufficient testimony exclusive of such affidavits with which to support the court's findings that such sale was valid, such error becomes harmless.

7. APPEAL AND ERROR ⇐171(3)—PLEADING ⇐433(6)—LITIGATION OF FACT NOT ALLEGED—AIDED BY JUDGMENT.

Where a material fact is omitted from those alleged in a complaint, but is fully litigated without objection as if said fact had been put in issue by the pleadings, it is the duty of the trial court, and this court on appeal, to treat the complaint as having been properly amended in aid of the judgment.

8. FORCIBLE ENTRY AND DETAINER ⇐29(4)—EVIDENCE—DETENTION OF PROPERTY.

Held, in this case, there is substantial evidence to support the findings of the court: (1) That appellant unlawfully detained the real property involved; (2) that a sufficient notice to quit was served three days prior to suit; (3) that appellee should recover the damages adjudged to him.

9. APPEAL AND ERROR ⇐1010(1)—FINDINGS OF TRIAL COURT—REVIEW.

The findings of fact made by the trial court will not be disturbed on appeal, where he heard the witnesses testify, if such findings were supported by substantial evidence.

Appeal from District Court, Quay County; Leib, Judge.

Action of forcible entry and detainer by W. R. Springer against J. R. Wasson. Judgment for plaintiff, and defendant appeals. Affirmed.

This is the second appeal of this case. Springer v. Wasson, 28 N. M. 277, 167 Pac.

712. Plaintiff (appellee herein) recovered judgment against the defendant (appellant herein) in the justice of peace court for precinct No. 1, Quay county, for the possession of two lots in the city of Tucumcari, on which a garage was situated, and for damages, and likewise in the district court on appeal upon trial de novo. This court reversed the judgment of the district court and ordered a new trial. Upon a second trial in the district court, judgment for possession and damages was again entered for the plaintiff, from which defendant (appellant) prosecutes this appeal.

H. H. McElroy, of Alamogordo, for appellant.

R. A. Prentice, of Tucumcari, for appellee.

BRICE, District Judge. This action was begun in precinct No. 1, Quay county, by filing with the justice of the peace thereof on August 3, 1915, a written complaint containing the following allegations:

"On this 3d day of August, A. D., 1915, personally appeared Wilson R. Springer before the court of Samuel McElroy, justice of the peace in and for precinct No. 1, of the county of Quay, in the state of New Mexico, and after being duly sworn in conformity with law states: That James R. Wasson, of the city of Tucumcari, Quay county, New Mexico, by force, intimidation, fraud, and stealth, has entered into the lands and tenements of Wilson R. Springer, to wit, lots one (1) and two (2) of block sixteen (16) of the original townsites of the town (now city) of Tucumcari, Quay county, New Mexico, and continues in possession of the said premises after a sale thereof by execution, not claiming title derived from the purchaser at the sale, and that this happened in the city of Tucumcari, Quay county, New Mexico, on the day and date last above mentioned.

"W. R. Springer."

Plaintiff claimed title to two lots in the city of Tucumcari by virtue of a sheriff's deed based upon an execution sale to enforce payment of a judgment in favor of the plaintiff and against the defendant (appellant and appellee respectively herein) duly rendered by the district court of Quay county in cause No. 1456, on the docket of said court, wherein appellee herein was plaintiff and appellant was defendant.

There are 42 assignments of error filed in this court. Many issues are raised by 2 or more assignments, and many assignments are plainly without merit. We will consider only such alleged errors as are necessary to the determination of the case, and all other assignments have been reviewed and found to be without merit.

[1] 1. Assignments of error Nos. 1 to 15, inclusive, 30, 35, 36, 38, 39, 40, and 41 are based upon alleged errors of the trial court in the admission of testimony, both oral and documentary, tending to prove appellee's

title by virtue of the sale under execution hereinbefore referred to and other alleged errors by the court in sustaining appellee's title to said lots. These assignments of error will first be considered together.

1. It is stated by appellee in his brief:

"The court in this case found that appellee was entitled to damages in the sum of \$60 per month for the period from July 27, 1915, to April 12, 1916, amounting in the aggregate to \$492. The reason that the 12th day of April, 1916, was specified was that on that day the appellant redeemed the property from appellee from under the sheriff's sale theretofore made of the property, and it was agreed that no claim would be made for rent after the period of redemption."

There is no evidence of the above important facts in the record, but appellant in his reply brief, presumably referring to the above, uses the following language:

"As a matter of fact, a stipulation is filed showing the period for which rent can be claimed, and of course, when Mr. Wasson later on redeemed the property from the execution sale, he had the right to the possession and rents."

It will be taken as a fact that a stipulation was filed as stated, and that appellant redeemed the property from the sale under execution on the 12th day of April, 1915.

"Statements of fact made by counsel in a brief, if undisputed, can be considered by us the same as an admission made on the trial of the case." *Territory v. Board of County Commissioners*, 13 N. M. 89, 79 Pac. 709.

[2] 2. The sale under execution was made on the 27th day of July, 1915, and the property bought in by appellee, and redeemed from such sale by appellant on the 12th day of April, 1916. Whether or not the appellant, by redeeming the property from the execution sale, was estopped from questioning the validity of such sale, was not before the court in the former appeal, nor is it raised herein, but may properly be determined in deciding the merits of the said assignments of error. The act of redeeming the property from execution sale by the appellant estopped him from collaterally questioning the validity of such sale.

"The sheriff's sale under which Shaw claims title was made May 18, 1878. On the 14th day of February, 1879, plaintiff deposited with the clerk of the court an amount sufficient to redeem the land from the sale. It will be remembered that the deed was made up on the day of sale, and the right of redemption denied on the ground that defendant Henckley had appealed the case wherein judgment was rendered to the Supreme Court. Plaintiff, having made the deposit of money to redeem the land, cannot set up an equity under the original contract for the acquisition of town property to defeat the sale. By her effort to redeem from the sale she admits that it was valid, and that the land was subject to the judgment against Henck-

ley. We are therefore relieved from the duty of considering her claim that the land was not subject to sale upon the judgment." *Thayer v. Coldren*, 57 Iowa, 112, 10 N. W. 301.

In the case of *Payment v. Church*, 38 Mich. 777, it appears an execution was issued on an irregular judgment, and levied on certain property. The execution debtor, thinking the sale would be valid, requested the substitution of other property, which was sold in lieu of the property levied on. Upon replevin to secure possession of the property so sold, the court said:

"The plaintiff knew that a judgment had been rendered against him and others, and that the property was being sold to satisfy the judgment. He apparently took no steps to ascertain whether the proceedings had been regular and a valid judgment rendered or not. If irregular, he * * * could have waived the irregularity, and this he might do by action as well as by words, and the effect upon the defendants would be precisely the same whether he knew of the defective proceedings previous to the sale or not. We think the court did not err in rejecting this testimony."

"Where a sheriff's sale is void" by reason of failure to appoint appraisers, "the judgment debtor may, if he chooses, waive the invalidity of the sale, treat the sale as valid, and make it valid by suing the sheriff" on his bond. *De Jarnette v. Verner*, 40 Kan. 230, 19 Pac. 669.

"The rule is well recognized that the formalities required to be observed in the conduct of execution sales are designed for the protection and benefit of those interested in the property and its proceeds, and may be waived by their common consent; and the parties interested also by their acts may estop themselves from attacking the validity of the sale." 17 Cyc. 1269; *Richey v. Merritt*, 108 Ind. 347, 9 N. E. 368.

[3] 3. But, irrespective of estoppel, the result must have been the same. The only evidence necessary to establish title under an execution sale is a valid judgment, execution and return showing levy and sale, and the sheriff's deed. *Newell on Ejectment*, §§ 104 and 110; *Springer v. Wasson*, 23 N. M. 277, 167 Pac. 712; *Freeman on Executions*, § 334; *Los Angeles County Bank v. Raynor*, 61 Cal. 145.

[4] 4. The deed and judgment are not questioned, but it is urged that the copy of execution and return substituted under order of court for the lost original in said cause No. 1456 was erroneously admitted in evidence for a number of reasons assigned, none of which are well taken. The district court had, independently of the statute, the power to restore or supply its lost records either before or after judgment, and such restored records have the same force, effect, and evidentiary value as had the originals. 1 *Freeman on Executions*, § 56A; *Freeman on Judgments*, § 89; *Loomis v. McKenzie*, 43 Iowa, 416; *Buckman v. Whitney*, 28 Cal. 556; 34 Cyc. 606.

[6] 5. There is no evidence that such order of substitution was made without notice to appellant as urged. In a collateral proceeding, where no evidence of irregularity appears, the presumption will be indulged that the order and judgment were entered according to the proper rules of practice and procedure.

[6] 6. The court permitted to be introduced, over the objection of the appellant, restored copies of the appraisers' report and published notice of sale. Aside from the power of the court to restore its lost records, so that they will have the same evidentiary value as the originals, the judgment, execution and return, and sheriff's deed were prima facie evidence at least that all ministerial proceedings relative to the sale of the property were regular; and there is no proof to the contrary. *Los Angeles County Bank v. Raynor*, supra; 17 Cyc. 1243; 3 Freeman on Executions, §§ 362, 334.

"Errors and irregularities must be corrected by a direct proceeding. If not so corrected, they cannot be made available by a collateral attack. Hence an execution sale cannot be collaterally avoided because * * * of irregularities or deficiencies in the advertisement, * * * nor for defects in the levy. * * * If the sheriff's return fails to state whether or not the land was appraised before it was sold, the presumption, in the absence of any other evidence on the subject, must be indulged that the sheriff did his duty in regard to such appraisalment." 3 Freeman on Executions, § 339.

If there was error in the admission of these documents in evidence, which we do not decide, it was harmless, as appellee's title was sufficiently proved without them, and there was no proof on part of appellant of any irregularity in the proceedings to sell the property.

7. The admission in evidence of certain affidavits tending to prove the regularity of the sale was assigned as error, and such is probably true; but the presumption that the sale was regularly made in the absence of proof to the contrary, renders such error harmless. Appellee's title was proved completely without reference to such affidavits.

[7] 8. It is contended that the complaint did not contain allegations of fact sufficient to constitute a cause of action. If this were true, no advantage was taken of it in either the justice of peace court or district court in any of the trials. Appellant having gone to trial on the complaint, and all questions necessary to a complete determination of this cause having been litigated, and upon such issues evidence having been introduced by both parties, and no objection to evidence

made on account of a defective complaint, the district court and this court will treat the complaint as sufficiently amended to support the judgment. *Canavan v. Canavan*, 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064; *Bank of Commerce v. Telegraph Co.*, 19 N. M. 222, 142 Pac. 156, L. R. A. 1915A, 120; *Dailey v. Fitzgerald*, 17 N. M. 187, 125 Pac. 625, Ann. Cas. 1914D, 1183; *Telegraph Co. v. Longwill*, 5 N. M. 316, 21 Pac. 339.

[8, 9] 9. It is contended that there was not substantial evidence to prove: (1) A forcible entry; (2) an unlawful detainer; (3) that a sufficient notice to quit was served on defendant at least three days before suit was filed; (4) that defendant had possession of said property at any time between the 27th day of July, the date of sale, and the 3d day of August, the date the suit was filed; (5) the damages recovered.

We find upon examination of the record that there is substantial testimony to support the findings and judgment of the court. It was unnecessary to prove a forcible entry; proof of an unlawful detainer was sufficient. There was evidence to the effect that during the time mentioned the doors were all locked or hooked, and possession could not have been obtained without the use of force; that defendant claimed to be the owner of the property; that the building was being used by him for storage purposes; that a few days later he rented it, and collected the rents for some months. From these facts the court might well infer he was in possession and detaining the property unlawfully, if he was served with the proper notice to quit and failed to surrender the premises. *Freeman on Executions*, § 350. The remaining in possession after execution sale gave the right of action under the statute. Code 1915, § 2384. The evidence is conflicting as to whether or not a sufficient notice was served; but there is substantial evidence, though not very satisfactory, that the notice was served July 30th, that it was signed by the plaintiff, and that it complied with the statute as to contents. The admissions in the brief quoted herein, together with other evidence, is sufficient basis for the damages. There was proof that the rental value was \$30 per month, and testimony from which the court could infer that defendant was in possession from July 29, 1915, to April 12, 1916, the date it was redeemed, and double rental value was allowed from this time.

Finding no substantial error in the record, the judgment of the district court should be affirmed; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

BLACKLOCK v. FOX. (No. 2251.)

(Supreme Court of New Mexico. Aug. 19, 1919.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §209(1) — EVIDENCE TO SUPPORT FINDING—REVIEW.**

The Supreme Court on appeal will not determine whether or not there is evidence sufficient to support a material finding of the court or its judgment, unless such question is submitted to, and has been decided by, the trial court, by some proper proceeding calling for such decision of the question.

2. APPEAL AND ERROR §169—EQUITY CASES —EXCEPTIONS—STATUTE.

The provision that "no exception shall be required to be reserved in the trial of equity cases or cases before the court in which a jury has been waived," contained in section 37 of chapter 43, Session Laws of 1917, dispenses with formal exceptions to rulings of the court in the progress of the trial, but does not authorize the determination by the Supreme Court of an issue not raised and passed upon in the district court.

3. APPEAL AND ERROR §233(1)—OBJECTIONS IN LOWER COURT — EVIDENCE TO SUPPORT FINDING—DEMURRER.

The question of whether there is material evidence to support a finding may be raised in any appropriate manner, such, for example, as by a demurrer to the evidence, or by a motion for nonsuit or dismissal, or by an objection interposed to the objectionable finding on the ground that there is no substantial evidence to support it or by an exception to the finding on such ground. The essential thing is that the attention of the trial court should be called to the fact that it is committing error in making the finding, pointing out wherein the finding is erroneous.

Error to District Court, San Juan County; Holloman, Judge.

Action by C. W. Fox against Foster Blacklock. Judgment for plaintiff, and defendant brings error. **Affirmed.**

E. R. Wright, of Santa Fé, for plaintiff in error.

Frank A. Burdick, of Farmington, for defendant in error.

BRICE, District Judge. The plaintiff in error states in his brief:

"The contention of the plaintiff in error resolves itself into the following:

"(1) There is no competent evidence to support the court's finding that the plaintiff in error, Blacklock, was ever a copartner.

"(2) If the defendant and plaintiff in error, Blacklock, ever was a copartner, he did not become a member of the copartnership until December, 1912.

"(3) Not becoming a partner until December, there was an entire failure of evidence to show

that the plaintiff in error, Blacklock, ever assumed or agreed to pay any part of the indebtedness of the copartnership prior to December, 1912."

[1] It does not appear from the record that any objection was made to the findings of the court in the particulars stated, nor to the judgment of the court entered in this case. It has been held by this court that:

"At the time of the passing of the decree of divorce, the sole objection thereto on the part of the defendant was the alleged want of sufficient notice, and that the same was partial and incomplete, purporting to dispose of only one of the issues in the case. No objection to the decree, as such, was interposed, no exception to the findings or conclusions was suggested, nor were other findings or conclusions proposed. The general exception appearing in the decree as follows: 'To which decree, judgment, and orders defendant then and there duly excepts'—conveys, under the circumstances in which it was made, no intimation that the decree was erroneous, or, if so, upon what ground." *Fullen v. Fullen*, 21 N. M. 224, 153 Pac. 297.

In the case of *Baca v. Board of Commissioners*, 22 N. M. 502, 165 Pac. 213, this court said:

"It is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the court below.' It is therefore clearly apparent that the exceptions of November 19th were interposed at a time after the judgment of November 4th had become final, and after the jurisdiction of the court to change the same had passed, except as to irregularities under statutory authority. In arriving at this conclusion we are not unmindful of the fact that appellant contends that, this being a case tried before the court without the intervention of a jury, no exceptions were necessary. In this counsel rely upon the provisions of section 4214 of the Code of 1915, which section has been construed by the territorial Supreme Court in the case of *Neher v. Armijo*, 11 N. M. 67, 66 Pac. 517, and in that case it was pointed out that the section in question, while dispensing with the necessity for a formal exception, does not dispense with the necessity of an objection in order to preserve the error complained of. See, also, *Cunningham v. Springer*, 13 N. M. 250, 32 Pac. 232."

The general rule is stated in 3 C. J. 836, as follows:

"The general rule is that a question of a sufficiency of evidence to authorize submission of the case or the defense to the jury, or to support the verdict, findings, or judgment, must be raised by proper objection in the trial court, and will not be considered if raised for the first time on appeal; and in many jurisdictions, although not in all, it is held that the question of law whether there is any evidence tending to support the verdict, findings, or judgment cannot be raised for the first time on appeal."

[2] The question as to whether there is sufficient evidence to support a material find-

ing may be raised in any appropriate manner, such, for example, as by a demurrer to the evidence, or by a motion for a nonsuit or dismissal, or by an objection interposed to the objectionable finding on the ground that there is no evidence to support it, or by an exception to the finding on such ground. The essential thing is that the attention of the trial court should be called to the fact that it is committing error in making the finding, pointing out wherein the finding is erroneous.

[3] We are not unmindful of the fact that section 37 of chapter 43, Session Laws of 1917, provides that:

"No exception shall be required to be reserved in the court of equity cases or cases before the court in which a jury has been waived."

This is but a re-enactment of section 4214, Code 1915, which has been often construed by this court. This provision only dispenses with the formal exception to a ruling of the court, and does not authorize the determination by the Supreme Court of an issue not raised and passed upon in the district court.

In this case no objection was made to the findings or judgment of the court, nor were any proceedings taken to secure a ruling of the district court as to the sufficiency of the evidence to support the findings or judgment. It follows that no question is presented to this court of which it can take cognizance, and the judgment must be affirmed; and

It is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

BISSETTI v. ROBERTS, Sheriff, et al.
(No. 2277.)

(Supreme Court of New Mexico. Aug. 4, 1919.)

(Syllabus by the Court.)

PLEADING ~~§~~306—STRIKING PARTS OF COMPLAINT—FAILURE TO AMEND—OPERATION AND EFFECT.

Under section 4136, Code 1915, providing, "When a complaint, answer or reply shall be adjudged insufficient in whole or in part upon demurrer, or the whole or some part thereof stricken out, on motion the proper party may file a further like pleading within such time as the court shall direct, and in default thereof, the court shall proceed with the cause in the same manner as if no such original pleading had been filed," where parts of a complaint are stricken out, but enough remains to constitute a cause of action, plaintiff need not amend to prevent a default, but may except to the ruling striking out such parts, go to trial on what is left, and on appeal have a review of the ruling striking out such parts.

Appeal from District Court, McKinley County; Reynolds, Judge.

Action by Claude Bissetti against R. L. Roberts, Sheriff of McKinley County, and another. Judgment for defendants, dismissing the complaint, and plaintiff appeals. Reversed and remanded.

A. T. Hannett and J. W. Chapman, both of Gallup, for appellant.

Wilson & Walton, of Silver City, and H. O. Denny, of Gallup, for appellees.

MERRITT C. MECHEM, District Judge. Action for false imprisonment. The trial court sustained a motion to strike parts of the complaint and granted plaintiff 10 days in which to amend. The plaintiff excepted to the ruling of the court in striking parts of the complaint and to the action of the court in requiring him to file an amended complaint, and insisted, as the complaint, omitting the parts stricken, stated a cause of action, upon his right to have the defendant answer it and proceed to trial, and for these reasons refused to file an amended complaint. He was adjudged in default for failing to file an amended complaint within the time so fixed by the court, and his complaint was dismissed.

No point is made that the complaint failed to state a good cause of action, omitting the parts stricken by the court's order. The sole question presented for our determination here is: Can the court, after striking out a part of a complaint, require the plaintiff to file an amended complaint, and, in case of the plaintiff's refusal so to do, dismiss the action, although, omitting the stricken part, the complaint states a cause of action?

Our procedure in such case is governed by section 4136, Codification of 1915, which reads as follows:

"When a complaint, answer or reply shall be adjudged insufficient in whole or in part upon demurrer, or the whole or some part thereof stricken out, on motion the proper party may file a further like pleading within such time as the court shall direct, and in default thereof, the court shall proceed with the cause in the same manner as if no such original pleading had been filed."

The question is raised in this jurisdiction for the first time. The section above quoted is taken from Missouri (section 2066, Rev. Stat. 1889; Bremen Mining Co. v. Bremen, 13 N. M. 111, 79 Pac. 806), and the Supreme Court of that state in *Munford v. Keet*, 154 Mo. 36, 55 S. W. 271, in an exhaustive opinion, has construed and applied this statute. The question arose in that case in this wise: The defendant had pleaded several defenses, a part of them being stricken as insufficient, on plaintiff's motion.

"The court then asked defendant's attorneys whether they desired to file an amended an-

swer, or stand upon the answer so filed.' The said attorneys informed the court 'that they desired to proceed to trial on the part of the answer not so stricken out (saving exceptions, of course, to the action of the court in striking out part of said answer), which the court refused to permit,' and held that the defendant must file a new answer, omitting the matter stricken out of the answer, or on failure so to do a default would be entered against the defendant. The defendant refused to file a new answer, and thereupon the court entered an interlocutory judgment of default against him." 154 Mo. 45, 55 S. W. 273, supra.

The case was appealed to the St. Louis Court of Appeals, in which the decision of the trial court was affirmed; that court holding that:

"When a petition, answer, or reply has been adjudged insufficient, in whole or in part, on demurrer or motion to strike out, the party has only one of two courses to pursue: First, to refuse to amend, in which case a default must be entered against him, and, after a final judgment, appeal the case; or, second, to file an amended pleading, omitting the matter adjudged insufficient, in which event he waives the right to have the ruling of the court reviewed on appeal." 154 Mo. 46, 55 S. W. 273, supra.

Upon appeal to it, the Supreme Court of Missouri said:

"It is perfectly obvious that section 2066, Revised Statutes 1889, cannot be literally construed without producing legal absurdities. For instance, it is therein provided that if a petition, answer, or reply be adjudged insufficient in whole or in part upon demurrer, or the whole or some part thereof be stricken out on motion, 'the party may file a further like pleading within such time as the court shall direct.' The adjective 'like' is defined by Webster to mean: '1. Resembling; having resemblance; similar. 2. Equal; same in quantity, amount or extent.' No one would contend that this section means that, when a pleading has been adjudged insufficient, a similar pleading must be filed, for such a proceeding would not only be absurd, but would amount to contempt of court. Yet this is the literal construction of the statute. The true meaning of the words 'like pleading' is that they refer to a petition, answer or reply, as the case may be, which has been adjudged insufficient; or, in other words, if a petition, answer, or reply has been adjudged insufficient, another petition, answer, or reply must be filed, but it must not be 'like' the petition, answer, or reply which has been adjudged insufficient. This section does not mean, however, that where a petition contains more than one count, or an answer contains more than one defense, and one count of the petition or one defense of the answer is adjudged insufficient, the whole petition of the whole answer is thereby adjudged insufficient. The judgment of the court only acts on the part of the petition or answer that is attacked. The parts not attacked are not affected in such a case. To hold, therefore, that section 2066 requires that, when a part of a pleading is successfully attacked, the pleader must file an amended plea, simply stating again what is already stated, and has not been challenged

or adjudged insufficient, would be to require a perfectly senseless and useless proceeding. For when the court adjudged the part attacked insufficient, such part, so far as that court is concerned, is eliminated from the pleading, and what remains unattacked would be the same, whether stated in that or in any other pleading; or, otherwise stated, the pleading is then in the same shape it would have been, if the part eliminated had never been stated in that pleading, or as it would be if an amended pleading was filed, omitting the matter adjudged insufficient, and stating only that which had not been adjudged insufficient. If, therefore, a part of a pleading is adjudged insufficient, but there remains enough to constitute a good petition or answer, the issues so remaining must be tried just as if the parts eliminated had never been embodied in the pleading, and thereafter, upon proper exception, the ruling of the trial court as to the part eliminated is open to review in the proper appellate court. Of course, if the whole pleading is adjudged insufficient, or is stricken out on motion, no issue remains, and there is nothing left to the defeated party but to amend by stating something else and different from the matter theretofore adjudged insufficient, or else to stand upon the ruling of the court, let judgment go against him, and appeal, after saving proper exceptions. The difference between the procedure where the whole and where only a part of a plea has been adjudged insufficient is manifest and rests upon common sense. The error of the lower courts in this case lies in not applying this meaning to the section of the statute under consideration.

"Section 2066, Revised Statutes 1889, is a part of article V of chapter 33, which relates to pleading, and hence that section must be read in connection with the other sections of that article. It is a part of the Code of Civil Procedure, and, being in *pari materia* with all the other parts of the Code on the subject of pleading, it must be read with all such other parts, and must be construed as to harmonize and give meaning to all its parts, if possible. This is axiomatic. Reading it in this way, the result is that section 2040 permits a plaintiff to unite in the same petition several causes of action, stating each cause in a separate count, whether the same be such as have been heretofore denominated legal or equitable, or both. Section 2049 permits the answer to contain a general or specific denial of the facts stated in the petition, and also to set up any new matter constituting a defense or counterclaim. Section 2050 provides: 'The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, in such manner that they may be intelligibly distinguished, and refer to the cause of action which they are intended to answer.' Section 2052 permits the reply to contain a general denial of the new matter set up in the answer, and also 'any new matter not inconsistent with the petition, constituting a defense to the new matter in the answer.'

"Under these provisions of the Code it has been the settled rule in this state, ever since the decision in *Nelson v. Brodhack*, 44 Mo. 596 [100 Am. Dec. 328], that a defendant may interpose as many defenses, stated separately, as he has,

provided they are consistent with each other; that is, so long as proof of one does not necessarily disprove the other. Thus, in a suit on a note, the defendant may plead non est factum, and also payment or release, or, in an action for slander, he may deny uttering the words and also plead that the thing charged is true. So a plaintiff may unite in his petition a count in equity, asking a cancellation of a release of a cause of action, and a count at law, asking damages upon the cause of action referred to in the release. *Courtney v. Blackwell*, 150 Mo. 245 [51 S. W. 668]; *Id.*, 139 Mo. 440 [41 S. W. 205]. A petition may also contain two counts, and if one count is adjudged insufficient, and the other count is held good, the plaintiff can save his exception to the ruling as to the count held bad, go on and try the case upon the good count, and afterwards have the ruling on the count adjudged bad reviewed on appeal. *McKenzie v. Donnell*, 151 Mo. 431 [52 S. W. 214]. The same is true of an answer which contains several defenses stated separately. If any one count of a petition, or any separate defense set up in an answer, is adjudged insufficient, such ruling does not affect the other counts of the petition or the other separate defenses; and if the counts or defenses remaining constitute a cause of action or a defense, as the case may be, there are issues pending before the court which must be tried. In such cases the pleader may amend the insufficiently pleaded matters, or may stand upon the ruling of the court as to them. If he amends, he thereby submits to the ruling of the court, and cannot afterwards have such ruling reviewed; but if he stands upon the ruling, the court can only enter judgment against him as to such matters as have been held insufficient, and if enough remains of the petition or answer to constitute a cause of action or a defense to a cause of action pleaded, the issues so remaining must be determined, and thereafter the ruling of the trial court will, on proper exceptions saved, be reviewed by the appellate court.

"This is the true construction to place upon section 2066, and it effectuates the provisions of sections 2040, 2049, 2050, and 2052. A single illustration will show that this is the correct view to take of section 2066. A petition may contain several causes of action, stated in separate counts. An answer may contain several defenses, and also a counterclaim, each stated separately. If the equity count in a petition, or the counterclaim in an answer, is adjudged insufficient, the count at law in the petition, or the defenses in the answer, still remain unattacked, and not adjudged insufficient. A complete issue thus remains. If the adjudication as to the count in equity, or as to the counterclaim, compels the party to amend, so as to omit such matters, on penalty of a judgment of nonsuit or default for failure so to do, then a perfectly good cause of action or a complete defense would thereby be thrown out of court, without ever having been attacked, tried, or determined; and this, too, because the plaintiff was held not to have some other cause of action, or the defendant some other defense, and the plaintiff would have to risk his right to recover on his good cause of action, or the defendant his right to defend on his complete defenses, in order to have a review of the ruling of the trial court upon the count or defense adjudged insufficient.

Such a construction of the statute leads to this result: A trial court could always dictate what causes of action the plaintiff shall assert or what defenses a defendant shall make. By adjudging one count of a petition (or even a part of a count) insufficient, the plaintiff could be compelled to amend and leave such count out of his petition, and if he does so the ruling of the trial court cannot be reviewed, or else he must allow judgment to go against him on the good counts, as well as the bad, and risk reversing the trial court's ruling on the bad counts. The defendant is in even worse plight, for the plaintiff can amend by omitting the part or count adjudged insufficient, and at once begin a separate action on these claims, but the defendant cannot thus go out of the front door of the court and come in again through the back door; he is in court against his will, and must make all his defenses then, in that suit, and cannot avail himself of any he had in any subsequent proceeding. If an adverse adjudication as to one defense compels the defendant to amend and omit such defense in order to secure a hearing upon the other defenses pleaded, then it follows that the trial court absolutely determines which defenses shall be set up, for no reasonable man would run the risk of allowing judgment to go against him on his good, unattacked defenses, in order to test the ruling of the court on those which were challenged and adjudged insufficient. Neither did the lawmakers ever intend by section 2066 to place litigants so completely or unreasonably in the power of the trial courts, for the policy expressed in section 2246 is that every person aggrieved by any final judgment or decision of any circuit court shall have a right to appeal to the proper appellate court in all cases not prohibited by the Constitution.

"It was intended by section 2066 to provide that if the whole of a petition, or answer or reply was adjudged insufficient, the party should amend the whole pleading or judgment should go against him, and if only one count of a petition, or one defense in an answer or reply, was adjudged insufficient, the party should amend such count or defense, or judgment should go against him as to such count or defense only; but it was never intended that, when only one cause of action or one defense was adjudged insufficient, other causes of action or defenses contained in the pleading should be thrown out of courts without a hearing, unless the party amended so as to omit the matters adjudged insufficient. This is the first case of its kind, to which our attention has been directed, that has reached this court, and hence the first time this court has been called upon to adjudicate the question. The provisions of section 2066, Revised Statutes 1889, have stood upon our statute books in exactly the same words ever since 1855, where they appear as section 40 of article VI of chapter 128, Revised Statutes 1855, and this is the first case which has reached this court where the construction adopted by the trial court and sustained by the Court of Appeals has ever been contended for. The reports of our state contain many cases in which this court has reviewed the ruling of the trial courts in holding one count or one defense insufficient, and where the defeated party has saved his exception and proceeded with the trial upon the counts of the petition or the other defenses of the answer, which were not adjudged

insufficient. This in itself is persuasive of the correctness of the construction here adopted. The answer in this case stated a good defense, if proved, to plaintiff's cause of action, even after the court had stricken out the part embraced in the brackets, and hence the trial court erred in entering a judgment by default against the defendant and in refusing to allow him to participate in the trial."

A decision of the Supreme Court of the state of Missouri on the construction of a section of our Code of Civil Procedure borrowed from that state, made after the date of its adoption by New Mexico, while not binding upon this court, is of great persuasiveness. Aside from this consideration, however, the conclusions reached in the opinion quoted thoroughly recommend themselves to us as the only ones possible to be reached, if the statute is to be construed in the liberal spirit of code pleading.

Counsel for appellees cite *Lasswell v. Kitt*, 11 N. M. 459, 70 Pac. 561, as in point sustaining the action of the court in this case. But a reading of that case shows that the defendant demurred because the complaint on its face showed that the plaintiff had an adequate remedy at law, and the effect of the court's ruling in defendant's favor was to adjudge the whole complaint insufficient, so, as pointed out in the opinion quoted above, the plaintiff had nothing to stand on, and had no alternative but to amend or let a judgment of dismissal go against him and appeal.

It is therefore held that the lower court erred in entering its judgment of dismissal, and that said judgment must be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

FERRIER v. ROBERTS, Sheriff, et al.
(No. 2278.)

(Supreme Court of New Mexico. Aug. 4, 1919.)

Appeal from District Court, McKinley County; Reynolds, Judge.

Action by A. J. Ferrier against R. L. Roberts, Sheriff of McKinley County, and another. Judgment for defendants, and plaintiff appeals. Reversed.

A. T. Hannett and J. W. Chapman, both of Gallup, for appellant.

Wilson & Walton, of Silver City, and H. C. Denny, of Gallup, for appellees.

MERRITT C. MECHEM, District Judge. The judgment in this case is reversed, upon the grounds announced in the opinion of this court filed in No. 2277, *Bissett v. Roberts et al.*, 188 Pac. 403.

PARKER, C. J., and ROBERTS, J., concur.

FERREAR v. ROBERTS, Sheriff, et al.
(No. 2279.)

(Supreme Court of New Mexico. Aug. 4, 1919.)

Appeal from District Court, McKinley County; Reynolds, Judge.

Action by Paul Ferrear against R. L. Roberts, Sheriff of McKinley County, and another. Judgment for defendants, and plaintiff appeals. Reversed.

A. T. Hannett and J. W. Chapman, both of Gallup, for appellant.

Wilson & Walton, of Silver City, and H. C. Denny, of Gallup, for appellees.

MERRITT C. MECHEM, District Judge. The judgment in this case is reversed, upon the grounds announced in the opinion of this court filed in No. 2277, *Bissett v. Roberts et al.*, 188 Pac. 403.

PARKER, C. J., and ROBERTS, J., concur.

OZELLA v. ROBERTS, Sheriff, et al.
(No. 2280.)

(Supreme Court of New Mexico. Aug. 24, 1919.)

Appeal from District Court, McKinley County; Reynolds, Judge.

Proceeding by Pete Ozella against R. L. Roberts, Sheriff of McKinley County, and another. Judgment for defendants, and plaintiff appeals. Reversed.

A. T. Hannett and J. W. Chapman, both of Gallup, for appellant.

Wilson & Walton, of Silver City, and H. C. Denny, of Gallup, for appellees.

MERRITT C. MECHEM, District Judge. The judgment in this case is reversed, upon the grounds announced in the opinion of this court filed in No. 2277, *Bissett v. Roberts et al.*, 188 Pac. 403.

PARKER, C. J., and ROBERTS, J., concur.

WHEELER et al. v. WIDENER et al.
(No. 8551.)

(Supreme Court of Oklahoma. July 8, 1919.)

*(Syllabus by the Court.)*1. PUBLIC LANDS ⇨139 — CONTRACTS FOR
PURCHASE AND CONVEYANCE — ENFORCE-
MENT IN EQUITY.

Contracts concerning the purchase and conveyance of public land, made prior to the entry and proving up of the homestead claim, are violative of the spirit of the laws of the United States, and in fraud thereof, and cannot be enforced by a court of equity.

2. PUBLIC LANDS ⇨128—RESULTING TRUST
—EVIDENCE.

Record examined, and *held*, that the plaintiffs are not entitled to the relief prayed for.

Error from District Court, Pawnee County; W. B. Bowles, Judge.

Action by May Wheeler and others against James Widener and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

McNeill & McNeill, of Pawnee, for plaintiffs in error.

R. A. Lowry and C. L. Burdick, both of Stillwater, for defendants in error.

KANE, J. This was an action commenced by the plaintiffs in error, plaintiffs below, against the defendant in error James Widener, for the purpose of declaring a resulting trust in a certain tract of land entered and proved up by Widener under the homestead laws of the United States. Upon trial to the court there was judgment in favor of the defendants, to reverse which this proceeding in error was commenced. Hereafter, for convenience, the parties will be designated as "plaintiffs" and "defendants," respectively, as they appeared in the trial court.

It appears that the land in controversy was entered by the defendant as a homestead some time during the year 1893, that it was subsequently proved up by the entryman, and that a patent therefor was issued in his name. The petition alleges, in substance:

That prior to the time the land was entered as a homestead the defendant and his wife, Weltha Widener, resided in a small town in the state of Kansas; that the defendant was sickly, and unable to do manual labor or work of any kind; that at that time the family of the Wideners consisted of seven children, three of them being small and unable to care for themselves or to do manual labor, and the remaining four being either adults or large enough to help with the work incident to proving up a claim; that by reason of the ill health of the defendant, the care and support of the family

devolved largely upon Weltha Widener, his wife, and the children large enough to do manual labor; that Weltha Widener, being desirous of obtaining a home for herself and children, urged the defendant to make homestead entry upon a certain claim in Oklahoma, information concerning which had been furnished to the defendant and the members of his family by May Widener, now May Wheeler, one of the plaintiffs herein; that the defendant objected to going to Oklahoma and filing upon said land on account of his physical condition, believing that he would not live a sufficient length of time to prove up said claim, and because he had no money or means at that time either to file upon the land or to remove to Oklahoma; that said Weltha Widener being unable to go to Oklahoma herself on account of her small children, and being obliged to work to support the family, she and John Widener and May Widener, now May Wheeler, adult children of the Wideners, entered into an oral contract and agreement with the defendant, the purport of which is stated in the petition as follows:

"James Widener should come to the said state of Oklahoma and file upon the land as described to him by the said May Widener, now May Wheeler, and the said Weltha Widener and John Widener and May Wheeler especially would advance the money for the filing on said claim and with the horse and mule of Weltha Widener the said John Widener, with the younger children as they advanced in age, would build a house upon said land and improve the same and make a home for the said Weltha Widener and the said James Widener and children, and the same to be the property of Weltha Widener."

That in accordance with said agreement the said defendant came to Oklahoma and filed upon the land involved herein; that shortly thereafter Weltha Widener and said children came to Oklahoma, where they proceeded to improve said land and to make the same their homestead; that the said Weltha Widener carried out her portion of said agreement, and furnished the money and advanced the same to the said James Widener for the purpose of filing upon said land; that said John Widener and May Wheeler carried out their portion of said agreement by the said John Widener building a house upon said land and improving said land according to their said agreement that the said land should be the property of the said Weltha Widener and the homestead of the said Weltha Widener. The petition then sets forth in detail the work and labor performed by the various members of the family in pursuance of this contract, and further alleges in substance that all of said agreements upon behalf of the said Weltha Widener were carried out on her part, and that by reason thereof the patent obtained by the

said James Widener in his name should inure to the use and benefit of the said Weltha Widener, and that said land should be held to be the home of the said Weltha Widener and said children; that the said Weltha Widener died on or about the 10th day of April, 1909, at which date she was still residing upon said land and premises, never having sold or disposed of the same, the record title thereto still remaining in the said James Widener; that since the death of the said Weltha Widener, said defendant, holding a clear record title to said premises, has collected and received large amounts of oil and gas royalties from said land; that, said land being the homestead of the said Weltha Widener, and being the property of the said Weltha Widener, title of which is held in trust by the said James Widener for her use and benefit, only one-third of the royalties received from said premises belong to said James Widener, the balance belonging to said children by right of inheritance from said Weltha Widener; that said James Widener is now spending said money extravagantly and wasting the same on a second wife, whom he has lately married, and falls and refuses to deliver to the said plaintiffs, or either of them, their portion of said estate.

Then follows a prayer that a resulting trust be declared, and that the land and proceeds thereof be distributed to the parties, plaintiff and defendant, in such proportion as they would be entitled to as heirs of Weltha Widener, deceased. The evidence relied upon to establish this contract consisted largely of conversations between different members of the Widener family, at various conferences or family councils, held for the purpose of discussing the important question of taking up a claim in Oklahoma.

[1, 2] While there was a great deal of this evidence admitted at the trial, practically covering the history of the Widener family for twenty years or more, we do not deem it necessary to set it out in this opinion or to review it at any great length. On this point it is sufficient to say that we have examined the record carefully, and are satisfied that wherever there was conflict in the evidence on any material point the general findings of the trial court thereon in favor of the defendants were sustained by a preponderance of the evidence. But, assuming that there was evidence tending to establish the contract set up in the petition and none to the contrary, as counsel contends, still in our judgment the plaintiffs would not be entitled to the relief prayed. It would not be difficult to cite any number of cases holding that contracts concerning the purchase and conveyance of public lands made prior to the entry and proving up of the homestead claim are violative of the spirit of the laws of the United States and in fraud thereof and

cannot be enforced by a court of equity. Counsel for the plaintiffs concede the soundness of the general rule, but they say that the contract involved in the case at bar falls within a recognized exception under which similar contracts have been upheld by the courts of several of the states and by the Supreme Court of the United States. In support of this contention they cite *Barlow v. Barlow*, 47 Kan. 676, 28 Pac. 607; *McElhaney v. McElhaney*, 125 Iowa, 279, 101 N. W. 90; *Irvine v. Marshall et al.*, 20 How. 558, 15 L. Ed. 991.

We do not believe that any of these cases are analogous to the case at bar, or that they support the contention made by counsel for the plaintiffs. In the Kansas case, which is most nearly in point, the controversy was between Mrs. Barlow, the wife of a deceased homestead entryman, and the heirs of the latter who claimed that they were entitled, in the aggregate, to one-half of the land, under the laws of descent and distribution of that state. The trial court, in addition to finding that Mrs. Barlow furnished the money expended in procuring the homestead and the labor and money used in putting the improvements thereon, and in proving up the same, also significantly found that, although Mr. Barlow was the nominal head of the family, yet, because of his infirmities, his wife was the real and actual head thereof. The Supreme Court approved the findings of the trial court, and held that, as the contract previously entered into between husband and wife merely had the effect of transferring the legal title to the homestead from the nominal head, who was not really entitled to make the homestead entry, to the real head of the family, who was, it was not violative of the homestead laws. The trial court, in the instant case, not only found against the plaintiffs as to the existence of any contract, but also found that Widener was the actual head of the family at the time the homestead entry was made, and that he continued to occupy this relation up to and subsequent to the death of his first wife, Weltha Widener. The other cases relied on are so clearly not in point that we do not deem it necessary to distinguish them.

After a careful examination of the evidence and of the elaborate comments made thereon by the trial court, which are incorporated in the record, we have no doubt of the correctness of his conclusions. The trial court found that Widener was a man of more than ordinary intelligence, and that, while perhaps he was incapacitated from performing continuous hard labor, he was always doing something in the way of supplying labor, money, and counsel toward carrying on the common purpose of proving up the claim and supporting his wife and family. And, even if it is conceded that Widener entered the land in response to the yearnings of his

wife for a home, it seems to us his obligation in that regard was fully performed in accordance with her expectations. The evidence conclusively shows that Mrs. Widener moved upon the land shortly after it was entered as a homestead, and continued to occupy the same with her husband and family, from that time until her death, which occurred several years after the land had been proved up and patented to her husband. That she considered that whatever arrangements she had made with her husband concerning the entry of the land as a homestead had been satisfactorily executed by him is amply attested by the fact that she never at any time disputed his title or intimated that he was merely holding the land in trust for her. It is true that she often spoke of the land as her home, and such in truth and in fact it was. The land was the homestead of the family, and as such it was not only the home of the father, the head of the family, but of his wife and of such of their children as remained beneath their roof-tree. On the whole case we are constrained to agree with the trial court, who closed his review of the evidence as follows:

"How in the name of sense we could declare a resulting trust is a mystery to me; every dollar that was furnished was furnished by him and went through this man's hands; if a deed could be set aside on evidence of this sort, there is not a man before me that has got a family of children that they couldn't come in and make a will for him right away, just take his property away from him or have it either deeded to them or the mother. I could deed it to the children as well as I could to the mother, under the same sort of a contract; so you wouldn't have to wait until a man died to get what he has got, but just split it up as soon as the children are ready to get hold of it; that is what this means, nothing more or nothing less. Judgment in favor of the defendant."

For the reasons stated, the judgment of the court below is affirmed.

OWEN, C. J., and RAINEY, JOHNSON, and HARRISON, JJ., concur.

CUSHING v. NEWBERN et al. (No. 9304.)
(Supreme Court of Oklahoma. May 18, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. BILLS AND NOTES §516 — EVIDENCE — JUDGMENT.

In an action upon a promissory note, where certain defendants, who have executed the note, file an answer admitting the execution of the note, but fail to introduce any evidence, and the plaintiff introduces the note, it is error for

the court to render judgment against the plaintiff.

2. MORTGAGES §292(6)—PURCHASER ASSUMING MORTGAGE—ACTION—PROOF.

In an action upon a promissory note secured by a real estate mortgage, and against the purchaser of the property, who in his deed of conveyance promised and agreed to pay the mortgage debt, where service of summons is had upon him, and he fails to answer, and the plaintiff introduced the note and mortgage, and the deed showing that the purchaser had promised and agreed to pay the mortgage, it is error for the court to render judgment against the plaintiff.

3. MORTGAGES §280(3) — PURCHASER'S AGREEMENT TO PAY MORTGAGE DEBT—DEFENSE.

In an action against the signers of a promissory note secured by real estate mortgage, and the purchaser of the property, in whose deed of conveyance was inserted the clause binding the purchaser to assume and pay the mortgage debt, where the purchaser pleads and proves by competent evidence that said clause was inserted in the deed by the scrivener, contrary to the contract of the parties, and that there was no consideration for the inserting of said clause in said deed, and the same was inserted without the knowledge or consent of the parties, said fact is a good defense to said action, in so far as the personal judgment against the purchaser is concerned, and the mortgagee cannot avail himself of said mistake.

4. ABATEMENT AND REVIVAL §41, 47 — TRANSFER OF PLAINTIFF'S INTEREST PENDING ACTION—SUBSTITUTION OF PARTIES.

In an action to quiet title, an action does not abate by the transfer of any interest of the plaintiff therein during the pendency, and, if the plaintiff has transferred his interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

Appeal from District Court, Pontotoc County; J. W. Bolen, Judge.

Action by Francis J. Cushing, revived in the name of Ada T. Cushing, executrix, against S. C. Newbern, Emma Newbern, Ed. F. Miller, A. T. Smart, and others, with intervention by Lucy Harjo. Judgment for defendants and intervenor, and plaintiff appeals. Reversed as to defendants S. C. Newbern, Emma Newbern, and Ed. F. Miller, with direction to enter judgment against them, and affirmed as to defendant A. T. Smart and intervenor.

Tibbetts & Green, of Guthrie, for plaintiff in error.

B. C. King, of Ada, for defendant in error Harjo.

Wimbish & Duncan, of Ada, for defendant in error Smart.

McNEILL, J. This action was commenced in the district court of Pontotoc county by Francis J. Cushing against S. C. Newbern, Emma Newbern, Ed. F. Miller, and A. T. Smart et al., asking personal judgment against S. C. Newbern and Emma Newbern upon a promissory note executed by them, and to foreclose a real estate mortgage given to secure said indebtedness. The petition further alleged that Ed. F. Miller and A. T. Smart had purchased said property, and in the deed of conveyance to each of them had assumed the mortgage indebtedness against said property, and agreed to pay the same, and asked personal judgment against each of them.

Lucy Harjo intervened, claiming title and possession of the mortgaged premises, and asked to have her title quieted as against the plaintiff and all of the defendants. The defendant Smart answered that he had purchased said premise, but that there was no agreement to assume the indebtedness or to pay the mortgage against said premises, and that the scrivener, in writing said deed, had made a mistake in inserting said fact in the deed; and in answer to the plea of intervention of Harjo the defendant Smart answered that she had brought suit in a former action for possession of said land, and that he had made a settlement with the intervener, and in settlement of the same she had executed a mortgage in the sum of \$3,000, and he was the holder of the mortgage, and asked to have the same foreclosed. The plaintiff replied to the answer of Smart, and asked that the interest of Smart in said mortgage be subject to the lien of the plaintiff, and, if plaintiff's lien was of no force and effect, that he be subrogated to the amount of his mortgage in the mortgage of A. T. Smart in said premises. The plaintiff, in reply to the plea of intervention, moved to dismiss the plea of intervention of Lucy Harjo, for the reason that she had sold and disposed of all her interest in the property after the filing of the plea of intervention, set forth a copy of her deed, and asked to have her plea of intervention dismissed, for the reason that she had no interest in the subject-matter and could not maintain her action. Plaintiff's motion to dismiss was overruled, to which he excepted, and plaintiff filed an answer to the plea of intervention, setting forth the fact that Lucy Harjo had disposed of her interest, and was not the party in interest in the plea of intervention, and again attached to the reply a copy of the deed of conveyance from Lucy Harjo to Edna E. King, and asked that she take nothing by said suit, for the reason she had no interest in the premises.

Francis J. Cushing died, and the case was revived in the name of Ada T. Cushing, executrix of the estate of Francis J. Cushing, deceased. The court below rendered judgment against said plaintiff and in favor of all the defendants and the intervener. Plain-

tiff brings case here, and asks for a reversal of said judgment.

It was conceded that Lucy Harjo inherited this land, she being a full-blood Chickasha Indian; that she had conveyed the same to the American Trust Company, and that the American Trust Company conveyed the same to Newbern, who mortgaged the same to the plaintiff. Newbern conveyed the same to Ed. F. Miller, and he conveyed the same to Smart. It was further agreed that the deed from Lucy Harjo to the American Trust Company was dated April 8, 1907. It was also admitted that the deed from Lucy Harjo to the American Trust Company conveyed no title.

[1] This suit involves several separate and distinct issues. The first question argued by the plaintiff in error is "that the court erred in not rendering judgment against the defendants S. C. Newbern and Emma Newbern." The defendants Newbern filed an answer. The plaintiff introduced the note, and no evidence was introduced on behalf of the defendants Newbern. It was therefore error for the court to render judgment against said plaintiff.

[2] The second proposition argued by plaintiff in error is, "that the defendant Ed. F. Miller was personally served with summons and filed no answer, and the court erred in not rendering judgment against Miller. The plaintiff introduced the deed showing that the defendant Miller had purchased said property and assumed to pay this mortgage in the sum of \$1,750. The defendant Miller made no defense. It therefore follows that the court committed error in rendering judgment in favor of the defendant Miller.

[3] The third contention argued by plaintiff in error relates to the defendant Smart. The evidence disclosed that Smart purchased 200 acres from Miller, and that in obtaining the deed a mistake was made, and only described 40 acres. This deed contained the provision that it was subject to the mortgage of the plaintiff herein. Thereafter a new deed was obtained from Miller to Smart to the other 160 acres, but without any other consideration passing between the parties, and that deed contained the provision that it was purchased subject to the mortgage of plaintiff, and the defendant Smart had assumed and agreed to pay the same. The court, in making his findings, found that there was no consideration for Smart assuming and agreeing to pay the mortgage indebtedness, and further found there was a mistake in the deed delivered to A. T. Smart by Miller, and that Smart at no time agreed to pay the indebtedness of the plaintiff herein, and that the scrivener inserted that provision in the deed without any authority. There was sufficient evidence to sustain said finding. There was no direct evidence that any such a contract existed between Smart and Miller, but the agreement to assume the mortgage indebtedness was written in the

deed by the scrivener. The Supreme Court of Colorado, in the case of *Lloyd v. Lowe*, 165 Pac. 609, L. R. A. 1918A, 999, states:

"If the scrivener by mistake, contrary to the contract of the parties and without their knowledge, inserts a clause in the deed binding the grantee to assume a mortgage, the mortgagee cannot avail himself of it."

This was the theory of the defendant Smart, having pleaded said fact and the evidence being sufficient to sustain the same. We therefore hold that the court did not commit error in so finding.

The plaintiff then argues the question of subrogation in so far as defendant Smart is concerned; but, the court having found that the defendant Smart was not liable for said indebtedness, the question of subrogation could not arise. The judgment, in so far as Smart is concerned, is affirmed.

[4] As to the intervener, Lucy Harjo, the plaintiff argues that, by reason of her having disposed of her interest prior to the termination of the suit, she could no longer maintain her action to quiet title. Section 4695 of the statute (Rev. Laws 1910) provides as follows:

"* * * In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

It appears that this statute is controlling in the case at bar, and the plaintiff presented no authority or reason why this statute should not govern. We therefore hold that in the case at bar the statute will govern, and it was not error to permit Lucy Harjo to continue to prosecute the case in her name.

The judgment is therefore reversed, as far as S. C. Newbern and Emma Newbern and Ed. F. Miller are concerned, with directions to enter judgment against said defendants for the amount of the note, interest, and attorney fees, but affirmed as far as A. T. Smart and Lucy Harjo are concerned.

SHARP, RAINEY, HARRISON, PITCH-FORD, and JOHNSON, JJ., concur.

PALMER et al. v. KING et al. (No. 9483.)

(Supreme Court of Oklahoma. July 1, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. INDIANS §—18 — ALLOTMENT — DEVOLUTION—STATUTE.

A full-blood Choctaw Indian woman died in 1906 possessed of an allotment of land. Her nearest relatives on her father's side were an uncle and cousin, and on her mother's side were

cousins, all being Indians by blood. The paternal heirs claimed that section 2532 of Mansfield's Digest of the Laws of Arkansas controlled the devolution of her estate, and that they were the sole owners thereof. The maternal heirs claimed that section 2531, supra, controlled, and that they take an undivided one-half of her estate. *Held*, that section 2531 controls, and that an undivided one-half of the allotment possessed by the deceased at the time of her death goes to the maternal heirs, and the other half goes to the paternal heirs.

2. STATUTES §—207 — GENERAL TERMS — SPECIFIC TERMS.

Where general terms or expressions in one part of the statute are inconsistent with more specific or particular provisions in another part, the particular provision will be given effect, as a clearer and more definite expression of the legislative will.

Error from District Court, Haskell County; W. H. Brown, Judge.

Suit by Rachael King and others against N. W. Palmer and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. L. Beckett, of Okmulgee, and J. E. Whitehead, of Oklahoma City, for plaintiffs in error.

G. A. Holley and E. D. Means, both of Stigler, for defendants in error.

HIGGINS, J. Charlotte Winlock, a full-blood Choctaw Indian woman, departed this life in what is now Haskell county, Okla., January 14, 1906, the owner of an allotment of land by virtue of her citizenship in said tribe, leaving surviving her Rufus Winlock, a paternal uncle, Martin Compelube, a paternal cousin, and Rachael King and other defendants in error, maternal cousins; all heirs, both paternal and maternal, being of Indian blood. In May, 1909, the paternal heirs deeded a portion of the lands allotted to the deceased, and from this deed the other parties plaintiffs in error derive their title.

In February, 1914, this suit was commenced by the maternal cousins for an undivided one-half interest in the lands, to wit: West half of the southwest quarter and the southwest quarter of the northwest quarter of section 36, township 9 north, range 21 east, Haskell county, state of Oklahoma. In the answer of plaintiffs in error they contend that the paternal heirs take all the lands involved, to the exclusion of the maternal heirs, and ask for judgment accordingly. The deed of the paternal heirs was executed in May, 1909, prior to the rendition of the opinion in *Shulthis v. McDougal*, 170 Fed. 529, 95 C. C. A. 615, and at a time when many believed the estate was a new acquisition. The property thus would go to the paternal heirs in the instant case, if this had been such an estate. The parties agreed upon the facts, but dis-

agreed as to what section of chapter 49, Mansfield's Digest of the Laws of Arkansas, controls; plaintiffs in error's contention being that section 2532 controls, and defendants in error insisting that section 2531 controls. These sections are as follows:

"2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided.

"2532. The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation."

If section 2532 controls, then the plaintiffs in error take all; but if section 2531 controls, then defendants in error take an undivided one-half of the real estate involved, and plaintiffs in error take the other half. The trial court held that section 2531 controlled the devolution of the real estate of the deceased, and that each line of heirs took an undivided one-half interest, from which judgment plaintiffs in error appealed to this court.

[1] This court and the Supreme Court of the United States have passed upon two cases in which the facts are similar to the case at bar. *Brady v. Sizemore*, 33 Okl. 169, 124 Pac. 615, and 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308; *Roberts v. Underwood*, 38 Okl. 376, 132 Pac. 673, and 237 U. S. 386, 35 Sup. Ct. 608, 59 L. Ed. 1007. The opinions of the Supreme Court of the United States are conflicting as to the rights of the paternal and maternal heirs. In the first case it is held that the paternal heirs took all, to the exclusion of the maternal heirs, and in the second case held that the paternal and maternal heirs each took an undivided one-half interest. This conflict has apparently come about for the reason that each case was presented on other issues, and not upon the issue as to the conflicting rights of these two lines of heirs. In both cases the Supreme Court of the United States, in making the findings as to the rights of these lines of heirs, followed the concession of the parties. In the first case the opinion so states, and in the second the pleadings show that the court followed that which was conceded. We are thus required to seek adjudicated cases from other courts.

In *Kelly's Heirs v. McGuire*, 15 Ark. 582, Charles Kelly emigrated to Arkansas in

1815, and married a widow, Mrs. Craig, who had two daughters by a former marriage; that Kelly accumulated quite a fortune, consisting of real and personal property; that he died in 1831, leaving surviving him his wife and a son, Clinton Kelly; that the widow died in 1836, and in 1844 Clinton Kelly died, leaving surviving him his half-sisters, all having the same mother, but different fathers, and a paternal grandfather and other paternal kindred. Clinton Kelly died possessed of lands inherited from his father. The half-sisters and paternal kindred each claimed to be the sole owners of the lands left by the deceased. The court held that section 2531 controlled, and that the paternal heirs took all the real estate to the exclusion of the half-sisters, not for the reason, as insisted, that section 2532 was made inapplicable by the existence of kindred in a nearer relation, but for the reason that the estate came by the father; the language of the opinion being as follows:

"The manifest intention of the first part of this section [referring to section 2531, *supra*] was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of common-law principle, which invariably followed the line of the blood. * * * In other words, it remains in the paternal or maternal line, from whence it was derived."

Again in *Beard v. Mosely*, 30 Ark. 518, Hugh Beard died, survived by his wife and a daughter, Eleanor. The widow married Mr. Mosely. The daughter died without issue, having never married, possessed of real estate inherited from her father and leaving her mother surviving her. The paternal and maternal heirs, the mother in this instance, claimed the real estate left by the deceased daughter, which she inherited from her father, Hugh Beard. The court held that the paternal kindred took, to the exclusion of the mother and maternal kindred, not for the reason, as insisted, that section 2532 was inapplicable, there being kindred in a nearer relation, but for the reason that the estate came by the father and must ascend to his heirs, the paternal kindred.

[2] Plaintiffs in error contended that section 2532 is a general statute, and that a literal construction should be given thereto, applying to all estates. In order to determine the legislative intent of section 2532, it is necessary to consider all of chapter 49, *supra*. Section 2531 refers to a particular estate, one left by an intestate, which came by the father or mother, and fixes the devolution of this estate, which says it must ascend to the side from which it came. Section 2532 is a general statute. The rule of construction of conflicting statutes, as set forth in 36 Cyc. 1130, is as follows:

"Where general terms or expressions in one part of a statute are inconsistent with more

specific or particular provisions in another part, the particular provisions will be given effect, as clearer and more definite expressions of the legislative will."

The estate involved in the case at bar is ancestral. *Shulthis v. McDougal*, supra. The father and mother of Charlotte Winlock are both of Indian blood. Applying the reasons given in the above cases cited from the Arkansas courts and the general rule of construction of conflicting statutes, we find that section 2531 controls in the devolution of the real estate of the case at bar, and that each line of heirs took an undivided one-half interest in the allotment of the deceased.

The judgment is affirmed.

HAMILTON et al. v. BAHNSEN et al.
(No. 8711.)

(Supreme Court of Oklahoma. July 29, 1919.)

(*Syllabus by the Court.*)

1. INDIANS ⇐18—ALLOTMENT—DESCENT—STATUTE.

The devolution of an allotment on behalf of a deceased Creek citizen, which was not selected nor made until after the Supplemental Creek Agreement of June 30, 1902 (32 Stat. 500, c. 1323), went into effect, is governed by the Arkansas laws of descent and distribution, which by section 6 of that act, and by the act of May 27, 1902 (32 Stat. 258, c. 888), were substituted for the Creek tribal laws of descent and distribution recognized by a provision of the Original Creek Agreement of March 1, 1901 (81 Stat. 861, c. 676, § 28), which the later acts repeal.

2. INDIANS ⇐18—ALLOTMENT—DESCENT.

If a Creek citizen dies before receiving his allotment, at the time of his death he is not seised of an inheritable estate in lands afterwards allotted to him or to his heirs, and the descent of such allotment is cast at the time the certificate of allotment is issued, and the law in effect at that particular time governs in the devolution of said allotted lands.

3. INDIANS ⇐18—ALLOTMENT—RESERVATION—RIGHTS OF HEIRS.

The fact there appears on file in the office of the Dawes Commission, in the allotment record of Mack McNally, a paper certified to as "a reservation plat and memorandum slip," which has indorsed upon the same the following: "Reserved March 16, 1901, pending ratification of Creek Agreement"—and a description of the land, and testimony is introduced to the effect that, at the time said slip and reservation plat were filed, the Dawes Commission permitted some one to make an application for this allotment for Mack McNally, who was then deceased, the plat or memorandum slip having been made prior to the time of the ratification of the Original Creek Agreement May 25, 1901, and Mack McNally having died June 7, 1899, and

there being no authority for making such a reservation, and there being no law permitting an allotment to be made to the deceased at that time, nor his heirs, said exhibit, although disclosing that an application for an allotment had been made on said date, gave the heirs no inheritable estate by reason thereof. It appearing that thereafter the Dawes Commission issued an "original memorandum of selection," and a certificate of allotment, both of which bore the date of October 20, 1902, held, the date of the certificate of allotment is controlling as to the devolution of said estate.

Appeal from District Court, McIntosh County; R. W. Higgins, Judge.

Action by Cassie Hamilton and others against John E. Bahnson and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Anglin & Hall, of Holdenville, and Turner & Turner, of Eufaula, for plaintiffs in error. Vernor & Vernor, of Muskogee, and Stansard, Wahl & Ennis, of Shawnee, for defendants in error.

MCNEILL, J. This controversy involves the allotment made to the heirs of Mack McNally, a Creek freedman, who died June 17, 1899, leaving him surviving his mother, Belle Wright, née McNally, a noncitizen of the Creek Nation, and certain brothers and sisters, who were the plaintiffs in the court below and are plaintiffs in error here. The defendants below, being the defendants in error here, are in possession of the premises through their tenants, and claim title by virtue of a deed executed by the noncitizen mother, Belle Wright, née McNally, in the fall of 1901, and a certain mortgage executed by Belle Wright.

The question presented is whether the lands descended to Belle Wright, née McNally, a noncitizen and being the mother of Mack McNally, or did the same descend to the brothers and sisters of Mack McNally? It is agreed by all parties that, if the descent was cast under the Creek law by reason of the act of Congress approved March 1, 1901, known as the "Original Agreement," then the noncitizen mother, Belle Wright, née McNally, inherited the land, while on the other hand, if the descent was not cast until after the act of Congress of June 30, 1902, commonly known as the "Supplemental Agreement," then the plaintiffs in error inherited the allotments. The plaintiffs in error take the position, because of the date of the certificate of allotment and the date of the original memorandum of selection, both of which were dated October 20, 1902, that then, and not until then, did there come into being an estate capable of descending. While the defendants take the position that the descent was cast as soon as the allotment of Mack McNally, deceased, was by his heirs selected,

designated, and segregated from the common body of land. This they contend was done on the 16th day of March, 1901. At the trial of the case below the court found for the defendants in error, and the plaintiffs bring the case here on appeal.

At the trial of the case below certain facts were agreed to, to wit: That Mack McNally died June 7, 1899, and that at the time of his death he had made no selection, nor had he received a certificate of allotment for any land in the Creek Nation. Plaintiffs in error introduced in evidence a part of the records of the Dawes Commission, which was, first, an exhibit designated as "an original memorandum of selection." This was dated October 20, 1902. They then introduced the "original certificate of allotment," which was dated October 20, 1902.

[1] The facts in the case up to this point are identical with the facts in the case of Brady v. Sizemore, 33 Okl. 169, 124 Pac. 615, which case was affirmed by the United States Supreme Court in the case of Sizemore v. Brady, 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 808. In the case of Brady v. Sizemore this court stated as follows:

"Where a duly enrolled citizen of the Creek Nation died on March 1, 1901, before receiving his allotment or a certificate of selection therefor, held, that he died seized of no estate of inheritance therein.

"Where a duly enrolled citizen of the Creek Nation died on March 1, 1901, before receiving his allotment, for which on August 23, 1902, certificate of selection issued to his heirs, held, that chapter 49 of Mansf. Dig. of Ark. (Ind. T. Ann. St. 1899, §§ 1820-1843) governs the devolution of the allotment, as provided by the Indian Appropriation Act of May 27, 1902 (32 Stat. 258, c. 888), and section 6 of an act of Congress approved June 30, 1902, ratified July 28, 1902 (32 Stat. 500, c. 1323), known as the Creek Supplemental Agreement to be applied as if deceased had received title to his allotment and died seized thereof."

The court, in the case of Brady v. Sizemore, speaking through Justice Turner, stated as follows:

"Grayson died seized of no inheritable estate or vested right in said allotment, and therefore had no allotment upon which said section 28 could operate, but for the further fact, not appearing in the Sanders Case, that such was true until August 23, 1902, which was after ratification of the Supplemental Agreement when his allotment was selected and certificate of selection therefor, on said date, issued to his heirs. Then, and not until then, did any law of descent and distribution take hold of the then created res and determine its devolution."

And the court further stated as follows:

"Which said chapter 49, being the law of descent and distribution in force at the date of the allottee's certificate, we hold to be the governing statute here."

The Supreme Court of the United States, passing upon the question, stated as follows:

"The devolution of an allotment on behalf of a deceased Creek citizen, which was not selected nor made until after the Supplemental Creek Agreement of June 30, 1902 (32 Stat. 500, c. 1323), went into effect, is governed by the Arkansas laws of descent and distribution, which, by section 6 of that act, and by the act of May 27, 1902 (32 Stat. 258, c. 888), were substituted for the Creek tribal laws of descent and distribution recognized by a provision of the Original Creek Agreement of March 1, 1901 (31 Stat. 861, c. 676, § 28), which the later acts repeal."

The case of Scott v. Jacobs, 40 Okl. 522, 140 Pac. 148, the court stated as follows:

"And as no res existed for the law to take hold of until November 18, 1901, the date of her certificate of allotment."

[2] In the case of McDonald v. Ralston, 166 Pac. 405, the court stated as follows:

"If a Creek citizen dies before receiving his allotment, at the time of his death he is not seized of an inheritable estate in lands afterwards allotted to him or to his heirs, and the descent of such allotment is cast at the time the certificate of allotment is issued, and the law in effect at that particular time governs in the devolution of said allotted lands."

In the case of Jesse v. Chapman, 173 Pac. 1044, the court stated as follows:

"The law in force at the date of the allotment controls as to when the title vests in the heirs."

In the case of McKee v. Henry, 201 Fed. 74, 119 C. C. A. 412, the court stated as follows:

"No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted."

[3] In support of the theory of the defendants in error, they introduced certain evidence over the objection of plaintiffs in error, an exhibit which was certified to as a part of the allotment record of Mack McNally which is as follows: "51. Department of Interior, Commission to Five Civilized Tribes." Then appears a map of a congressional township in which the land in question is identified by a mark surrounding the same and on the face of this plat appears the following: "Reserved March 16, 1901, pending ratification of Creek Agreement." On the bottom of the plat are these words: "Mack McNally, deceased." This exhibit was certified to by the Superintendent of the Five Civilized Tribes as a true and correct copy of reservation plat and memorandum slip on file in the allotment record of Mack McNally.

Defendants in error then produced a witness, Mr. Hastain, who testified in substance that beginning April, 1899, and for three years, he was clerk of the Dawes Commission, and testified as follows:

"Q. Mr. Hastain, I will ask you if it was customary, if in fact it was done, to list the names of deceased persons after March 1, 1901, to

be enrolled that were represented or purported to be living on April 1, 1899? A. We did.

"Q. At the same time, was it permitted and allowed by the officials in the Dawes Commission the heirs or the personal representatives of the deceased to make a selection of land for the allotment of the deceased? A. It was.

"Q. And was that land so selected reserved? A. It was, where requested.

"Q. Now, reserved for what? A. It was reserved for him as an allotment.

"Q. Mr. Hastain, I want to exhibit to you defendants' Exhibit No. 1, and ask if that was the method of procedure for selecting and reserving land for a deceased person prior to the adoption or ratification of the Original Agreement? A. It was."

He then testified that the exhibit disclosed that on the 16th day of March, 1901, some one had appeared at the office and the Commissioner made the record as set forth. In testifying in regard to the exhibits introduced by the plaintiff in error, which were the "original memorandum of selection" and the certificate of allotment, he stated those exhibits were based upon an application having been made for an allotment. He also testified that, where an application was made prior to May 25, 1901 and was not inconsistent with the Original Creek Agreement, thereafter they proceeded to allot the same as if filed on afterwards. And it is upon this evidence that the defendants in error rested their case, and to take this allotment out of the category of allotments controlled by the decision of Brady v. Sizemore.

The defendants in error in support of their case, cite Woodward v. De Graffenried, 238 U. S. 284, 35 Sup. Ct. 764, 59 L. Ed. 1310, and quote from the opinion the following language:

"We construe" section 6 "to mean that allotments theretofore made, if not inconsistent with the provisions of the Agreement, were to be treated the same as if made after the ratification of the Agreement; and this includes the designation of the beneficiaries in case of the death of the allottee."

The court further stated:

"That which had been tentative and provisional then became, by force of the provisions of the Agreement, final and conclusive. The result was to vest a complete equitable title in her 'heirs,' to be determined according to the Creek laws of descent and distribution."

But counsel have overlooked the fact that in the case of Woodward v. De Graffenried the court stated that it was agreed that Agnes Hawes was a citizen of the Creek Nation; that she died June 29, 1900, having previously made selection of the tract in question as her allotment of land in that Nation before the Commission of the Five Civilized Tribes, and received from the Commission a certificate of allotment therefor. The court held

that, she having made her selection and received her certificate of allotment prior to her death, as provided in section 11 of the Curtis Act, said allotment came within that category of allotments designated in section 6 of the Original Creek Agreement. If Mack McNally had made a selection and received his allotment certificate prior to his death, this would be a parallel case; but such are not the facts.

Counsel then cite the case of Hooks v. Kennard, 28 Okl. 457, 114 Pac. 744, and they quote the following language from that opinion:

"That the selection of and the filing upon an allotment of land was the inception and beginning of the title of the allottee or his heirs, and that, when the patent, which is only the evidence of title, is issued, it relates back to the inception of the title."

This quotation of the court is taken from the case of De Graffenried v. Iowa Land & Trust Co., 20 Okl. 687, 95 Pac. 624; Godfrey v. Iowa Land & Trust Co., 21 Okl. 293, 95 Pac. 792; Irving v. Diamond, 23 Okl. 325, 100 Pac. 557. But, looking to the case of De Graffenried v. Iowa Land & Trust Co., it will be found that the allottee on April 22, 1899, selected her allotment, and received a certificate of allotment, and died June 7, 1902, which was after the passage of the Original Creek Agreement and prior to the time the Supplemental Creek Agreement became effective; so in that case the allottee had made her selection of allotment and received a certificate as provided in the Curtis Act (Act June 28, 1898, c. 517, 30 Stat. 495). But, looking to the facts in the case of Hooks v. Kennard, supra, the court stated the facts as follows:

"The lands * * * were set apart and allotted in the names of the deceased Creek citizens prior to the approval and ratification of the Supplemental Agreement made with the Creek Nation."

The court further stated that the allotments were made under section 28, Original Creek Agreement; so the facts in that case are different from the facts in the case at bar, and do not support the contention made by defendants in error. Defendants in error then cite the case of Barnett v. Way, 29 Okl. 780, 119 Pac. 418; but the facts in that case disclose that the allottee had been allotted the land in question under section 11 of the Curtis Act, and had received the certificate of allotment therefor, and died prior to the ratification of the Original Creek Agreement. The court held that the allotment was thereafter ratified by section 6 of the Original Creek Agreement.

A similar question, presented by defendants in error, we do not believe has been passed upon by this court. The court had in numerous cases stated that the title was

vested at the date said allotments were segregated and allotted. We know of no case where the lands were allotted under section 11 of the Curtis Act, or under section 28 of the Original Creek Agreement where the court has ever held that the title vested as of the date of the application made for the allotment, and counsel have not cited us any case; but the cases all state that title vests at the time of the selection and allotment. The court has used the term "selection," and that the "allotment was segregated"; still there is no case where they ever held the descent was cast prior to date of the certificate of allotment, and a reading of all the opinions disclose that is the date the lands are referred to as being allotted.

In the case at bar, the plaintiffs introduced in evidence what purported to be the "original memorandum of selection," signed by the chairman of the Dawes Commission, and the original certificate of allotment, and they contend that this is the date when the land was allotted. To overcome this, the defendants in error introduce the unsigned plat, with the words indorsed upon the case, "Reserved March 16, 1901 pending ratification of Creek Agreement." Now, if this is to overcome the instruments which are designated as the "original memorandum of selection" and the "certificate of allotment," there should be some authority for such a record to be made. No authority existed under section 11 of the Curtis Act, for making such a reservation, or such a record; then if there was no authority for such a record, or such a procedure, certainly no vested right accrued thereby. While it is true, the witness Hastain testified, that the Dawes Commission permitted this practice, but a practice permitted without authority, and done at a time that the heirs were not entitled to an allotment of land, and no provision made for allotting land to the deceased or his heirs.

That this memorandum slip or reservation plat was not considered as a selection must be self-evident, for the reason that thereafter the Dawes Commission signed what purported to be the "original memorandum of selection," and that is dated October 20, 1902, and on the same day issued the certificate of allotment, and until that was done no one acquired even the right of possession to this allotment, much less a vested interest in and to this allotment. It therefore follows the land in question was not lawfully segregated or allotted until October 20, 1902, and the law in force at that time will control.

It therefore follows that descent was cast on said date, to wit, October 20, 1902, the date of the "original memorandum of selection," and the date of the "certificate of allotment," and under the agreed statement of facts plaintiffs in error would inherit said allotment.

For the reasons stated, the judgment is reversed and remanded.

OWEN, C. J., and SHARP, KANE, HARRISON, PITCHFORD, and JOHNSON, JJ., concur.

McLAUGHLIN et al. v. NETTLETON et al.
(No. 8767.)

(Supreme Court of Oklahoma. Jan. 22, 1918.
On Motion for Rehearing, April 1, 1919.)

(Syllabus by the Court.)

1. JUDGMENT \Leftrightarrow 162(4) — DEFAULT — VACATION — UNAVOIDABLE CASUALTY — EVIDENCE.

Where a petition is filed pursuant to section 5267, Rev. Laws 1910, to vacate judgment on ground of unavoidable casualty preventing defendants from defending, which was occasioned by counsel for the said defendants, in their absence and without cause and without notice, withdrawing from said cause, and this court having examined such petition, and held that the same stated facts sufficient to entitle defendants to relief prayed for, and now the evidence being examined which had been offered upon the issues presented by such petition, and the weight thereof found to support said petition, it is ordered that said judgment be set aside and cause heard upon its merits.

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR \Leftrightarrow 1009(1)—REVIEW—WEIGHT OF EVIDENCE—EQUITY CASE.

In a proceeding under Rev. Laws 1910, § 5267, to vacate a default judgment for unavoidable casualty preventing a defense, being an equitable case, it is within the province of the Supreme Court, from the facts and circumstances introduced, to determine the weight thereof.

3. ATTORNEY AND CLIENT \Leftrightarrow 76(1) — CONDUCT OF LEGAL PROCEEDINGS — ABANDONMENT OF EMPLOYMENT—NOTICE.

An attorney, who has been employed to conduct legal proceedings, undertakes to conduct them to their determination, and cannot abandon the services of his client without cause and upon reasonable notice.

,Commissioners' Opinion, Division No. 2.
Error from District Court, Kiowa County;
Frank Mathews, Judge.

Proceeding by Charles McLaughlin and another against Arthur E. Nettleton and W. D. Herndon to vacate a default judgment foreclosing a mortgage. Judgment for defendants, dismissing the petition, motion for new trial overruled, and plaintiffs bring error. Reversed and remanded, with directions to set aside an order of the district court approving and confirming a sale of the lands involved to defendant Herndon.

See, also, 47 Okl. 407, 148 Pac. 987.

R. H. Towne, and Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiffs in error.

John T. Hays, of Hobart, for defendants in error.

WEST, C. This is a proceeding instituted by plaintiffs in error, who will hereinafter be called plaintiffs, against defendants in error, who will hereinafter be called defendants, to set aside a judgment entered against plaintiffs by default in the district court of Kiowa county on the 8th day of February, 1912, for the sum of \$650, attorney's fees, and costs, and to foreclose mortgage on the northwest quarter of section 8, township 2 north, range 17 west, and located in said county.

It appears that on the 2d day of November, 1905, there was filed in the district court of Kiowa county, by defendant Arthur Nettleton, a suit against plaintiffs asking for judgment of \$650, interest, and attorney's fees, with foreclosure of mortgage and vendor's lien securing said sums on said land mentioned above; and on May 21, 1907, judgment was entered by default against plaintiffs for said sums as prayed, with foreclosure of mortgage. On May 31, 1907, plaintiffs filed motion to set aside and vacate said judgment. On November 13, 1907, plaintiff Chas. McLaughlin filed petition to set aside said judgment of May 21, 1907, and the defendant Nettleton filed a general demurrer, and on January 13, 1908, judgment was rendered by the court sustaining said demurrer. Said cause was appealed and on December 14, 1909, this action of the court on the demurrer was reversed, with instructions to the district court to vacate said judgment, and on May 3, 1910, Chas. McLaughlin filed in said court his separate answer, duly verified. November 25, 1911, defendant Nettleton filed reply to the separate answers of defendants. On December 28, 1911, an order was made setting said cause for trial on February 5, 1912, and February 8, 1912, the following entry was made by the court:

"Now, at this time, February 8, 1912, this case is called. Judge L. M. Keys comes now and withdraws from the case as attorney. Plaintiff is present in court and by counsel, and defendant not appearing and adjudged in default, and the court, advised in the premises, grants judgment as per journal entry."

Which judgment was duly entered for sums sued for and foreclosure of mortgage. On August 14, 1912, order of sale was issued, and on September 16, 1912, the land in question was sold to defendant W. L. Herndon for \$1,500. On October 7, 1912, special judge was elected, and on said date said judge pro tem. entered order approving and confirming said sale. On January 2, 1913, writ of assistance was issued, and under said process W. L. Herndon was placed in possession of said real estate.

[1, 2] On January 23, 1913, Chas. McLaugh-

lin filed his verified petition to set aside said judgment rendered on February 8, 1912, to which petition a demurrer was filed and sustained, and on May 11, 1915, said judgment sustaining said demurrer was by this court reversed. See 47 Okl. 407, 148 Pac. 987. The second paragraph of the syllabus reversing said judgment is as follows:

"A petition to vacate a judgment by the court rendering the same, filed pursuant to section 5267, Rev. Laws 1910, after setting forth a defense to the action wherein the judgment was rendered, alleged in substance that the plaintiffs had employed counsel to represent them in the former case; that, in pursuance of said employment, said counsel entered his name as attorney of record for said plaintiffs, and acted as such attorney until the issues had been made up; that on several occasions after the issues had been joined, and prior to the rendition of the judgment and decree rendered against them, said plaintiffs appeared with their said counsel ready for trial, but for one reason or another said cause was continued from term to term; that finally said cause was set for trial on a day certain of a subsequent term of said court, of which action said plaintiffs had no notice; that, upon said cause being called for trial, said counsel for said defendants, in their absence and without cause, and without notifying his said clients of his intention so to do, or that their case had been set for trial at said term or on said day, arose in open court and announced that he withdrew from said cause as counsel for said defendants; whereupon the court, although said cause was at issue upon questions of fact decisive of the merits of said cause, rendered judgment and decree of foreclosure against said defendants. Held, that said petition stated facts sufficient to entitle the plaintiffs to the relief prayed for, upon the ground of unavoidable casualty preventing the plaintiffs from defending."

Cause was remanded, answer filed, and same was tried to the court without a jury, and on May 22, 1916, judgment was entered by said court, finding the issues, upon said petition to set aside the judgment of February 8, 1912, in favor of the defendants Arthur E. Nettleton and W. L. Herndon, and said petition was dismissed. Motion for new trial was filed and overruled, and plaintiffs have perfected their appeal. To review this last-named action of the court below, plaintiffs prosecute their appeal on eight assignments of error; the first of which is as follows:

The trial court erred in finding the issues under the petition of plaintiffs in error in favor of said defendants and against said plaintiffs in error.

And this assignment of error in effect covers the entire ground of errors assigned by plaintiffs. The evidence tended to show that, after the case was first remanded for new trial, Judge Jas. R. Tolbert, who was the elected presiding judge of said district court, had been of counsel for one of the plaintiffs and was disqualified to try said cause; that de-

defendants had been present at some three or four different terms of court without being able to get trial, and were advised that it would be necessary to have some other judge assigned to hear said cause. During the progress of the litigation several attorneys had represented the defendant, and at the time the judgment was entered, which is complained of, the defendants were being represented by Judge L. M. Keys, of Hobart, as local counsel, and other nonresident counsel; that after said cause was set in December, 1911, the clerk notified Judge Keys, and Judge Keys instructed his son, Leon Keys, who was his law clerk, to notify the defendants of the setting of the case, and Leon Keys testified that he did notify defendants but failed to hear from them; that Geo. P. Glaze, of Oklahoma City, one of the nonresident attorneys for defendants, in December had written to the clerk to find out the status of the case, but had failed to hear from the clerk.

Defendants both testified that they had no notice that the said cause had been set for trial, and that the first knowledge that they had that judgment had been entered against them was when the sheriff under writ of assistance had dispossessed their tenant and placed the purchaser in possession of the premises. They testified, however, that they had not written their attorneys to find out what was being done with their case during the year 1911, but they had been present at the May, 1911, term of the court of said county. The evidence adduced upon the issues involved upon petition to vacate the judgment in controversy presents in some respects an unusual situation. There is but little dispute in the evidence. This being an equity case, it is within the province of this court to weigh all the evidence, and from the facts and circumstances introduced to determine the weight of the same.

The undisputed evidence shows that the regular trial judge, having instituted the original suit, was disqualified from trying this cause; otherwise, we might say that the defendants were charged with notice of the time fixed by statute for the holding of district court in Kiowa county, and it was incumbent upon them to be present at each term or ascertain whether or not their cause would be for trial, and ordinarily the presumption would be that the cause was set and would probably be heard at each regular term of the court; but inasmuch as the regular judge was disqualified, and the fact that defendants had been present a number of times at the regular terms of court and were advised that it would be necessary to have a judge from some other district assigned to hear this cause, we cannot say that any such presumption arises.

The evidence further shows that one of the reasons for employing local counsel was that

such counsel could keep advised as to the progress of said cause and be able to notify other nonresident counsel and the defendants of each step taken in said proceeding. Judge Keys testified that he instructed his son Leon to notify the defendants of the setting of this cause, and his son testified that he had written the defendants, but had failed to hear from them. Plaintiffs each testified that they did not receive any notice. However, the evidence shows that Judge Keys did not advise the defendants of his withdrawal from the cause, or that judgment had been entered against them. This, we think, under the circumstances and under the terms of his employment, he was bound to do, and that the defendants had the right to rely upon him to keep them advised as to the progress of said suit. The only negligence that could be imputed to the defendants, if the same was negligence, under the circumstances, was the fact that they did not write to their local counsel, inquiring as to the status of the cause; but inasmuch as this case could only be heard, as defendants were advised, by some other judge being assigned to hear same, we think they had a right to rely upon the local counsel to advise them as to when the cause was set for trial and to be heard by a judge from another district being assigned for that purpose, and it would not be incumbent upon them to constantly remind their counsel that they desired information relative to the progress of this proceeding.

Defendant Charles McLaughlin, who seems to be the real party in interest, was, and had at all times since the inception of this litigation been, residing at Wichita, Kan., and testified that he did not have any notice of the setting of said cause, and no one testified that he had been advised that judgment had been rendered against him. It appears that once before, when the premises in controversy had been levied upon by process out of the district court, and appraised, that the appraisers fixed the value of this property at \$3,000. If plaintiff's local counsel had advised them of the rendition of this judgment, they would have at least been able to have partially protected themselves against the effect thereof.

Justice Kane, in the appeal by plaintiffs from the action of the district court in sustaining a general demurrer to the petition filed in this cause, used the following language:

"Whilst the extreme limit in defending a client's interest, advocated by Lord Brougham and Rufus Choate, has not met with the universal approbation of the American and English bars, yet it is conceded that the relation of an attorney to his client is one of great trust and confidence, calling for the highest degree of good faith. Upon undertaking to conduct a cause for a client, an attorney impliedly stipulated to carry it to its termination, and is not at liberty to abandon it without cause or reasonable notice."

No notice was given these plaintiffs that the attorney had abandoned their cause, or intended so to do; neither were they advised by him of the rendition of the judgment against them. This, we think, was incumbent upon their local counsel to do.

[3] The unquestionable weight of authority is that, when an attorney has been employed to conduct legal proceedings, he undertakes to conduct them to their determination, and cannot abandon the services of his clients without cause and upon reasonable notice. The evidence in this case shows that there was no notice given plaintiffs that their local counsel intended to abandon the cause, or terminate his services, or that he had done so, and while we are loath to disturb this verdict, on account of the fact that this is the second proceeding of this kind in this cause, nevertheless we are constrained to believe that, if this judgment should stand, it would have the effect of denying litigants their day in court and arouse an unjust resentment against the approved procedure in our tribunals of justice. It is the policy of the law and courts of Oklahoma to allow each litigant the right to be heard upon the merits of his cause, free from technical pitfalls.

After a careful consideration of all the evidence, we are of the opinion that the petition to set aside the judgment entered on February 8, 1912, should be sustained, and said judgment set aside and cause heard upon its merits; and it is so ordered.

PER CURIAM. Adopted in whole.

PER CURIAM. Motion for rehearing and to modify sustained, and opinion modified, per attached order:

And now, on this day, it is ordered by the court that the motion for specific directions be and the same is hereby sustained, and the former order heretofore entered herein reversing the above cause is modified, and remanded to the trial court, with directions to set aside the order of the district court of Kiowa county heretofore made on October 7 1912, approving and confirming a sale of the lands involved to W. L. Herndon.

CONQUEROR TRUST CO. v. BAYLESS DRUG CO. (No. 8761.)

(Supreme Court of Oklahoma. July 1, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 365(1)—BONA FIDE PURCHASER—TITLE.

The purchaser of a negotiable note before its maturity, in due course of business, in good

faith, without notice of imperfections or defects, takes the same freed of the outstanding equities and defenses that might have been asserted against the original payee by the maker.

2. BILLS AND NOTES \S 370—ACTION BY BONA FIDE PURCHASER—EVIDENCE.

In an action upon four negotiable promissory notes by a holder in due course, the maker of the notes was permitted by the court to offer in evidence the terms and conditions of the contract between the maker and the payee, and that the payee had violated the contract and that the consideration of the notes had failed after their negotiations. *Held*, that such evidence was improperly admitted, and constituted no defense to the action, in the absence of any showing that the holder in due course had notice of such contract, and of the failure of the consideration, at or before the time the notes were so purchased.

Error from District Court, Garvin County; F. B. Swank, Judge.

Action by the Conqueror Trust Company against the Bayless Drug Company. Judgment for plaintiff for a less amount than claimed, and it brings error. Reversed and remanded for a new trial.

Yerker E. Taylor, of Pauls Valley, and E. F. Cameron, of Joplin, Mo., for plaintiff in error.

Blanton & Andrews, of Pauls Valley, for defendant in error.

PITCHFORD, J. On April 17, 1914, the plaintiff in error, or plaintiff below, filed its petition in the district court of Garvin county, Okl., against the defendant in error, or defendant below. The parties will be designated as they appeared in the trial court. The action filed by the plaintiff was on four promissory notes, each dated March 11, 1913, aggregating \$300. The notes were payable to the Vernon Advertising & Manufacturing Company and indorsed by it to the plaintiff, the Conqueror Trust Company, of Joplin, Mo. The plaintiff alleged that the notes were indorsed by the payee to it, and that it was a purchaser in the usual course of business, before maturity, for value, without notice, and in good faith. The defendant admitted the execution of the notes, but denied that the plaintiff was an innocent holder thereof in good faith, alleging that the notes sued upon were a part of a certain contract entered into by the defendant and the Advertising & Manufacturing Company, and further that the Vernon Advertising & Manufacturing Company agreed to furnish the defendant with a number of fountain pens, which were to be salable and usable, and that these were a part of a voting contest; that, when a person purchased one of these fountain pens, he was entitled to a certain number of votes on the grand prize, which

was a sewing machine or a piano, and the person obtaining the largest number of votes was entitled to the grand prize.

Defendant alleged a breach of contract and claimed a credit on the notes for the breach. He further alleged that all unsold pens were to be taken back by the Vernon Advertising & Manufacturing Company at \$1.50 each, and that the Vernon Advertising & Manufacturing Company had failed and refused to take back the unsold portion of the pens. This was denied by the plaintiff in its reply. Plaintiff again alleged that it was a purchaser and holder of the notes in good faith, and that this could not be a defense to the notes.

The principal issue, as presented by the pleadings and evidence, was whether or not the plaintiff was an innocent holder for value. The cause was tried on the petition of the plaintiff, the answer of the defendant, and the reply of the plaintiff, and resulted in judgment for the plaintiff for \$183.50. The plaintiff appeals.

The plaintiff argues two propositions:

First. That the plaintiff was an innocent holder for value of the notes sued on, and was therefore entitled to a peremptory instruction in its favor.

Second. That the court erred in permitting the defendant to prove the terms and conditions of the contract made by it with the Vernon Advertising & Manufacturing Company without first showing that the plaintiff had knowledge of the contract.

This case presents many features similar in almost every respect to others brought to the appellate courts of the several states. In investigating the authorities upon the question, we are rather amazed at the little progress made by the average man for the last 100 years in being able to protect himself against the gentlemanly appearing and smooth-talking faker. The authorities are crowded with cases from almost every state in the Union, where the innocent, credulous, and gullible citizen has been induced to sign notes by plausible reasons given by some facile talker, who was able to conjure up in the mind of his intended victim visions of great material benefit to himself, resulting in the execution by the victim of commercial paper which immediately finds itself ushered into the commercial world. If the party signing the note would use ordinary caution—the least forethought—he would realize that, if the transaction should prove to be fraudulent, he, by his own act, would be placing it in the power of another to perpetrate a fraud upon an innocent purchaser of the note that he himself had signed, and thereby says in effect, 'This note is O. K.; buy it.' In almost every instance, if the purchaser of the note, prior to its maturity, would consult the maker, he would be informed that he had signed the note, that

he intended to pay it, that the inquirer would be perfectly safe in purchasing the same, and that there was no defense thereto.

The law merchant, which is now the law in the great majority of the states, is intended to protect, not only the maker, payee, and the bona fide purchaser, but every one having any connection with a negotiable note. The law is wholesome; but, while this is true, we see daily evidence that the schemer is taking advantage of the wholesome provisions of the law for the purpose of carrying out his nefarious schemes. No doubt there are many instances where a wrong is committed in the name of the law; but, when one knows in signing a note that it can come, and probably will come, into the hands of an innocent purchaser, he must be presumed to anticipate that the note will be transferred. He is also presumed to know that this note in the hands of an innocent purchaser will be protected against any defense that might be set up against the original payee. In the instant case, it might be that the Vernon Advertising & Manufacturing Company intended to and did practice a fraud upon the defendant; but he has no one to blame but himself. We find that the defendant executed and delivered six notes. The plaintiff, before purchasing, wrote the following letter to the State Bank of Stratford, Okla.:

"Will you kindly give us your opinion as to the responsibility and promptness of Bayless Drug Company, of your city, and whether they would be considered good for an amount not to exceed \$400? We will indeed appreciate it to have you write us as fully and frankly as you can in the matter. The information will be kept in the very strictest confidence, and some time we may be able to serve you in our section in return for your courtesy."

To which the bank replied: "We consider B. D. Co. a reliable firm." Thereafter the six notes executed by the defendant were assigned by the Vernon Advertising & Manufacturing Company to the plaintiff. Two of these notes were paid when they became due. When the others became due, and demand for payment was made, the defendant requested the plaintiff to wait awhile on them, as business was slow, but they would soon get to them. There is an entire failure of evidence to show that at the time the notes were purchased the plaintiff had any knowledge of any defense on the part of the defendant. While we find from the evidence that the plaintiff and the Vernon Advertising & Manufacturing Company resided in the same city and on opposite sides of the same street, and that the plaintiff was acquainted with the members composing the Advertising Company, we cannot see that for that reason fair-minded men would be led to the conclusion that the plaintiff, in taking the notes, acted in bad faith.

As we have before stated, had the plaintiff at that time consulted the defendant, there is no question but that the defendant would have acknowledged its liability on the notes. As we have seen, two of the notes were paid as they became due, and the defendant asked for time upon the others. We cannot subscribe to the view that, in this day of telephone, telegraph, and other means of rapid communication, the rules of the law merchant have largely lost their usefulness. This is, in effect, saying that the defendant's counsel recognizes that the law is against his contention and is asking this court to disregard the law. If every one would only practice ordinary caution when importuned to sign a negotiable note, we would then probably be in better position to appreciate the objects, purposes, and advantages of the law merchant. A person residing in the state of Missouri has the same right to deal in commercial paper executed in Oklahoma as does the citizen of Oklahoma, and will be guaranteed all the privileges and protected in all of his rights the same as if he were a citizen of this state.

[1] It may be that the plaintiff was not an innocent purchaser in good faith, but the evidence is conclusive to the contrary. All that the courts can judge by is the evidence. There might be circumstances connected with this transaction that would excite one's suspicion, but the great weight of authority, and particularly the decisions of this court, have followed the rule that suspicion, or that the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or of circumstances sufficient to put one upon inquiry, is not sufficient to defeat the rights of one claiming to be a bona fide holder. That result can be produced only by bad faith on his part. The authorities are uniform in holding that the owner of a negotiable promissory note, who obtains it before maturity and for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world.

It has been held in Arkansas that it is no defense against a note in the hands of a bona fide holder that the note was given in settlement of an account, and that the same was procured by fraud or mistake (*Lanier v. Union M. B. & T. Co.*, 64 Ark. 39, 40 S. W. 466), and also that it is no defense against a note, where the purchaser of the note knew that it was accommodation paper when he took it, and the defendant was not permitted to plead failure of consideration as against the bona fide purchaser (*Evans v. Speer Hdwe. Co.*, 65 Ark. 205, 45 S. W. 370, 67 Am. St. Rep. 919). In *Showalter v. Webb*, 42 Okl. 297, 141 Pac. 439, it is said:

"If a man who has bought commercial paper fair on its face, before maturity, in the due

course of business, without knowledge of anything that would put him on inquiry, could be robbed of this character of innocent purchaser by the random statements of his predecessors in title, who in no way are shown to be connected or interested with him, and made in his absence, then certainly an investor in commercial paper would be in a hazardous business. We do not think this has ever been the law. The purchaser of a negotiable note before its maturity, in due course of business, in good faith, without notice of imperfections or defects, takes the same freed of the outstanding equities and defenses that might have been asserted against the original payee by the maker."

To the same effect see *State Exchange Bank of Elk City v. National Bank of Commerce*, 174 Pac. 796, 2 A. L. R. 211; *Farmers' Bank of Roff v. Nichols*, 25 Okl. 547, 106 Pac. 834, 138 Am. St. Rep. 931, 21 Ann. Cas. 1160; *McPherrin v. Tittle*, 36 Okl. 510, 129 Pac. 721, 44 L. R. A. (N. S.) 395; *First State Bank of Okla. City v. Tobin*, 39 Okl. 96, 134 Pac. 395.

[2] In proposition No. 2 plaintiff contends that the court erred in permitting the defendant to offer in evidence the terms and conditions of the contract made with the *Vernon Advertising & Manufacturing Company*. If the plaintiff was a bona fide purchaser of the notes before due and for a valuable consideration, then the court was clearly in error in admitting this evidence. To make this evidence competent, it was not enough that the plaintiff had knowledge of the contract between the defendant and the *Advertising Company*, but the defendant would be required to go further and show that the contract was fraudulent and that the plaintiff was aware of the fraud.

In *Farmers' Bank of Roff v. Nichols*, 25 Okl. 547, 106 Pac. 834, 138 Am. St. Rep. 931, 21 Ann. Cas. 1160, it was said:

"A negotiable promissory note was executed in payment of the premium on some life insurance policies. At the time of the delivery of the note to payee, who was agent for the insurance company, the payee executed a written agreement that, if the maker of the note within a stipulated time investigated the company and found it not satisfactory or as represented, the note or the amount thereof in cash would be refunded to the maker by the payee. Held, that the contemporaneous agreement did not constitute the delivery of the note a conditional delivery, or deny to the payee the right to transfer the same, and that one who purchased the note in due course of business before maturity for a valuable consideration, could recover in an action thereon, although at the time of the transfer he had notice of the contemporaneous agreement."

See L. R. A. 1917C, 308, note.

The Supreme Court of Arkansas recently handed down a decision in which the plaintiff here was the plaintiff in that cause. The questions involved were identical with the questions raised in the case at bar. The

Arkansas case referred to was *Conqueror Trust Co. v. Reves Drug Co.*, 118 Ark. 222, 176 S. W. 119. There the court said:

"Proof that plaintiff paid a valuable consideration for notes before maturity and without notice of any fraud in their inception shifts the burden to the maker to show that plaintiff was not an innocent purchaser for value without notice, and, in the absence of evidence, recovery cannot be defeated," and "fraud in procuring a note is no defense as against a bona fide purchaser without notice."

It was further held in *Conqueror Trust Co. v. Sinmon*, 162 Pac. 1098, that:

"In an action upon four negotiable promissory notes by a holder in due course, the maker of the note offered in evidence a written contract between him and the payee, executed as a consideration for the notes, and to show that the payee had violated the contract, and that the consideration of the notes had failed after their negotiation and after the maturity and payment by him of the first two notes of the series of six, and before the maturity and payment of the remaining four sued on. *Held*, that said evidence was improperly admitted and constituted no defense to the action, in the absence of any showing, or attempt to show, that the holder in due course had notice of such contract * * * at or before the time he purchased said notes."

In view of the foregoing, we are of the opinion that the judgment of the trial court should be reversed and remanded for a new trial; and it is so ordered.

OWEN, C. J., and SHARP, HARRISON, McNEILL, and HIGGINS, JJ., concur.

KENT et al. v. TALLENT et al. (No. 8156.)

(Supreme Court of Oklahoma. July 22, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. INDIANS §39 — CONVEYANCE PRIOR TO STATEHOOD—WHAT LAW GOVERNS.

Where a conveyance of real estate was executed prior to statehood, and while the statutes of Arkansas were yet in force in the Indian Territory, the rights of the parties to such instrument were fixed by the statutes then in force, and are not determined by chapter 13 of the statutes of Oklahoma.

2. MORTGAGES §32(3)—DEED ABSOLUTE ON ITS FACE—CONSTRUCTION.

Under the statutes of Arkansas (Mansf. Dig. § 642), as construed by the Supreme Court of that state, a deed absolute on its face, if intended as a security for the payment of money, was treated in the courts of equity as a mortgage, and the rights of the parties deter-

mined as if the instrument were in fact a mortgage.

3. MORTGAGES §137—ARKANSAS STATUTES—TITLE OF MORTGAGEE.

Under the statutes of Arkansas, as construed by the Supreme Court of that state, a mortgage of real estate, as under the common law, conveyed the legal title to the mortgagee.

4. DEEDS §2 — CONVEYANCE PRIOR TO STATEHOOD—RECONVEYANCE BY GRANTEE—WHAT LAW GOVERNS.

Although title to real estate may have been conveyed to a grantee under the statutes of Arkansas prior to statehood, if, since statehood, and since the statutes of Oklahoma were put in force, he (the grantee) reconveys the title to the original grantor, such title is determined by the statutes of Oklahoma, and the right of parties to such instrument are determined thereby.

5. HUSBAND AND WIFE §47(1), 49½(5) — CONVEYANCE TO WIFE—GIFT—PAYMENT OF INDEBTEDNESS—PRESUMPTION.

A husband has the right to convey land to his wife, or to have it conveyed to her, either as a gift outright, or in payment of a debt owed to her, and in the absence of fraud or interests of creditors the presumption of law is in favor of such conveyance.

6. HUSBAND AND WIFE §119(3) — CONVEYANCE TO WIFE—TITLE.

Where a husband is entitled to a reconveyance of the title to land, and expresses a desire to the reconveyancer that the deed of reconveyance be made to his wife, and in compliance with his desire and at his special request such deed is made to his wife, she thereby acquires title to the land, and a deed from her vests title in her grantees.

Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Juanita Tallent and others against George M. Kent and others. Judgment for plaintiffs in part, and for defendants in part, and defendants bring error. Reversed and remanded, with directions.

Hayes & McIntosh and McPherren & Cochran, all of Durant, for plaintiffs in error.

H. H. Loden, of Durant, for defendants in error.

HARRISON, J. This was an action by Juanita Tallent et al., heirs of Pier Durant, deceased, for possession of a certain tract of land in Bryan county, and for cancellation of certain deeds to said tract. The tract in question was the surplus allotment of Pier Durant. During his lifetime he obtained a loan of \$1,000 from N. F. Frazier, and to secure the payment of same executed a warranty deed to Frazier, which deed was joined in by his wife, Melvina Durant, and, though such deed was on its face an absolute conveyance, it was understood among

the parties that the land would be reconveyed upon payment of the debt.

In November, 1908, the debt was paid, but N. F. Frazier, the grantee, had died in the meantime, leaving a will which constituted his wife, Emma Frazier, his executrix, with authority to convey any and all real estate of which he was possessed at his death. Knowing the agreement between the Durants and her husband, N. F. Frazier, and that the deed was intended as a conveyance to secure the payment of the loan, the executrix, Emma Frazier, proposed to reconvey the land to the Durants, whereupon Pier Durant requested that it be conveyed to his wife, Melvina Durant, for the reason that he has used a portion of her money, and that he wanted the land conveyed to her in payment of what he owed her, as he would have no other means of repaying her, whereupon Emma Frazier, the executrix, deeded the land in question to Melvina Durant.

In March, 1909, Pier Durant died, and in April, 1909, Melvina Durant deeded the land to C. H. Harden Smith, and the defendants below claimed under chain of title from Melvina Durant to C. H. Harden Smith. The plaintiffs below claimed as heirs, and upon the ground that the deed from Emma Frazier to their mother, Melvina Durant, was invalid, and that her deed to Harden Smith was invalid.

It is contended by plaintiffs that the deed from Pier Durant and his wife to Frazier was a mortgage, and did not convey legal title to Frazier, and that therefore Frazier could not convey legal title to Melvina Durant. There was testimony to the effect that Durant had requested the land to be conveyed to his wife in payment of money which he had used of hers. There was also testimony by W. A. Durant that he asked his brother, Pier Durant, why he had conveyed the land to his wife, or why he had had it conveyed to her and that Pier had answered that he had used a lot of his wife's money, and would have no other way of paying her back, and had therefore had the land conveyed to her in order to pay her.

It also appears from the record that the incumbrances and conveyances of the land in question had all been executed by Pier Durant and joined in by his wife, prior to and up to the time the loan to Frazier was paid, and after that time and after the land had been reconveyed by the Fraziers to Melvina Durant, in fact nine days after she had received the deed from the Fraziers, she obtained a loan on the tract of land and executed a mortgage to secure the payment of same, which mortgage was joined in by her husband, Pier Durant. This testimony was introduced in order to prove that Pier Durant intended that his wife should have the land and have control of same, and that she assumed control of same after she had re-

ceived the deed to it, and continued to exercise control over it during her husband's lifetime, and to convey it after his death.

On the other hand, there was testimony that Juanita Tallent had resided on the land during a portion of the years 1907 and 1908, and had exercised control over it, renting it to other parties and collecting the rents during those years, and that she had a house on said tract, which she afterwards sold. This testimony was introduced to show that their mother, Melvina Durant, had not taken charge of the land under her deed, and had not exercised control over it by reason of her deed. But it appears from the record and from the testimony of W. A. Durant that the house in question was not built by Juanita Tallent, but had been built upon the land by her father, and that Juanita Tallent purchased it from her father, and that during a portion of the years 1907 and 1908 rented the land; but this is immaterial, for the reason that it was all prior to the deeds to their mother, Melvina, prior to the payment of the mortgage to Frazier in November, 1908, and during the years 1907 and 1908, when the equitable title was in her father Pier Durant. The fact that he permitted his daughter to reside upon the land and collect the rents therefrom while the equities were yet in him is no evidence of who had possession and control over it after the loan was paid off and after the Fraziers had deeded it to her mother, Melvina Durant, and there was no evidence that, after the deed was made to Melvina Durant, Juanita Tallent ever exercised any further control over it or collected the rents thereafter.

It does appear, however, that from April, 1909, until this suit was filed in August, 1914, the plaintiffs, Juanita and the other children, had never questioned their mother's right to convey the land to Harden Smith, and had never questioned the soundness of his title, nor pretended to reassert the right of control over it, which Juanita claimed to have exercised during the years 1907 and 1908, when the equities were still in her father.

At the conclusion of the testimony the court made certain findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of plaintiffs, Juanita Tallent et al., for a two-thirds undivided interest in the land, and in favor of defendants Kent et al. for a one-third undivided interest therein, and decreed title in and to the respective parties accordingly. Defendants appealed upon four specifications of error, which are presented and argued under one general proposition, that under the evidence and under the court's own findings of fact the court erred in its conclusions of law.

As to whether the court erred in its judg-

ment depends, of course, on the question whether Melvina Durant had both legal and equitable title to the land in question, and her title depends upon the character of title held by the Fraziers, together with the question of fact whether it was the intention of Pier Durant to have the title, both legal and equitable, vested in his wife, Melvina.

It is contended by defendants in error, plaintiffs below, that the deed from the Durants to Frazier was in fact a mortgage, and that therefore the Fraziers had no title to the land and could not convey title thereto, and that the evidence was insufficient to constitute a parol gift from Pier Durant to his wife—citing in support of such contentions, *Levy v. Yabrough*, 41 Okl. 16, 136 Pac. 1120; *Harris v. Arthur*, 36 Okl. 33, 127 Pac. 695; *Sutherland v. Taintor*, 17 Okl. 427, 87 Pac. 900; *Davis v. Judson*, 159 Cal. 121, 113 Pac. 147; *Bringhurst v. Texas Co.*, 39 Tex. Civ. App. 500, 87 S. W. 893; *Neale v. Neale*, 9 Wall. 1, 19 L. Ed. 590; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Baldwin v. Baldwin*, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957; *Bevington v. Bevington*, 133 Iowa, 351, 110 N. W. 840, 9 L. R. A. (N. S.) 508, 12 Ann. Cas. 490; *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 49; *Cuppy v. Hixon*, 29 Ind. 522; *Bresnahan v. Bresnahan*, 71 Minn. 1, 73 N. W. 515. We have no fault to find with the foregoing authorities, either on the question that a deed absolute on its face, though in reality given to secure the payment of money, shall be treated as a mortgage, and the rights of the parties determined under the law of mortgages, nor with the authorities cited in support of the contention that a parol gift or parol sale, when attacked in a proper proceeding, must be supported by proof that it was the intention and desire of the donor to make the conveyance in question, and that the donee or grantee took either actual or constructive possession of the premises, and thereafter exercised dominion and control over same, to the exclusion of other parties. We fully concur in the doctrine announced in the authorities cited; but, as we view them, they tend to support rather than to conflict with the views herein reached.

On the other hand, it is contended by plaintiffs in error, defendants below, that the evidence was sufficient to constitute a parol gift, and sufficient to prove that Pier Durant surrendered control and dominion over said tract to his wife, Melvina, after the delivery of the deed from the Fraziers to her, and that thereafter Melvina assumed and exercised complete dominion and control over said land until she conveyed it to Harden Smith, citing a number of authorities in support of their contention, and further contended that the plaintiffs below, as heirs of Pier Durant, are estopped for two reasons: (1) That Pier Durant, having had said land conveyed to his wife and having held out to the

world that the title was in her, would have been estopped from asserting title against C. H. Harden Smith, and that his heirs, having no better right than he, would also be estopped. (2) That the heirs, having full knowledge of the conveyance by their mother to Harden Smith, and having fully acquiesced in such conveyance, living on an adjoining tract, for a period of more than five years, without ever questioning his title, permitting him to exercise complete control over and possession of said tract, having full knowledge of his selling and conveying same to other parties, without ever questioning his right to do so, are upon this ground estopped from now disturbing innocent purchasers in their title.

As stated above, the completeness of her title depends upon the character of title held by the Fraziers, and the actual intention of Pier Durant that the title, both legal and equitable, should be vested in his wife. The deed from the Durants to Frazier is as follows:

"This indenture, made and entered into this the 21st day of November, 1900, by and between Pier Durant and Melvina Durant, his wife, of Durant, Indian Territory, parties of the first part, and N. F. Frazier, of Eldorado, Kansas, party of the second part, witnesseth that for and in consideration of \$1,000 paid by the said party of the second part to the said parties of the first part, the receipt whereof is hereby acknowledged, first parties have granted, bargained, sold, and conveyed, and by these presents do hereby grant, bargain, sell, convey, and confirm, unto said party of the second part, his heirs and assigns, the following described property, lying and situated in Durant recording district, Indian Territory, bounded and described as follows: East $\frac{1}{2}$ of lot 4, less 4.83 acres adjoining Durant townsite, and less a strip along south end, containing one acre, containing in all 13.51 acres, together with all improvements thereon, in Sec. 5, township 7 south, range — east, together with all privileges and rights, appurtenances thereto belonging. To have and to hold the same unto the said party of the second part, and unto his heirs and assigns, in fee simple forever, and the said Pier Durant hereby covenanting that he is lawfully seized and possessed of an absolute and indefeasible estate in fee in the premises herein conveyed, and that he will, and his heirs, executors, administrators, and assigns shall, warrant and defend the title to the said premises unto the said party of the second part, and unto his heirs and assigns forever, against the lawful claims and demands of all persons whomsoever. The above described premises being a portion of my surplus on which restrictions have been removed.

"And I, Melvina Durant, wife of the said Pier Durant, for the consideration aforesaid, do hereby release and relinquish and quitclaim, transfer, and convey all my right, claim, or possibility of dower and homestead in said real estate to the said party of the second part in fee simple forever.

"In witness whereof the parties of the first part have hereunto set their hands and seal.

"Pier Durant,

"Melvina Durant."

The foregoing deed was acknowledged by Pier Durant and Melvina Durant separately; he acknowledging that he executed same for the consideration and purposes therein mentioned, and she acknowledging, in the absence of her husband, that as his wife she had of her own free will signed and relinquished her right of dower in the homestead, and had signed same for the uses therein set forth, without compulsion or undue influence on the part of her husband.

This deed on its face is an absolute conveyance of fee-simple title, it contains no qualification nor provision for defeasance, and but for the honesty of the Fraziers the court would never have known of any other agreement between the parties, except that set forth in the deed itself; but it so happened that Emma Frazier, the wife of N. F. Frazier, the grantee, and R. E. Frazier, the son of the grantee, both knew of the parol agreement, between N. F. Frazier and Pier Durant, that Frazier would reconvey the land upon payment of the money advanced to Durant and the interest due thereon. R. E. Frazier, the son, knew also the reason why a deed instead of a mortgage was made, and testified that, previous to the execution of the deed to his father, Pier Durant had borrowed \$500 from his father, N. F. Frazier, and gave him a mortgage on the land, and that before the satisfaction of said mortgage he sought to borrow \$500 more, and to give him a mortgage on the land to secure the payment of same, but that N. F. Frazier declined to loan the additional \$500 and take a mortgage, but advanced the extra \$500 upon condition that the Durants make him a deed to the land. This condition was complied with by the Durants, and, having delivered the deed, the agreement was reached between the Durants and N. F. Frazier that upon payment of the money he (Frazier) would reconvey the land.

The question, then, is whether the Fraziers had any title to reconvey; that is, whether or not the deed in question conveyed the legal title to Frazier. It is clear from the record that the foregoing instrument was not intended as a mortgage merely, but was intended to be a deed. Frazier declined to advance any money on a mortgage, but was willing to advance it on a deed, or to advance it upon delivery to him of the foregoing instrument, which is a deed with every requisite covenant of conveyance, seizin, and warranty, and without any qualifications whatever, and could not be construed as anything else than an absolute conveyance of title, except for the parol evidence of an oral agreement which shows that the agreement was that the land would be reconveyed. The agreement alone that it would be reconveyed shows of itself that it was being conveyed, and was intended to be conveyed.

It is contended by defendants in error that under section 1150, Rev. Laws 1910, every

instrument, although purporting to be an absolute conveyance, if intended to be defeasible, or as security for payment of money, shall be treated as a mortgage, and that under our statutes a mortgage on real estate creates merely a lien, and does not pass the title, and that therefore the conveyance from the Durants to Frazier, being a mortgage under our statutes, did not pass the title to Frazier.

[1, 2] It is unnecessary in this case to decide whether or not the contention of plaintiffs in error would be well taken if the controversy were settled by our statutes. But the land involved herein and the parties to the instrument, or at least the grantors, Durant and his wife, resided in what was the Indian Territory prior to statehood, and the deed in question, having been executed and delivered in November, 1906, prior to statehood, the rights of the parties under the instrument, and the effect of the instrument in question, were fixed by the statutes then in force in the Indian Territory, which were the statutes of Arkansas. Under the statutes of Arkansas, as construed by the Supreme Court of that state, a deed, though absolute on its face, if intended as the security for money, was regarded in equity as a mortgage; that is, the rights of the parties were adjudicated and determined by the courts of equity, and the parties decreed the same rights that they would have been entitled to receive if the deed had in fact been a mortgage. *Porter v. Clements*, 3 Ark. 364; *Johnson v. Clark*, 5 Ark. 321; *Blakemore v. Byrnside*, 7 Ark. 505; *McCarron v. Cassidy*, 18 Ark. 34; *Stryker v. Hershy*, 38 Ark. 264.

[3] But under the statutes of Arkansas, as construed by the Supreme Court of that state, a mortgage on real estate, as under the common law, conveyed the title. In *Kline v. Ragland*, 47 Ark. 111, on page 117, 14 S. W. 474, on page 475, in deciding whether title passed to the mortgagee, the court said:

"But as the mortgage is, with us, at common law, the conveyance of a conditional estate, and the statute by its terms applies to any conveyance purporting to convey a fee-simple or any less estate (*Mansf. Dig. 642*), the provisions must be held to apply to mortgages equally as to conveyances absolute in form. *Clark v. Baker*, 14 Cal. 612 [76 Am. Dec. 449]; *Vallejo Land Ass'n v. Viera*, 48 Cal. 572."

In *Turman v. Sanford*, 69 Ark. 95, 61 S. W. 167, decided February 18, 1901, the Supreme Court of Arkansas, in discussing the rights of a mortgagee, said:

"The legal title, it is true, passes to him by the mortgage; but he holds it for the protection of his debt, and for that purpose only."

Again in the same opinion the court said:

"If only the legal title in the mortgagee passed, it would be worthless; for the legal title can be used by the mortgagee only to collect his debt."

Hence it is immaterial in this case whether or not the instrument from the Durants to Frazier was anything more than a mortgage, as under the Arkansas statute a mortgage of real estate conveyed the legal title thereto. Therefore Frazier, having legal title, could convey such title to his grantees, and the deed from his executrix to Melvina Durant conveyed title to her. And in addition to this it is held under the weight of authority that a deed absolute on its face, though given to secure the payment of money, and though treated as a mortgage, conveys the legal title to the grantee. *Cottrell v. Moran*, 138 Mich. 410, 101 N. W. 561; *Grover v. Fox*, 36 Mich. 453; *Wallop v. McKinney*, 10 Mo. 229; *Gray v. Folwell*, 57 N. J. Eq. 446, 41 Atl. 869; *Kerr v. Davidson*, 32 N. C. 269; *Muller v. Flavin*, 13 S. D. 595, 83 N. W. 688; *Baird v. Kirtland*, 8 Ohio, 21; *Rawson v. Plaisted*, 151 Mass. 71, 23 N. E. 722; *Loring v. Melendy*, 11 Ohio, 355; *Groves v. Williams*, 69 Ga. 614; *McCalla v. Am. Land Mortg. Co.*, 90 Ga. 113, 15 S. E. 687; *First National Bank v. Tighe*, 49 Neb. 299, 68 N. W. 490; *Powell v. Crow*, 204 Mo. 481, 102 S. W. 1024; *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10; *Pardee v. Treat*, 82 N. Y. 385; *Carr v. Carr*, 52 N. Y. 251. See, also, notes to *Flynn v. Holmes*, 145 Mich. 606, 108 N. W. 685, 11 L. R. A. (N. S.) 209.

In the case of *Wagg v. Herbert*, 19 Okl. 525, 92 Pac. 250, which was appealed to and affirmed by the Supreme Court of the United States, Mr. Justice Brewer, in delivering the opinion, 215 U. S. 551, 30 Sup. Ct. 220, 54 L. Ed. 321, said:

"Of course, upon the face of the papers the deeds of May, 1901, vested in the defendant the title to the 55 acres."

The deed of reconveyance, having been made to Melvina Durant pursuant to the express desire and at the special request of Pier Durant, and such deed being on its face an absolute conveyance of fee-simple title, vested the fee simple title in Melvina Durant.

[4] Pier Durant had the right to convey this land to his wife, or to have it conveyed to her, either as a gift outright, or in payment of a debt owed to her, and in the absence of fraud or the interest of creditors the presumption is in favor of such conveyance. *Arp v. Jacobs*, 3 Wyo. 489, 27 Pac. 800; 21 Cyc. 1284, 1287, 1297, and authorities cited in notes; *Manning v. Maytubby*, 42 Okl. 414, 141 Pac. 783, *Veeder v. McKinley Loan & Trust Co.*, 61 Neb. 892, 86 N. W.

982; *Whitley v. Ogle*, 47 N. J. Eq. 67, 20 Atl. 284. And, the reconveyance having been made since statehood, the rights of the parties thereto are determined under the statutes of Oklahoma.

[5, 6] There was no testimony tending to overcome the presumption in favor of this conveyance; on the other hand, the testimony showed conclusively, and is undisputed, that Pier Durant requested the Fraziers to reconvey the land to his wife, Melvina, because he had used her money and wanted by that means to repay her. He told his brother, within a few days after the date of the deed, that he had deeded it to his wife because he had used her money and had no other means of repaying her, and within nine days after she received the deed from the Fraziers she mortgaged the land in question in her own name and secured a loan thereon. Her acts in this regard were known to her husband, Pier Durant, and he joined her in the execution of the mortgage, and it was at the time of the execution of such mortgage that he explained to his brother, W. A. Durant, why he had it deeded to his wife.

Hence we have not only the instrument of conveyance, which creates the presumption in its favor, but we have undisputed evidence that, before the deed of reconveyance was made, Pier Durant requested that it be deeded to his wife, and evidence that it was deeded to her at his special instance and request, and evidence that, after it was so deeded, he explained to his brother why he had had it so deeded to her, and also evidence that after the deed to her he relinquished further control over the title, and she assumed full control over same, and there is no evidence tending to overcome the legal presumption in favor of the instrument itself.

Therefore the trial court erred in holding that the evidence was insufficient to support an intention on the part of Pier Durant to have the land conveyed to his wife, and erred in holding that she had no further title than her one-third interest in the land, and erred in holding that plaintiffs had any interest in the land, and erred in deciding against defendants below, who claimed under deed from Melvina Durant.

The judgment is reversed, and the cause remanded to the district court of Bryan county, with instructions to enter judgment and decree in accord with the conclusions herein reached.

KANE, RAINEY, JOHNSON, McNEILL, and SHARP, JJ., concur.

KNOX et al. v. CRUEL (No. 5398.)

(Supreme Court of Oklahoma. June 24, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD ⇐175—SALE OF REAL ESTATE—MISAPPROPRIATION—LIABILITY OF SURETIES.

Sureties on a guardian's bond for the sale of real estate, executed pursuant to section 6564, Rev. Laws of 1910, are not liable for misappropriations by the guardian of funds not arising from the sale of real estate in relation to which the bond was executed.

2. GUARDIAN AND WARD ⇐182(6) — SALE BOND — LIABILITY OF SURETY — BURDEN OF PROOF.

In a joint action against the sureties on several general guardian's bonds and the surety on the guardian's bond for the sale of real estate, executed pursuant to section 6564, where the record shows that the county court, on settlement of the final account of the guardian, found the amount misappropriated and due by the guardian to the ward, and the surety on the sale bond seeks to avoid liability on the ground that the guardian did not misappropriate any of the funds of his ward while the bond on which it was surety was in force, the burden is on the said surety to establish such defense.

3. APPEAL AND ERROR ⇐1170(3)—RULING ON DEMURRER TO ORIGINAL PETITION—REVIEW.

Where defendant's demurrer to plaintiff's petition is overruled, and thereafter, during the progress of the trial, the court permits the plaintiff to amend his petition, and the defendant does not demur to the petition as amended, and where evidence is introduced without objection, proving the matter which defendant contends should have been alleged in the original petition, this court will not consider the alleged error of the trial court in overruling defendant's demurrer to the original petition.

Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by Ed. Cruel, a minor, by A. J. Mason, his guardian, against Ed. Knox, the Southwestern Surety Insurance Company, and others. Joint judgment against all defendants, and they bring error. Affirmed.

See, also, 178 Pac. 91.

Jesse W. Watts, of Wagoner, for plaintiff in error Southwestern Surety Ins. Co.

W. O. Rittenhouse, of Wagoner, for defendant in error.

RAINEY, J. On the hearing and settlement of the final report of Ed. Knox, guardian of Ed. Cruel, a minor, the county court of Wagoner county found that the said guardian was indebted to his ward in the sum of \$851.48. During the time the said Ed. Knox was guardian of said minor he executed several bonds, all of them being general guardianship bonds, except one executed by the

Southwestern Surety Insurance Company, known and commonly called the sale bond, which was executed pursuant to the provisions of section 6564, Rev. Laws of 1910.

This action was instituted jointly against the principal and sureties on the respective bonds, and a joint judgment was rendered against all the defendants for the amount found due by the county court on final settlement of the guardian's account. The evidence in the case discloses that during the time the said Ed. Knox was acting as guardian of said ward all the lands belonging to the estate of said ward were sold at guardian's sale, upon petition filed by the guardian and the order of the county court made pursuant thereto, all of which was done after the execution of the bond by the defendant Southwestern Surety Insurance Company, the only plaintiff in error that has filed a brief in this case.

[1, 2] Counsel for the surety company are correct in their contention that the additional bond for the sale of real estate, executed pursuant to section 6564, supra, is security only for the funds derived from the sale of said real estate, and the surety on said bond is not liable for misappropriation of funds not arising from the sale of said real estate in relation to which the bond was executed. National Surety Co. of N. Y. v. Washington et al., 170 Pac. 1142; Smith et al. v. Garnett, 161 Pac. 1083. But under the decisions of this court all the bondsmen may be jointly sued, and where an additional bond is executed, the real estate sold as contemplated, and there has been an adjudication of the amount due by the guardian on the settlement of his final account, the burden is on the surety on the additional bond to show that the guardian did not misappropriate any of the funds of his ward while the bond on which it was surety was in force. American Bonding & Trust Co. v. Coons, 166 Pac. 887; Freeman v. Brewster, 93 Ga. 651, 21 S. E. 166; Boyd v. Withers, 103 Ky. 702, 46 S. W. 13. In American Bonding & Trust Co. v. Coons, supra, this court said:

"It is the purpose of the law to protect the property interest of all wards and to carefully guard their rights from the conduct of their guardians. Here a surety for hire seeks to avoid paying for the default of the guardian, and says the ward has not shown any default while it was surety upon the bond. A default is shown to exist. The ward's money is gone—spent while he was unable to act or protect himself. He perhaps would not be able to show when or how his money was wasted. He has shown enough to justify a recovery against his guardian. He need show no more. The surety must pay, or show why he should not. * * *

The case of National Surety Company of New York v. Washington, supra, is not in conflict with the views herein expressed. In that case it was held that the surety on the

sale bond executed pursuant to section 6564 was not liable for misappropriation by the guardian of funds not arising from the sale of the real estate in relation to which the bond was executed, and that it was error for the trial court to overrule a motion to make the petition more definite and certain by showing the date of the misappropriations. We think in every case where plaintiff has knowledge of the dates of the defalcations he should be required to allege the facts in his petition, for if the alleged facts show that the defalcations did not occur while the bond was in force the surety would not be liable, and by making the petition more definite and certain in this respect the issues would be more clearly defined and the trial facilitated; but where plaintiff does not possess information of the dates of the shortage he cannot be required to make his petition more definite and certain in that respect.

[3] But counsel for the surety company insist that plaintiff's petition in this case was fatally defective, and that the court should have sustained defendant's demurrer thereto, for the reason that plaintiff did not allege that the real estate of his ward was sold under the order of the court as contemplated by the terms of the bond, which was attached to the petition and made a part thereof. The petition alleged the execution of the respective bonds, and that liability existed thereon because of the defalcations of the guardian; but if we assume, for the purposes of this case, that an averment that the real estate was sold as contemplated is essential to state a cause of action, we do not think, under the state of the record, the surety company is in a position to take advantage of the alleged error in overruling the demurrer. It appears from the record that after the issues were joined, and during the progress of the trial, plaintiff was permitted to amend his petition. The record in this respect discloses the following proceedings:

"Mr. Watts: Comes now the defendant the Southwestern Surety and Insurance Company, and moves the court to continue this case, and for reason says that plaintiff on this date has filed an amendment to the petition in which he sets up a new and separate cause of action from the one in the original petition; that this defendant cannot safely proceed to trial without being given an opportunity to prepare its defense to the amendment to the petition; that this motion is not made to delay, but that justice may be done. The defendant pleads surprise at the filing of the amendment to the petition at this late hour.

"Mr. Calhoun: The defendant Knox joins in this motion.

"The Court: In view of the fact that this reply, which was just this minute filed, is being pleaded as an amendment to the reply filed on January 23, and further fact that all the attorneys in this case on last evening by appointment with me argued all of the legal propositions to the court, and at that time knew and

understood what my rulings would be upon this proposition involved in this amendment, and have not until the jury is called into the box announced that they would be surprised by reason of this pleading, the motion for a continuance comes too late and will be overruled.

"Mr. Watts: To which the defendants except.
"The Court: Inasmuch as the issues in this case are generally understood and have been argued to the court, the reply of the plaintiff, containing some allegations that in the judgment of the court should be contained in the petition, instead of the reply, that reply will be treated as an amendment to the petition."

After a most diligent examination of the record we have been unable to find this amendment to the petition, but we think it might well be presumed that the petition, as amended was sufficient; but, whether it was or not, the surety company did not file a demurrer to the petition as amended, and inasmuch as proof was adduced without objection showing that all the lands of the minor were sold, we will consider the pleadings as amended to conform to the proof.

Under section 6005, Rev. Laws of 1910, this court is not authorized to set aside any judgment on account of any error in any matter of pleading or procedure, unless, in our opinion, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

We are convinced from the evidence in the record that the surety company and the other defendants are jointly and severally liable to the plaintiff, and the judgment of the trial court is therefore affirmed.

OWEN, C. J., and KANE, JOHNSON, and HARRISON, JJ., concur.

ROY v. STATE. (No. A-3285.)

(Criminal Court of Appeals of Oklahoma. Aug. 19, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1182—APPEAL—AFFIRMANCE—RULE OF COURT.

Where no appearance was made for plaintiff in error on submission of cause, nor any brief filed in his behalf, and where an examination of pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals, rule 9 (165 Pac. x),

Appeal from Superior Court, Creek County; Gaylord R. Wilcox, Judge.

Dorothy Roy was convicted of keeping a bawdyhouse, and sentenced to pay a fine of \$250, and she appeals. Judgment affirmed.

R. B. Thompson, of Sapulpa, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. Dorothy Roy was convicted in the superior court of Creek county of keeping a bawdyhouse, and her punishment fixed as above stated.

This appeal has been pending in this court since the 12th day of March, 1918, the cause having been submitted June 5, 1919, at which time no appearance was made by any counsel representing plaintiff in error, nor has any brief been filed in her behalf. Rule 9 (165 Pac. x) of this court provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence, and if no prejudicial error appears, will affirm the judgment."

This appeal has evidently been abandoned. An examination of the pleadings, instructions, and judgment and sentence discloses no prejudicial error, and, in accordance with rule 9, supra, the judgment is affirmed.

SMITH v. STATE. (No. A-3286.)

(Criminal Court of Appeals of Oklahoma.
Aug. 28, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1182 — APPEAL — AFFIRMANCE—RULE OF COURT.

Where no appearance was made for plaintiff in error on submission of cause nor any brief filed in his behalf, and where an examination of the pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals Rule 9 (165 Pac. x).

Appeal from Superior Court, Creek County; Gaylord R. Wilcox, Judge.

J. M. Smith was convicted in the superior court of Creek county of the crime of unlawful possession of intoxicating liquor, and sentenced to serve a term of 30 days in the county jail and to pay a fine of \$100, and he appeals. Judgment affirmed.

R. B. Thompson, of Sapulpa, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. J. M. Smith was convicted in the superior court of Creek county of the crime of unlawful possession of intoxicating liquor, and his punishment fixed as above stated.

This appeal has been pending in this court since the 12th day of March, 1918, the cause having been submitted June 5, 1919, at which time no appearance was made by any counsel representing plaintiff in error, nor has

any brief been filed in his behalf. Rule 9 (165 Pac. x) of this court provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence, and if no prejudicial error appears, will affirm the judgment."

This appeal has evidently been abandoned. An examination of the pleadings, instructions, and judgment and sentence discloses no prejudicial error, and in accordance with rule 9, supra, the judgment is affirmed.

STATE v. POSTAL TELEGRAPH-CABLE CO. (No. 14209.)

(Supreme Court of Washington, June 12, 1919.)

En Banc.

Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by the State against the Postal Telegraph-Cable Company. Judgment of dismissal, and the State appeals. Reversed in part, and affirmed in part.

See, also, 101 Wash. 630, 172 Pac. 902; 176 Pac. 346.

W. V. Tanner, Atty. Gen., and John H. Dunbar, of Olympia, for the State.

O. L. Willett, of Seattle (W. W. Cook, of New York City, of counsel), for respondent.

PER CURIAM. Since the original opinion was filed in this case (101 Wash. 630, 172 Pac. 902), the state has waived its right to file a reply to the answer of respondent, as permitted therein. That part of the judgment must therefore be affirmed.

SANDS v. STATE. (No. A-3268.)

(Criminal Court of Appeals of Oklahoma.
Oct. 21, 1919.)

Appeal from District Court, Greer County; T. P. Clay, Judge.

Charlie Sands was convicted of a violation of the prohibitory liquor law, and appeals. Affirmed.

Stewart & Edwards, of Mangum, for plaintiff in error.

W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted in the district court of Greer county of the offense of having in his possession intoxicating liquors with intent to sell the same.

It is alleged in the information that he had been previously convicted in the county court of Greer county of the offense of selling

whisky. Judgment was rendered in accordance with the verdict, and he was sentenced to be confined for 30 days in the county jail and pay a fine of \$50. From the judgment he appeals.

The only evidence is that introduced by the state, and it is ample to sustain the verdict. Discovering no prejudicial error in the record, the judgment is affirmed. Mandate forthwith.

KILLOUGH v. STATE. (No. A-3042.)

(Criminal Court of Appeals of Oklahoma. Aug. 28, 1919.)

(Syllabus by the Court.)

INTOXICATING LIQUORS §211—POSSESSION WITH INTENT TO VIOLATE LAW—INFORMATION—DEFINITENESS.

Where an information charges in one count that on the 27th day of July, 1916, and between the said date and May 29, 1916, T. A. K. had possession of 8 barrels of beer and 42 gallons of whisky, with intent to violate the prohibitory liquor laws of this state, and does not aver that possession of all of said intoxicating liquor was at one and the same time, it is too indefinite and uncertain, and insufficient to sustain a judgment thereon; and a demurrer thereto, on the ground of being too indefinite and uncertain, should be sustained.

Appeal from County Court, Harper County; A. H. Walker, Judge.

Tom A. Killough was convicted of having illegal possession of intoxicating liquors with intent to violate the prohibitory liquor laws, and he appeals. Reversed, and cause remanded.

C. W. Hofmeister, of Buffalo, and B. F. Willett, of Woodward, for plaintiff in error.

S. P. Freelling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Tom A. Killough, hereinafter called defendant, was by information charged with the offense of having illegal possession of intoxicating liquors with intent to violate the prohibitory liquor laws, convicted and sentenced to be confined in the jail of Harper county for a period of six months and to pay a fine of \$500. To reverse the judgment rendered, he prosecutes this appeal.

The charging part of the information in this case is as follows:

"That Tom A. Killough did, in Harper county and in the state of Oklahoma, on or about the 27th day of July, 1916, and between said date and May 29th in the year of our Lord 1916, and anterior to the presentment hereof, willfully, unlawfully, and knowingly commit the crime of possessing certain intoxicating liquors with the intention of violating the law in the manner and form as follows, to wit: That is to

say that the said Tom A. Killough did, on or about the date above named, then and there unlawfully and willfully have in his possession certain intoxicating liquors, to wit, 8 barrels of beer and 42 gallons of whisky, the same being more than any man in Oklahoma should by right, law, and justice have, which were had and possessed by said defendant with the intention of him, the said Tom A. Killough, of violating section 3605 of the Revised Laws of Oklahoma, 1910."

The defendant, among other grounds, demurred to the information upon the ground "that the information herein is general, indefinite, uncertain, and insufficient to charge a public offense."

The court overruled the said demurrer, and the defendant excepted.

The information does not state that the 8 barrels of beer and 42 gallons of whisky were possessed by defendant at one and the same time, and the time alleged in which the defendant is charged with violation of the law extending over 60 days leaves in doubt whether the defendant is charged with the possession of said intoxicating liquors on July 27, 1916, or possession of parts of said liquors on July 27, 1916, and of parts thereof on other days of said 60 days. An information must point out the offense charged sufficiently specific that a judgment rendered thereon may be pleaded in bar of another action for the same offense, and this the information does not do. In *Price v. State*, 9 Okl. Cr. 359, 131 Pac. 1102, it is said:

"It is true that an indictment should be reasonably certain as to the offense charged in order that the defendant may not be surprised and may be able to prepare to make his defense, and also to enable him to plead a judgment of acquittal or conviction in bar to a subsequent prosecution for the same offense."

Section 20, art. 2, of the Constitution provides: That accused "shall be informed of the nature and cause of the accusation against him."

Section 5739, Revised Laws 1910, provides:

"That the indictment or information must be direct and certain as it regards * * * the offense charged," and "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

Section 5738 requires that an information must contain:

"A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

"It is not a technical, but a sound fundamental rule of criminal procedure that the accused must be apprised at the outset by the indictment or information with reasonable certainty of the nature and cause of the accusation against him." *Abrams v. State*, 13 Okl. Cr. 11, 161 Pac. 331.

We are of the opinion that the information in this case, when tested by the well-settled rules of law herein cited, is too indefinite and uncertain, does not specifically point out the offense with which it is intended to charge the defendant, and that the court committed reversible error in overruling the demurrer thereto.

As the errors pointed out must work a reversal of the judgment rendered, it is unnecessary to review any of the other errors assigned.

The judgment of the trial court is reversed, and cause remanded.

DOYLE, P. J., and MATSON, J., concur.

HUGHES v. STATE. (No. A-3284.)

(Criminal Court of Appeals of Oklahoma.
Aug. 28, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1182 — APPEAL — AFFIRMANCE—RULE OF COURT.

Where no appearance was made for plaintiff in error on submission of cause, nor any brief filed in his behalf, and where an examination of pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals rule 9 (165 Pac. x).

Appeal from Superior Court, Creek County; Gaylord R. Wilcox, Judge.

Dade Hughes was convicted of the crime of unlawful possession of liquor, and his punishment fixed at a fine of \$500 and six months' imprisonment in the county jail, and he appeals. Judgment affirmed.

R. B. Thompson, of Sapulpa, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. Dade Hughes was convicted in the superior court of Creek county of the crime of unlawful possession of liquor, and his punishment fixed as above stated.

This appeal has been pending in this court since the 12th day of March, 1918, the cause having been submitted June 5, 1919, at which time no appearance was made by any counsel representing plaintiff in error, nor has any brief been filed in his behalf. Rule 9 (165 Pac. x) of this court provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence,

and if no prejudicial error appears, will affirm the judgment."

This appeal has evidently been abandoned. An examination of the pleadings, instructions, and judgment and sentence discloses no prejudicial error, and in accordance with rule 9, supra, the judgment is affirmed.

DAVIS v. STATE. (No. A-3338.)

(Criminal Court of Appeals of Oklahoma. Aug. 19, 1919.)

(Syllabus by the Court.)

1. LARCENY §55—SUFFICIENCY OF EVIDENCE—GRAND LARCENY.

In a prosecution for grand larceny, the evidence examined, and held sufficient to sustain the verdict.

2. CRIMINAL LAW §1182—FAILURE TO FILE BRIEFS—AFFIRMANCE.

Where an appeal from a judgment of conviction is taken, and no briefs are filed or argument presented, this court will examine the record, and, if no error is apparent, the judgment will be affirmed.

Appeal from District Court, Okmulgee County; Ernest B. Hughes, Judge.

John Davis was convicted of grand larceny, and he appeals. Affirmed.

Cochran & Ellison, of Okmulgee, and Harry W. Worsham, of Bixby, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, John Davis, was convicted in the district court of Okmulgee county on an information charging the theft of harness of the value of \$30 and his punishment was fixed at imprisonment in the penitentiary for one year and one day.

From the judgment rendered in pursuance of the verdict on the 26th day of October, 1917, an appeal was perfected by filing in this court on April 20, 1918, a petition in error with case-made.

No brief has been filed, and when the case was called for final submission no appearance was made on behalf of plaintiff in error. The Attorney General moved to affirm the judgment for failure to prosecute the appeal.

[1, 2] We have carefully examined the record and the evidence in the case, and it appears that the information is sufficient, and the verdict is abundantly sustained by the evidence. The instructions of the court, to which no objection was made or exception taken, fully and fairly cover the law of the case. Upon the whole case our conclusion

is that plaintiff in error had a fair trial, and was properly convicted.

The judgment is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

BOWERS v. STATE. (No. A-3342.)

(Criminal Court of Appeals of Oklahoma. Aug. 19, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1182—FAILURE TO PROSECUTE APPEAL—AFFIRMANCE.

Where a cause on appeal was called for submission and no appearance was then made by plaintiff in error to orally argue the case, and no brief was filed in his behalf, the Attorney General's motion to affirm the conviction for failure to diligently prosecute the appeal would be sustained.

Appeal from County Court, Rogers County; Edward Jordan, Judge.

Walter Bowers was convicted of the crime of unlawful possession of intoxicating liquors, and his punishment fixed at a fine of \$125 and 30 days' imprisonment in the county jail, and he appeals. Judgment affirmed.

H. Tom Kight and H. H. Brown, both of Claremore, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. This appeal has been pending in this court since the 30th day of April, 1918. On the 7th day of June, 1919, the case was called for submission. No appearance was made at that time by counsel representing plaintiff in error to orally argue the cause, nor has any brief been filed in behalf of plaintiff in error. At the time the cause was submitted, the Attorney General filed a motion to affirm the same for failure to diligently prosecute the appeal.

It is apparent that this appeal has been abandoned. The motion of the Attorney General to affirm the judgment for failure to diligently prosecute the appeal is sustained, and the judgment of conviction is affirmed. Mandate forthwith.

LEDDON v. STATE. (No. A-3270.)

(Criminal Court of Appeals of Oklahoma. Aug. 19, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1182—APPEAL—AFFIRMANCE—RULE OF COURT.

Where no appearance was made for plaintiff in error on submission of cause, nor any brief filed in his behalf, and where an examination of pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals rule 9 (165 Pac. x).

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Cole Leddon was convicted of felonious assault, defined by section 2344, Revised Laws 1910, and sentenced to pay a fine of \$50 and to serve three months in the county jail, and he appeals. Judgment affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. Cole Leddon was convicted in the district court of Jefferson county of felonious assault, defined by section 2344, Revised Laws 1910, and his punishment fixed as above stated.

This appeal has been pending in this court since the 28th day of February, 1918, the cause having been submitted June 4, 1919, at which time no appearance was made by any counsel representing plaintiff in error, nor has any brief been filed in his behalf. Rule 9 (165 Pac. x) of this court provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence, and if no prejudicial error appears, will affirm the judgment."

This appeal has evidently been abandoned. An examination of the pleadings, instructions, and judgment and sentence discloses no prejudicial error, and in accordance with rule 9, supra, the judgment is affirmed.

STATE v. PARKS et al. (No. 2294.)

(Supreme Court of New Mexico. Aug. 19, 1919.)

*(Syllabus by the Court.)*1. WITNESSES \S 350 — CROSS-EXAMINATION — OTHER OFFENSES.

Cross-examination of Charley Parks held not error, consonant to doctrine in *State v. Perkins*, 21 N. M. 135, 153 Pac. 258, that overt acts of wrongdoing on part of witness are relevant as impeaching evidence, but cannot be shown outside the examination of the witness; the extent of such examination resting largely in the discretion of the court.

2. MURDER—DIRECTED VERDICT.

Evidence examined, and held, court did not err in refusing to instruct the jury to find John Parks not guilty.

3. HOMICIDE \S 325 — APPEAL — INSTRUCTION—EXCEPTION—REVIEW.

Instructions examined, and held: (1) That so far as same are reviewable they correctly state the law; and (2) that no proper exception was taken to certain instructions.

4. HOMICIDE \S 116(3) — SELF-DEFENSE — INSTRUCTION.

Requested instruction held erroneous, in that it is not sufficient to justify the taking of human life that a person has reason to apprehend death or great bodily harm to himself unless he killed his assailant. He must entertain such belief and must act upon it.

5. HOMICIDE \S 308(3) — INSTRUCTION — MURDER IN SECOND DEGREE—EVIDENCE.

Action of the court in instructing jury on second degree murder held proper, notwithstanding contention of the state that the killing was murder in the first degree.

6. CRIMINAL LAW \S 1170½(5)—CROSS-EXAMINATION — ERRONEOUS RULING — REVERSAL.

Rulings upon questions asked a witness on cross-examination, although erroneous, will not constitute ground for reversal, where no substantial prejudice results. Held, appellant suffered no prejudice.

7. CRIMINAL LAW \S 1170½(3)—OBJECTION TO QUESTION—ANSWER—REVERSAL.

Error in overruling an objection to a question will not constitute ground for reversal, where the question was not answered.

8. CRIMINAL LAW \S 655(1), 657—ACTION OF COURT—IMPOSITION OF FINE ON COUNSEL—MISTRIAL.

It is improper for the court, during the progress of the trial, to make any unnecessary comments, or to take any unnecessary action, which might tend to prejudice the rights of either of the parties litigant; but, when it becomes unavoidable, the court has the right, even in the presence of the jury, to impose a fine upon any person connected with the trial, and such action cannot of itself cause a mistrial,

merely because it might have some influence on the minds of the jurors.

9. CRIMINAL LAW \S 1090(18)—CONDUCT OF STATE'S ATTORNEY—REVIEW—BILL OF EXCEPTIONS.

Proposition concerning alleged remarks during the trial of one of the attorneys for the state held not reviewable, because such alleged remarks were not incorporated in the record by bill of exceptions.

10. CRIMINAL LAW \S 726 — REMARKS OF DISTRICT ATTORNEY — PROVOCATION — REVERSAL.

Remarks of the district attorney, which ordinarily would be improper, are not cause for reversal, where provoked by defendant's counsel and in reply to his acts and statements, unless such remarks extend to an impertinent reply, and bring before the jury extraneous matters touching important issues.

11. WITNESSES \S 287(3) — EVIDENCE — EXCUSE FOR FAILURE TO ACT.

Action of the court in permitting a witness to be questioned concerning the cause for the lack of certain action by him held to be proper.

Appeal from District Court, Grant County; Ryan, Judge.

Charley Parks and John Parks were convicted of murder in the second degree, and they appeal. Affirmed.

H. D. Terrell and K. K. Scott, both of Silver City, for appellants.

O. O. Askren, Atty. Gen., and A. B. Renahan, Sp. Asst. Atty. Gen., for the State.

HOLLOMAN, District Judge. The defendants in this case were indicted at the March, 1918, term of the Grant county district court, charged with the murder of one J. Edward Schrimsher, and they were tried at the same term of court. A verdict of murder in the second degree was returned against them, and the court sentenced each of them to imprisonment in the state penitentiary for not less than 90 nor more than 99 years, from which judgment and proceeding this appeal is perfected.

[1] The appellants complain that the court erred in permitting the state, on cross-examination of the defendant Charley Parks, to ask questions relative to other crimes and specific acts of violence, etc., alleged to have been committed by him. The propriety of such an examination has been so often upheld by this court that a discussion of the same is unnecessary; *State v. Perkins*, 21 N. M. 135, 153 Pac. 258.

[2] The second error assigned is that the court erred in overruling a motion of the defendant John Parks, asking that the jury be instructed to find the defendant John Parks not guilty. We have carefully examined the testimony in the case, and are convinced that there was sufficient evidence to justify the

submission of the case against John Parks to the jury.

[3] Many errors are assigned directed to the instructions given by the court. In fact, so many of the instructions were attacked by appellants that it would unduly lengthen this opinion to consider them singly. We have carefully examined all the instructions given, and are satisfied that in so far as the same are reviewable they state the law correctly. In some instances appellants urge objections to the instructions not called to the attention of the trial court by proper exceptions. These objections will not, of course, be considered. For example, instructions 23, 31, 33, and 34 are here attacked. These instructions deal with the right of self-defense, and are here attacked because the court used the term "a man of ordinary prudence, firmness, and courage." Appellants contend that this is not a correct statement of the law, in that the danger is to be viewed from the standpoint of the defendant as a "reasonable man." The exceptions to these instructions are that the same "do not correctly state the law of self-defense and on other good and sufficient grounds," and further "that they do not correctly state the law applicable to this phase of the case," and that they do not correctly state the law "applicable to the facts proved on the trial and that such instructions were prejudicial to the defendants." These exceptions were not sufficient to call to the trial court's attention the objection now urged and of course will not be considered. We do not mean to intimate, however, that the instructions were erroneous.

[4] Complaint is made of the refusal of the lower court to give appellants' requested instruction No. 12. Proper instructions were given by the court covering this phase of the case. The requested instruction, however, was erroneous. It announced the law as follows:

"You are instructed that if a person is assailed, being without fault, and at a place where he had a right to be and for a lawful purpose, and has reason to apprehend death or great bodily harm to himself or to his brother unless he kill his assailant, then the killing is excusable."

It is not sufficient to justify the taking of human life that a person has reason to apprehend death or great bodily harm to himself unless he killed his assailant. He must entertain such belief and must act upon it. *People v. Gonzales*, 71 Cal. 569, 12 Pac. 783; *Walker v. State*, 97 Ga. 350, 23 S. E. 902; *Batten v. State*, 80 Ind. 391; *State v. Matthews*, 78 N. C. 523.

[5] Appellants complain because the court instructed the jury as to murder in the second degree; it being their contention that, under the evidence, they should have been convicted of murder in the first degree or have been acquitted. It is true the state

contended that appellants lay in wait for the deceased in a shed, from which they shot him, and that the crime was murder in the first degree. It was not obligatory on the jury, however, to adopt that theory, any more than to adopt any theory justified from the evidence submitted. There was evidence of footprints of the appellants and of empty cartridges outside of the shed in the corral. Killing with a deadly weapon was admitted; therefore malice was implied. It was for the jury to determine from all the evidence whether the killing occurred according to the theory of the state, or that of the appellants, or in some other manner. The case properly called for an instruction as to murder in the second degree.

[6] In their eleventh assignment of error appellants contend that the court erred in permitting the district attorney to ask the witness Robson the following question on cross-examination:

"Didn't you write me a letter while the grand jury was in session, telling me about a Mexican getting his throat cut down there, and at the bottom of the letter didn't you say, 'Hachita is living up to her usual reputation'?"

—to which the witness answered, "I believe I did."

"Rulings upon questions asked a witness on cross-examination, although erroneous, will not constitute ground for reversal, where no substantial prejudice results therefrom." 4 C. J. 968.

Even if the court was in error in permitting the question, which we do not hold, because of the cross-examination theretofore of the witness, we fail to see how appellants were prejudiced thereby.

[7] The twelfth error assigned is that the court erred in permitting counsel for the state to ask a witness for the appellants if he had not appeared in court as a character witness for one John Berry on trial for larceny at the last term of the court, because the same was improper cross-examination. This error assigned can be disposed of for the same reasons as heretofore given relative to the eleventh assignment of error. However, the record shows that the questions objected to were not answered by the witness.

"Error in overruling an objection to a question will not constitute ground for reversal, where the question was not answered." 4 C. J. 964.

It is true the fact sought to be elicited was later brought out by the state, but there was no objection interposed to the questions which were answered.

The overruling of the objection urged as error by the thirteenth assignment was without prejudice, as it was answered in the negative, which was favorable to appellants.

[8] Error is also assigned on account of the court imposing a fine for contempt upon

Attorney H. D. Terrell, leading counsel for the defendants, in open court and in the presence of the jury without sufficient cause therefor. It is improper for the court, during the progress of the trial, to make any unnecessary comments, or to take any unnecessary action, which might tend to prejudice the rights of either of the parties litigant; but, when it becomes unavoidable during the progress of the trial, the court has the right to impose a fine upon any person connected therewith, even though it be in the presence of the jury, and such action cannot of itself cause a mistrial, merely because the occurrence might have some influence on the minds of the jury. *Grant v. State of Texas*, 67 Tex. Cr. R. 155, 148 S. W. 760, 42 L. R. A. (N. S.) 428. The certificate of the court relative to this matter is contained in the record. There is nothing in the certificate, however, which shows that the court did so through any prejudice or passion, especially since the certificate shows that, only a very short time after the fine was imposed, it was remitted. There being nothing in the record to show that the action of the court was not justified, the same cannot be here considered as error.

[9] The fifteenth assignment of error concerns certain statements of Mr. Vaught, one of the attorneys for the state, in his argument to the jury. The statements are not incorporated in the bill of exceptions, hence cannot be considered.

[10] The sixteenth alleged error concerns certain statements made by Mr. Renehan, counsel for the state, in his closing argument to the jury. It appears from the court's certificate that the statements, in reply to which the language objected to was used, are not of record. The general rule is that remarks of the district attorney, which ordinarily would be improper, are not ground for reversal if they are provoked by defendant's counsel, and are in reply to his acts or statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters touching important issues. 16 C. J. 911; *Adams v. State*, 179 Ind. 44, 99 N. E. 483. The statements made by the defendants' attorneys, to which the court certifies the language objected to was an answer, not being in the record, we cannot say the court erred in overruling the objection to the same and in refusing to withdraw the same from the jury.

[11] The last assignment of error urged by the appellants is that the court erred in permitting the witness McGrath, who was sheriff of Grant county, to testify concerning his failure to file a complaint against the deceased, Schrimsher, for certain alleged acts of violence which Schrimsher had committed. The witness had been asked on cross-examination by appellants' counsel whether he had filed such a complaint against Schrimsher, to

which he answered he had not. This rendered it proper for the state on redirect examination to ask him why he had not filed such complaint, and to give the witness an opportunity to explain the circumstances of Schrimsher's acts as reported to him. No error was occasioned by permitting the inquiry.

Other errors have been assigned, which we have considered, but have not discussed. We have searched the record in vain, however, for any errors or rulings of the court, to which proper exceptions were taken, that were prejudicial to the rights of the defendants. It is very apparent that many of the errors assigned were so assigned out of an abundance of caution, and it would serve no useful purpose to indulge in a further discussion of them, since they involve propositions of law so rudimentary that a discussion would be valueless either to the present or future cases.

Finding no error in the record, the judgment is affirmed; and it is so ordered:

ROBERTS, J., concurs.

RAYNOLDS, J., absent, not participating.

LAWRENCE COAL CO. v. SHANKLIN. (No. 2339.)

(Supreme Court of New Mexico. Aug. 19, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS — 426(2) — UNAUTHORIZED AGREEMENT OF THIRD PARTY — RATIFICATION.

A corporation may ratify an unauthorized agreement of another person, made in its behalf, and by such ratification become bound thereby.

2. PRINCIPAL AND AGENT — 172 — RATIFICATION — EXTENT.

The principal must ratify the whole of the agent's unauthorized act, or not at all, and cannot accept its beneficial results, and at the same time avoid its burdens.

3. CONTRACTS — 187(3) — PROMISE TO PAY DEBT OF ANOTHER — SUIT AGAINST PROMISOR.

Where for a sufficient consideration one agrees to assume and pay the debt of another, the creditor is impliedly included as within the privity of the promise, and he may single out the promisor and sue him by direct action.

Appeal from District Court, McKinley County; Raynolds, Judge.

Suit by L. G. Shanklin against the Lawrence Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit by L. G. Shanklin against the Lawrence Coal Company, a corporation, to recover upon an open account for goods, wares and merchandize of the value of \$718.52, alleged to have been sold to the Leyba Coal Company, and as to which it is alleged the defendant "accepted said account and agreed to pay the same." The facts are set out in the opinion.

A. T. Hannett, of Gallup, for appellant.

E. A. Martin, of Gallup, and McFie, Edwards & McFie, of Santa Fé, for appellee.

BRICE, District Judge. The testimony in this case is contradictory. It appears that Eleuterio Leyba was in the coal mining business under the name of the Leyba Coal Company in McKinley county, and, having gotten behind with his creditors, agreed to sell a one-half interest in his business to F. S. Lawrence. At the time of such agreement, it does not appear from the evidence whether or not the defendant corporation had been organized; but, if so, no board of directors had been elected, nor had it any officers authorized to transact its business. Leyba testified that Lawrence was acting for the Lawrence Coal Company when he contracted with Leyba for the one-half interest in his property. He also testified that Lawrence was to pay him \$10,000 for such interest, assuming as part payment \$8,000 indebtedness; the account sued upon being a portion of such indebtedness assumed.

On December 20, 1917, prior to the election of directors and officers of the Lawrence Coal Company, F. S. Lawrence wrote upon the account of plaintiff against Leyba, the following:

"The above account to be paid by Lawrence Coal Company. F. S. Lawrence."

After the corporation was organized and officers elected, it wrote upon a bill or account sent to it, requesting payment of such debt, the following:

"Do not send this bill to Lawrence Coal Company. They are not responsible for it. Goods purchased by E. Leyba. F. S. Lawrence."

F. S. Lawrence testified that he did not hold any office with the Lawrence Coal Company at the time of the transaction hereinbefore narrated; that he was only one of the original incorporators of the company. However, he did testify that the Lawrence Coal Company bought the land which was the subject of the contract hereinbefore mentioned from Leyba and his wife, and introduced a deed in evidence, executed by them, conveying such property to the corporation in consideration of "one dollar, and other valuable consideration," but stated that they bought no other real property from the Leybas.

There is testimony of both Lawrence and Leyba to the effect that Lawrence made the

trade personally; also testimony of Lawrence to the effect that he agreed to and did personally pay the debts of Leyba up to \$6,500 for the one-half interest in the property; that said property was conveyed to the corporation with the understanding that it should value it at \$13,000, and that its stock be apportioned equally between him and Leyba. The court seems not to have believed this testimony, but rendered his decision upon the theory that Lawrence contracted for the half interest in the Leyba property for the Lawrence Coal Company, and that defendant company ratified the contract made by Lawrence for its benefit, although at the time made it was unauthorized; and there is substantial testimony to support this theory.

The question to be determined by this court is: Could the corporation, having received the benefits of the contract made in its behalf by an unauthorized person, and such benefits having been retained, refuse to pay the consideration agreed to be paid therefor, having full knowledge of the terms of such contract? While there is a dispute as to the consideration to be paid for the Leyba property, the court evidently accepted the testimony of Leyba, and found that Lawrence had agreed to pay the debt of plaintiff as a part thereof, and had made a memorandum in writing to that effect.

[1, 2] That a corporation may ratify an unauthorized agreement of another person, made in its behalf, so that it will become bound thereby, is well settled. *Western Homestead & Irrigation Co. v. First National Bank*, 9 N. M. 1, 47 Pac. 721; *Elliott on Contracts*, § 459; 2 C. J. 473 et seq. It is further well settled that the principal must ratify the whole of the agent's unauthorized act, or not at all, and cannot accept its beneficial results and at the same time avoid its burdens. The corporation accepted a deed to the property from Leyba and wife, and in doing so it is required to pay the consideration its unauthorized agent agreed to pay, and of which it had full knowledge through such agent, who subsequently became president of the corporation, and was president of the corporation at the time the deed was made from Leyba and wife to it. This proposition of law is so general that we merely call attention to the authorities cited in 2 C. J. at page 493 et seq.

[3] The contention made, that the entire testimony only bound Lawrence, is not thought to be correct under the conclusion we have reached as stated above. Neither do we look upon the transaction as an agreement upon the part of the corporation to answer for the debt, default, or miscarriage of another, nor that it was a contract in the nature of a suretyship; but it became a direct contract on the part of the corporation with Leyba when the conveyance was accepted by it, and the agreement to as-

sume certain debts in consideration thereof incurred to the benefit of the creditors, whose accounts he agreed to pay. The act of ratifying the contract made by Lawrence for the benefit of the corporation made the corporation primarily liable to the plaintiff for the debt sued on; the assumption to pay this debt being a part of the consideration for the land.

"It is well-settled doctrine that, where one for a sufficient consideration agrees to assume and pay the debt of another, the creditor is impliedly included as within the privity of the promise, and he may single out the promisor and sue him by direct action." *Malanaphy v. Mfg. Co.*, 125 Iowa, 719, 101 N. W. 640, 106 Am. St. Rep. 332.

This action is not within the statute of frauds. *Greenlees v. Roche*, 48 Kan. 503, 29 Pac. 590. We believe that these observations dispose of all the assignments of error.

Finding no error in the record, the judgment of the district court should be and is accordingly affirmed; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

Ex parte McDERMOTT. (Cr. 2264.)

(Supreme Court of California. July 31, 1919.)

1. INSURRECTION — PUBLICATION OF ANARCHISTIC DOCTRINE — STATUTE — VALIDITY.

Act April 30, 1919 (St. 1919, p. 281), defining criminal syndicalism and sabotage, and prescribing penalties, is not beyond the legislative powers, at least in so far as its provisions are material in case in which the prisoner is charged with the offense defined by section 2, subd. 3.

2. STATUTES — EMERGENCY CLAUSE — SUFFICIENCY.

Section 4 of Act April 30, 1919 (St. 1919, p. 282), as to criminal syndicalism and sabotage, held to be a sufficient compliance with Const. art. 4, § 1, requiring a statement in one section of the act of the facts making it necessary in the judgment of the Legislature that a law shall go into immediate effect.

In Bank.

In the matter of the application for a writ of habeas corpus in behalf of Thomas McDermott. Application denied.

J. G. Lawlor, of San Francisco, for petitioner.

PER CURIAM. The prisoner has been held to answer a charge of willfully, unlawfully, and feloniously circulating and publicly displaying certain books, papers, pamphlets, documents, and other printed and

written matter, containing and carrying written and printed advocacy, teaching and advising criminal syndicalism, to wit, advocating, teaching and advising commission of crime, sabotage, and other willful and malicious damage and injury to property, and unlawful acts of force and violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and effecting political changes.

The complaint or deposition on which he was held to answer stated an offense under the language of an act of the Legislature entitled "An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor," approved April 30, 1919 (St. 1919, p. 281). The term "criminal syndicalism" is defined in section 1 of the act as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Subdivision 3 of section 2 defines the particular offense with which the prisoner was charged in substantially the language used in the complaint or deposition.

[1, 2] No reason for holding this act to be beyond legislative power appears to us, certainly in so far as its provisions are material in this case. Section 4 of the act is as follows:

"Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor."

We think this to be a sufficient compliance with the provisions of section 1 of article 4 of the Constitution requiring a statement "in one section of the act" of the facts making it necessary in the judgment of the Legislature that a law shall go into immediate effect, where the Legislature considers that this is necessary "for the immediate preservation of the public peace, health or safety." The courts may not say that this conclusion of the Legislature was not justified.

We have read the evidence adduced on the preliminary examination, and cannot hold that the prisoner has been committed for trial without reasonable or probable cause.

The application for a writ of habeas corpus is denied.

ANGELLOTTI, C. J., and SHAW, MELVIN, LAWLOR, WILBUR, LENNON, and OLNEY, J.J., concur.

EARL v. DUTOUR et al. (L. A. 5224.)

(Supreme Court of California. Aug. 20, 1919.
Rehearing Denied Sept. 18, 1919.)

1. BOUNDARIES — 33—PROPERTY CONVEYED— HALF OF "LOT"—PRESUMPTION.

Relative to eastern boundary of property conveyed by deed of the westerly half of a city lot, according to recorded map, the word "lot" will be presumed, in the absence of circumstances indicating a contrary intention, to be used in its general and customary sense, of not including the half of the street to which the owner of the lot held title, subject to the public easement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lot.]

2. BOUNDARIES — 33—PROPERTY CONVEYED— EVIDENCE TO REBUT PRESUMPTION.

Presumption of the word "lot" in deed of westerly half of city lot, according to recorded map, being used in its general and customary sense of not including part of street, held not rebutted by the map, nor by the fact that the deed conveyed half of the water right appurtenant to the lot, which had originally been allotted on the basis of acreage, including the portion of the lot lying in the street.

Department 2.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Edwin T. Earl against L. A. Dutoir and another. Judgment for defendants, and plaintiff appeals. Reversed.

W. J. Ford, of Los Angeles, W. Leroy Thomas, for appellants.

Anderson & Anderson, of Los Angeles, for respondent.

LENNON, J. This appeal is from a decree quieting plaintiff's title to a strip of land fifteen feet wide adjacent to the center line of lot 17 of the Hillard tract in the county of Los Angeles.

[1] Plaintiff and defendant own, respectively, the easterly and westerly halves of lot 17, and the sole question in dispute is whether the center line of the lot forms the eastern or western boundary of the strip of land in suit. The answer to this question depends upon the construction to be placed upon the word "lot" in the deed by which was conveyed to defendants the "westerly one-half of lot 17 of the Hillard tract, as per amended

map recorded in book 43, page 64, miscellaneous records of said county."

Inasmuch as the map referred to clearly indicates that the western boundary of lot 17 is the center line of an avenue 60 feet in width, it was contended on behalf of plaintiff and held by the trial court that the 30-foot strip covered by the street was part of the "lot" within the meaning of the deed, and that therefore the eastern boundary of defendants' land was a line halfway between the center line of the avenue and the eastern boundary of lot 17.

With this conclusion we are unable to agree. However clearly it may appear that the owner of a lot holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the lot is technically, therefore, the center of the street, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street, we are of the opinion that the word "lot," as generally and customarily used, does not include such portion of the street. *Wegge v. Madler*, 129 Wis. 412, 109 N. W. 223, 116 Am. St. Rep. 953. As stated by the Supreme Court of Indiana:

"Lot and street are two separate and distinct terms, and have separate and distinct meanings. The term 'lots,' in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy. While the term 'streets' means that portion set apart and designated for the use of the public, and such is the sense in which such terms will be presumed to have been used, unless it be made to appear that a contrary meaning was intended." *Montgomery v. Hines*, 134 Ind. 221, 225, 33 N. E. 1100, 1101.

In the absence, therefore, of any circumstance indicating that a more unusual and technical meaning of the word "lot" was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of the lot or parcel of land which is set apart for private use and occupancy.

[2] Plaintiff contends that the circumstances revealed by an analysis of the map referred to in the deed indicates that the defendants' grantor used the word "lot" as including the portion lying in the street as well as the portion set apart for private use. These circumstances are stated as follows:

"First. The length of all lot lines is given in chains on the face of the map, and extend to the center of the avenues in front. The widths of the streets are not given on the map itself, but are stated in the legend on the map, such width being given in feet. Second. The side lot lines themselves are extended by dashed lines to the centers of the avenues in front. Third. The

gross area is given in acreage marked on each lot. Fourth. The center line of each avenue is marked on the map by a dashed line which is intersected in nearly all instances by dashed lines extending the heavy lines of the lots to the center of the avenues."

Giving to these items all the force which may reasonably be claimed for them, they tend to show no more than that it was intended that lot owners in the Hillard tract should take title to the center of the streets or avenues. They do not, we think, tend in any way to rebut the presumption that defendants' grantor used the word "lot" in its ordinary and commonly accepted meaning. Of no greater force, in our opinion, is the fact that the deed in question conveyed one-half of the water right appurtenant to lot 17, the same having originally been allotted on the basis of acreage including the portion of the lot lying in the street. It follows that the presumption stands unrebuted.

The judgment appealed from is reversed.

We concur: WILBUR, J.; MELVIN, J.

PATTEN & DAVIES LUMBER CO. v. AMIGO CO. (L. A. 5210.)

(Supreme Court of California. Aug. 18, 1919.)

1. CONTRACTS — 302 — STATEMENT OF DEFECTS.

An owner of property being improved, who was to furnish a statement of defects, was not required, by implication, to add to a statement of defects directions as to the steps which the contractor should take in order to remedy the defect.

2. CONTRACTS — 305(1) — DEPARTURES FROM CONTRACT.

Where defects in work constituted material departures from the contract, and were made by the contractor with intent to cheat and defraud, and the owner was thereby cheated and defrauded, the contractor is in no position to assert that the owner waived his right to object to the defects in the work by failing to serve a statement of defects as required by the contract.

Department 2.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Patten & Davies Lumber Company, a corporation, against the Amigo Company. Judgment for defendant, and plaintiff appeals. Affirmed.

G. C. De Garmo, of Los Angeles, for appellant.

Emmet H. Wilson, of Los Angeles, for respondent.

LENNON, J. In this action the plaintiff, as assignee of one F. J. Castellaw, sued to recover a balance alleged to be due for labor and materials furnished in improving streets on defendant's land. The defendant had judgment, from which the plaintiff appeals upon a bill of exceptions.

The trial court found that the work done was defective in numerous particulars and that the defendant had paid all that the work was reasonably worth. The principal and practically the only point made in support of the appeal is that the trial court should have found—

"that the defendant, by reason of its failure to serve upon the contractor a written statement of the defects to be remedied by the contractor to entitle him to a certificate of completion, is estopped to deny the proper performance of the contract by the contractor and from claiming defective workmanship or materials performed and furnished by the contractor."

It might be supposed from this statement of appellant's contention that it would be claimed that no written statement of defects had been delivered by the defendant to the contractor, and that, therefore, the defects having been inadvertently made and never brought to the attention of the contractor, the latter was relieved of the responsibility of remedying them. It appears from its brief, however, that appellant admits that a general statement of defects in grading and oiling had been delivered, and admits that the contractor had knowledge of the defects in the work, but insists that the statement was not sufficiently specific to inform the contractor what steps defendant required to be taken to remedy these defects.

[1] This contention of the appellant is wholly and obviously without merit. In the first place, as found by the trial court, a written statements of defects, stating the true and just reasons for refusing to accept the work, was delivered. Defendant was, indeed, required by the contract to furnish a statement of defects; but it was not required, either expressly or by implication, to add to this statement directions as to the steps which the contractor should take in order to remedy the defects. Its duty was fulfilled when it stated the defects, indicated that they were departures from the contract, and demanded that the contract be carried out.

[2] Moreover, it appears from the unquestioned finding of the trial court that the defects in the work constituted material departures from the contract, which were made by the contractor willfully and with intent to cheat and defraud defendant, and that defendant was thereby cheated and defrauded. This being so, neither the contractor nor his assignee is in any posi-

tion to assert that defendant has waived its right to object to the defects in the work by failing to serve a proper statement of defects.

Finally, it appears from the unquestioned findings of the trial court that, several months prior to the alleged completion of the work, defendant had made a partial payment to cover certain concrete work already completed; that, by reason of defects in said work which were fraudulently concealed from defendant, this payment greatly exceeded the value of the work done; and that, by reason of willful departures from the contract, the value of the work done subsequent to the said payment and prior to the alleged completion of the work did not exceed the amount of the excess in the prior payment; wherefore no sum whatever was due or owing from the defendant to the contractor or to his assignee at the time the suit was filed. We are at a loss to understand how, without undertaking to question these findings, appellant can seriously argue that it should be allowed to recover the full contract price for the work by reason of any insufficiency in the statement of defects delivered by the defendant.

Judgment affirmed, with damages in the sum of \$50 for prosecuting a frivolous appeal.

We concur: WILBUR, J.; MELVIN, J.

In re BALLOU'S ESTATE. (Sac. 2930.)

(Supreme Court of California. Aug. 23, 1919.)

1. WILLS ⇨734(1)—LEGACIES—INTEREST.

The matter of interest on legacies is controlled by statute, in absence of provisions in will.

2. ADOPTION ⇨20—EFFECT.

Adoption establishes legal relation of parent and child, including obligation of parent to support child.

3. WILLS ⇨734(6)—LEGACIES—INTEREST—LEGACY FOR "MAINTENANCE."

A legacy to testator's adopted daughter, who had received substantial support from him for nearly 10 years preceding the making of the will and was in receipt of such support at the time of his death, held to be a "legacy for maintenance," within Civ. Code, § 1369, providing that such legacies bear interest from testator's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintenance.]

4. WILLS ⇨734(11)—INTEREST ON LEGACY—STATUTORY BENEFITS.

An adopted child's right to interest on a maintenance legacy, under Civ. Code, § 1369, is not destroyed because child demanded and

received statutory family allowance pending administration, etc., where there was nothing in will which required child to elect between rights under will and statute.

In Bank.

Appeal from Superior Court, Tulare County; Stanley A. Smith, Judge.

In the matter of the estate of George Adams Ballou, deceased. Application by Alice May Ballou, for distribution of a legacy. From part of a decree refusing certain interest on the legacy, the applicant appeals. Reversed.

Middlecoff, Scott & Ham, of Visalia, for appellant.

E. C. Farnsworth and Power & McFadzean, all of Visalia, for respondent.

ANGELLOTTI, C. J. Deceased died testate, May 31, 1917, leaving an estate aggregating in value nearly \$84,000. On July 6, 1914, when 81 years of age, he had legally adopted as his child one Alice May Riley, thereafter known as Alice May Ballou. In his will, executed May 16, 1916, he made provision for her as follows:

"Secondly, I give, devise and bequeath to my adopted daughter, Alice May Ballou, the sum of ten thousand dollars in cash."

This was the only provision which in any way referred to her. The residue of his property was left to his lawful nephews and nieces. Upon application by her for distribution of this legacy, the court below decreed payment to her, in full satisfaction of the legacy, the sum of \$10,000, together with interest from May 31, 1918, which was one year after the death of deceased. We have here an appeal by such child from the decree, in so far as it refused interest for the year immediately following the testator's death. The sole question on the appeal is as to the date from which interest should be paid on the legacy.

The child was within a few days of 11 years of age at the date of the making of the will, and she was, in substantial part, at least, supported by deceased from the time of her adoption to the date of his death. The court substantially found that at the time of the death of deceased she possessed no other property or source of maintenance. The evidence showed that she and her mother had been abandoned by the father in the year 1910, and that the father thenceforth had contributed nothing to the support of the child. At the time of the adoption, deceased deposited \$400 in a bank for the support of the child and its mother, and continuously thenceforth she lived either in an apartment provided for her and her mother by deceased, or at a convent school, where the cost of her maintenance was paid by

deceased. He also paid bills incurred to provide her with food. Some question appears to have arisen between the mother and deceased as to whether he was furnishing sufficient support; the mother commencing a suit against deceased in March, 1916, to compel him to furnish the same. This action was pending at the time of his death.

[1-3] In the absence of provision in the will, the matter of interest on legacies is controlled by our statutory regulations in that behalf. By section 1368, Civil Code, it is provided that legacies are due and deliverable at the expiration of one year after the testator's decease. Section 1369, Civil Code, is as follows:

"Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease."

The will here containing no provision on the subject, the question is whether or no the legacy to Alice May Ballou is one for maintenance. If it is a legacy for maintenance, it must be held under the clear and explicit terms of the statute that it bears interest from the testator's decease. The trial court found that the legacy "was not given or intended to be given to said minor as a legacy for maintenance." We are constrained to hold that this finding is without legal support in the evidence. Whether or not it was intended as a legacy for maintenance must, of course, be determined from the words of the will, taking into view the circumstances under which it was made, exclusive of the oral declarations of the testator. Civ. Code, § 1318. Except for its description of the legatee as "my adopted daughter," the will is entirely silent in this regard. That the legatee was the adopted daughter of deceased is a conceded fact that must be taken into view in determining the intent and purpose of this legacy. The effect of the adoption was to establish between deceased and Alice May Ballou the legal relation of parent and child, with all the incidents and consequences of that relation (see *Estate of Jobson*, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. [N. S.] 1062; *Estate of Darling*, 173 Cal. 221, 159 Pac. 606), including of course, the obligation of support of the child by the parent.

In all jurisdictions in which the question has arisen it appears to be held with practical unanimity that a legacy to a minor child by a parent, or one standing in loco parentis, is, in the absence of other substantial provision in the will for maintenance, and, of course, in the absence of language indicating a contrary intent, presumed to be a legacy for maintenance. As said in 40 Cyc. 2095:

"The reason for this exception is founded in the moral and legal obligation of parents to

provide for the necessities of their offspring, and from the presumption that they do not generally intend to leave their children in destitution and want during the most helpless periods of their infancy."

See 2 Woerner, *Am. Law of Adm'n* star p. 1005; *Brown v. Knapp*, 79 N. Y. 136, 142; *Neder v. Zimmer*, 3 N. Y. Supp. 133; *In re Keech's Estate*, 240 Pa. 491, 87 Atl. 623. In so far as the evidence of circumstances proper to be taken into consideration is concerned, there is nothing to rebut this presumption. In fact, such evidence affirmatively shows appreciation by the testator of his obligation to support his child, and substantial support by him from the time of adoption to the time of his death. Construing the words of the will in the light of the relationship between the parties, and in connection with the circumstance that the child had received substantial support from the testator for nearly ten years next preceding the making of the will, and was in receipt of such support at the time, "we are of the opinion," as said in *Estate of Mackay*, 107 Cal. 303, 308, 40 Pac. 558, 560, "that the provision in question created a 'legacy for maintenance.'"

[4] That under the law regulating the administration of estates of deceased persons the legatee was entitled, as the child of deceased, to receive a family allowance for her support pending the settlement of the estate we regard as entirely immaterial in this connection. Such a situation in no way affects the question of the character of the legacy as being one for maintenance or otherwise. Notwithstanding the right to family allowance for the few months of pendency of administration, the legacy is still a "legacy for maintenance," and, in so far as the matter we are discussing is concerned, section 1369, Civil Code, puts all legacies for maintenance on the same footing as legacies to the testator's widow, and expressly provides that both of these classes of legacies shall bear interest from the date of the testator's death, in the absence, of course, of provision to the contrary in the will. In this regard we are bound by the plain, unambiguous terms of the statute. The character of the legacy as a legacy for maintenance being established, the result prescribed by the statute necessarily follows.

That the legatee, as a minor child of deceased, was in fact allowed, and did in fact receive, a family allowance pending administration, as well as a homestead, we must likewise regard as immaterial on this appeal. Obviously such matters can have no bearing on the question of the character of the legacy, and are material, if at all, only upon some such theory as that by accepting certain benefits given her as the child of the deceased by statute, she has elected to take

those benefits in place of certain benefits given her by the will. There is, however, nothing in the will upon which it may be claimed that the child was put to an election in this matter, and, this being so, her receipt of the benefits accorded her by the law as a child of deceased from the funds of the estate in no way affects her rights as a legatee. See *Estate of Cowell*, 164 Cal. 636, 130 Pac. 209.

In so far as the decree disallows interest on appellant's legacy for the year commencing May 31, 1917, it is reversed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

NAHHAS et al. v. BROWNING et al.
(Sac. 2632.)

(Supreme Court of California. Aug. 19, 1919.)

1. REPLEVIN ⇨124(3)—DISMISSAL—EFFECT.

Plaintiff in replevin cannot, by dismissing his action after destruction of the property by fire, deprive defendants of the right given them by Code Civ. Proc. § 667, to recover damages on the replevin bond for the taking and withholding of the property.

2. REPLEVIN ⇨124(3)—BOND—DAMAGES.

Where, after plaintiff in replevin obtained property by replevin process, it was destroyed by fire, the owners may recover, in suit on replevin bond, not only the value of the property, but damages for withholding, and they are not restricted to interest on the value of the property, upon the theory that taking was a conversion.

3. REPLEVIN ⇨83—DAMAGES TO DEFENDANT.

One whose property is taken in replevin suit is not confined to interest as on the value of the property as damages, if he can establish the fact that the value of the use of the property exceeds the interest.

4. APPEAL AND ERROR ⇨694(1)—REVIEW—FINDINGS.

In the absence of a record showing the evidence, special findings of the jury are conclusive on appeal.

5. REPLEVIN ⇨79—INTEREST.

Parties whose property was taken under replevin process are not entitled to recover interest on the value of the property which was destroyed while in possession of the plaintiff in replevin, together with damages for the withholding of the property.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by J. N. Nahhas and another against J. W. Browning and others. From

an order, made on motion of defendants, vacating the judgment rendered on the verdict of the jury, plaintiffs appeal. Order reversed, with directions.

George R. Freeman, of Willows, for appellants.

Thomas Rutledge, of Colusa, for respondents.

LENNON, J. The plaintiffs herein sue on a replevin bond; Browning, the plaintiff in the replevin action, and Balsdon and Morris, his sureties, being joined as defendants. The property replevied consisted of a harvesting outfit. It was destroyed by fire while in the possession of Browning, who thereafter dismissed the replevin suit. The plaintiffs thereupon instituted this action and recovered judgment on a verdict awarding damages in the sum of \$3,695. The verdict of the jury was accompanied by answers to certain questions submitted by the court, which indicated that the sum of \$3,695 had been arrived at by adding the item of \$920, representing the plaintiffs' damage for the loss of the use of the property, to the item of \$2,775, representing the value of the property at the time it was replevied.

On the defendants' motion, the court, by an order purporting to be made pursuant to the provisions of section 663 of the Code of Civil Procedure, vacated the judgment on the ground that it was inconsistent with and not supported by the so-called special verdict, and entered judgment for the plaintiffs in the sum of \$2,775, with interest from the date of the replevin at 7 per cent. yearly. The plaintiffs thereupon prosecuted this appeal upon a bill of exceptions containing the pleadings, the verdict, the original judgment, and the order appealed from, but which does not set forth or purport to set forth any of the evidence received in the case.

[1, 2] In making the order complained of, the lower court apparently proceeded upon the theory that the plaintiffs' cause of action was to be viewed solely as one for wrongful conversion, and, pursuant to this theory, it applied the rule of damages prescribed by section 3336 of the Civil Code, and therefore eliminated the item of \$920, representing the plaintiffs' damage for the loss of the use of the property. In this the court was in error. By dismissing his action in replevin, Browning could not, and did not, deprive the plaintiffs of their right to recover such damages as they could have recovered in that action had it been prosecuted to judgment. *Mills v. Gleason*, 21 Cal. 274, quoted with approval in *Clary v. Rolland*, 24 Cal. 147, 152. It is expressly provided in section 667 of the Code of Civil Procedure that—

"If the property [involved in a replevin action] has been delivered to the plaintiff, and the

defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

A return of the property could not have been had in the replevin suit here in question. Had that action been carried to judgment, defendants, plaintiffs herein, would therefore have been entitled to a judgment for the value of the property, not as damages for its conversion, but as a substitute for and in lieu of the property, and would, in addition, have been entitled to a judgment for damages for the taking and withholding the property. Such, then, would have been the measure of the damages of the plaintiffs herein, had the replevin action proceeded to judgment, and such, therefore, should be the measure of their recovery on the bond. 34 Cyc. 1582-1585; 2 Sedgwick on Damages (9th Ed.) pp. 1433, 1434; Talcott v. Rose (Tex. Civ. App.) 64 S. W. 1009; Sopris v. Lilly, 1 Colo. 266.

[3-5] Ordinarily, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party in a replevin suit to recover interest on the value of the property from the time of the taking. There is no good reason, however, for holding that he is confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeds the interest. Hunt v. Thompson, 19 Wyo. 523, 120 Pac. 181, 122 Pac. 624; 2 Sedgwick on Damages (9th Ed.) p. 1046. In the absence of a record showing the evidence received in the case, the so-called special finding of the jury is conclusive upon this appeal that the damage for taking and withholding the property was shown to be \$920, an amount in excess of the interest. Special injury resulting from the taking and withholding of the property having been duly alleged in the complaint, plaintiffs are entitled to recover the sum of \$920 assessed as damages for such injury, together with the value of the property, with interest on the total sum from the date of the entry of the original judgment. They are not, however, entitled to interest on the value of the property from the date of the taking to the date of the judgment. 2 Sedgwick on Damages (9th Ed.) p. 1048; Freeborn v. Norcross, 49 Cal. 313; Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

The judgment is reversed, with directions to the lower court to enter judgment in accord with the views herein expressed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; SHAW, J.; OLNEY, J.; MELVIN, J.

MATTSON v. MATTSON. (L. A. 4910.)

(Supreme Court of California. Aug. 16, 1919.)

1. HUSBAND AND WIFE ⇨296—SEPARATE MAINTENANCE—COMPLAINT.

A wife's separate maintenance complaint need not allege her residence.

2. PLEADING ⇨192(2), 354(1)—COMPLAINT—MOTION TO STRIKE—DEMURRER.

A wife's complaint for separate maintenance is not subject to be stricken because uncertain in its allegations of cruelty, but the proper remedy is a demurrer, under Code Civ. Proc. § 430, upon ground that complaint is uncertain, etc.

3. TRIAL ⇨163—MOTION FOR NONSUIT—REQUISITES.

A motion for nonsuit at close of plaintiff's case will not be granted unless specific grounds on which motion is made are stated.

4. HUSBAND AND WIFE ⇨297—SEPARATE MAINTENANCE—CORROBORATION.

Corroboration is unnecessary in a wife's action for maintenance without divorce, since Civ. Code, § 130, requires corroboration only in actions where a divorce is granted.

5. HUSBAND AND WIFE ⇨298½—SEPARATE MAINTENANCE—FINDINGS.

In a separate maintenance action, findings that plaintiff wife did not accuse defendant of improper relations with his daughter-in-law and that none of plaintiff's statements had brought defendant into contempt, etc., held a sufficient finding upon the issue whether plaintiff circulated false reports regarding defendant and his daughter-in-law.

6. HUSBAND AND WIFE ⇨297—SEPARATE MAINTENANCE—SUFFICIENCY OF EVIDENCE.

In a wife's action for separate maintenance, conflicting evidence held to sustain trial court's finding that plaintiff wife did not circulate false reports regarding defendant and his daughter-in-law.

7. DIVORCE ⇨54—RECRIMINATION—CRUELTY.

In a wife's separate maintenance action a finding that plaintiff was entitled to divorce on grounds of extreme cruelty precludes defendant husband from securing a divorce on his cross-complaint, even if he could have established plaintiff's cruelty.

8. HUSBAND AND WIFE ⇨288—MAINTENANCE—MUTUAL FAULT.

Alimony may be awarded a wife in a separate maintenance action, although both she and defendant husband were at fault.

Department 1.

Appeal from Superior Court, Kern County; Howard A. Pearls, Judge.

Action by Alice Mattson against Olaf O. Mattson. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Emmons, H. E. Johnstone, and Thomas Scott, all of Bakersfield, for appellant.

Walter Osborn, of Bakersfield, for respondent.

LAWLOR, J. This action was brought in the superior court of Kern county by the plaintiff against the defendant, her husband, for maintenance and support, both pendente lite and permanent, counsel fees, and costs. After the defendant had interposed a demurrer and a motion to strike out, which were allowed by the court, the plaintiff filed an amended complaint, to which defendant demurred and moved to strike out certain portions thereof. The demurrer to the amended complaint and motion to strike out were denied, whereupon the defendant filed an answer and a cross-complaint in which he asked for a divorce upon the ground of extreme cruelty. The court found in favor of the plaintiff; that she and the defendant intermarried on June 8, 1910, and ever since have been, and now are, husband and wife; that she had a cause of action for divorce on the ground of extreme cruelty, and that she was entitled to the sum of \$150 a month for permanent support and maintenance, as well as to counsel fees and costs of suit, it having been found "that this defendant is the owner and is in possession" of property of the total value of about \$200,000, and "that his gross monthly income is of the sum of about \$500." The defendant was denied a divorce upon the ground of extreme cruelty as alleged in his cross-complaint. Judgment was entered accordingly. Defendant moved for a new trial upon statutory grounds, which motion the court denied. The defendant thereupon appealed from the judgment entered in favor of the plaintiff and against the defendant and from the judgment denying the defendant a divorce in said action.

It appears that both the plaintiff and the defendant were more than 60 years of age at the time they intermarried. The evidence as to the controverted issues is in sharp conflict. In support of the allegations of the complaint the plaintiff introduced evidence tending to show that the defendant had on numerous occasions struck and beat her and otherwise subjected her to cruel and inhuman treatment, which had caused her both physical and mental suffering. All this was vigorously denied by the defendant, who supported his cross-complaint with evidence that the plaintiff was of a nagging and quarrelsome disposition, and that she had circulated certain false and malicious reports concerning his alleged adulterous relations with his daughter-in-law. Plaintiff in her answer to to the cross-complaint and in her testimony, denied the allegations of extreme cruelty. The specific facts, in so far as they are pertinent, will be developed in our discussion of the various points presented for review on this appeal.

[1] 1. It is urged by defendant that his demurrer to the amendment complaint should have been granted. The demurrer was made on the ground that the complaint failed to allege the residence of the plaintiff. This contention is without merit. In an action for separate maintenance residence need not be alleged or proved. *Hiner v. Hiner*, 153 Cal. 254, 94 Pac. 1044.

[2] It is also urged that it was error to deny defendant's motion to strike out certain portions of the amended complaint. While the defendant, relying on the allegations of the pleading, has advanced no argument in his brief why the motion should not have been denied, an examination of the pleading itself, which is set out in the transcript, shows that it was made on the ground of uncertainty as to time and place of certain alleged acts of extreme cruelty. A motion to strike out on the indicated grounds is not proper practice in this state. The only proper remedy is by demurrer on the ground that the complaint is ambiguous, unintelligible, or uncertain under section 430 of the Code of Civil Procedure. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761.

[3] 2. At the close of the plaintiff's case the defendant moved for a nonsuit as follows: "If your honor please, in this case, we now move for a nonsuit as to the cause of action set out in the plaintiff's complaint." The motion was denied by the court and defendant assigns this as error. It is well established in this state that a motion for nonsuit will not be granted unless the specific grounds on which such motion is made are stated. *Coffey v. Greenfield*, 62 Cal. 602; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Durfee v. Seale*, 139 Cal. 604, 73 Pac. 435.

[4] Defendant urges that the motion should have been granted on the ground that the evidence in support of the allegations of extreme cruelty was not sufficiently corroborated. The only statutory provision requiring corroboration in a civil case is section 130 of the Civil Code. That section applies only to actions for divorce, and even in such actions only to the *granting* of the divorce. Hence there is no foundation whatever for the claim that corroboration is necessary in an action for maintenance without divorce.

[5] 3. As a further assignment of error it is urged by defendant that the court did not make a specific finding on a material issue in the case—on the question as to whether or not the plaintiff circulated false reports about the defendant and his daughter-in-law. However, the following appears in the findings of the court:

"That on said date and at said time or at any other time this plaintiff did not accuse the defendant of improper relations with his daughter-in-law; * * * that no acts or statements made by this plaintiff have brought this defendant into contempt with all of his friends or with any of his friends; and that no act or state-

ment of this plaintiff has brought the previous good reputation of this defendant into disrepute."

In our view, the finding we have just quoted is a sufficient answer to this objection.

[6, 7] It is further urged that the court erred in not finding in favor of the defendant on this issue, for the reason that the preponderance of the evidence tended to establish the fact that the plaintiff did circulate reports to the effect that the defendant had been on "intimate" terms with his daughter-in-law. It is true that there was evidence to that effect. It is also true that the plaintiff denied making any such statements, thus producing a conflict which the court resolved in favor of the plaintiff. Upon the record before us we cannot disturb the finding. Moreover, if the court had found in favor of defendant on this issue, the error would in no way be prejudicial to him, because, in view of the finding "that the plaintiff has a cause of action for divorce on the grounds of extreme cruelty," the defendant would not have been entitled to a divorce even if the court had found in his favor on this issue. In *Sweasey v. Sweasey*, 126 Cal. 123, 58 Pac. 456, it was said:

"Appellant complains of some findings against him in his cross-action for divorce. If these are well founded, appellant is still not injured; for it was found that he was guilty of desertion, and no complaint is made that this finding is not sustained by the evidence. He could not, therefore, have obtained a divorce, even though the court had found in his favor upon those issues."

[8] 4. It is contended by defendant that, in order for the plaintiff to recover in this action, she must be without fault, and that the evidence as to her conduct toward defendant, if not sufficient to warrant the granting of a divorce in his favor, was sufficient to bar her recovery. This is not the law. It is a well-established principle that, even "if the parties are both at fault and cannot live together, alimony may, however, be decreed." 21 Cyc. 1602.

The judgment is affirmed.

We concur: SHAW, J.; OLNEY, J.

HENSLEY v. HENSLEY. (L. A. 4474.)

(Supreme Court of California. Nov. 19, 1918.
Remittitur Issued Dec. 20, 1918.)

1. TRIAL §384—NONSUIT—WHEN PROPER—CASE TRIED BY COURT.

In a case tried without a jury, if the evidence is insufficient to support a judgment for complainant, nonsuit is properly granted.

2. HUSBAND AND WIFE §278(1)—SEPARATION—PROPERTY SETTLEMENTS.

Property settlements between husband and wife when there is no fraud are highly favored in the law.

3. HUSBAND AND WIFE §281—PROPERTY SETTLEMENTS—PRESUMPTION OF FRAUD.

Where the husband and wife had been living apart for years, and the wife acted upon the advice of her attorneys in making a property settlement, there was no presumption of confidential relation, and the wife had the burden of proving fraud, if any, in the agreement.

4. HUSBAND AND WIFE §281—PROPERTY SETTLEMENTS—FRAUD—EVIDENCE.

Evidence held insufficient to show fraud of the husband in securing property settlement with his wife.

Department 2.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Suit by Robert C. Hensley against Annie E. Hensley, wherein defendant filed a cross-complaint. There was a nonsuit as to one branch of the cross-complaint. Decree for defendant for a divorce and for monthly allowance. From the judgment of nonsuit and an order denying motion for new trial, defendant appeals. Affirmed.

H. H. Chase, of San Bernardino, and A. H. Davis, of San Francisco, for appellant.

Byron Waters and Holcomb & Coy, all of San Bernardino, for respondent.

MELVIN, J. Robert C. Hensley brought an action for divorce against Annie E. Hensley. She answered, denying the allegations of the complaint, and by cross-complaint she asked for a divorce from her husband on the grounds of desertion, cruelty, and nonsupport, and prayed for the rescission of a certain agreement by which the property matters had been settled out of court about a year before the complaint was filed. By stipulation the allegations of the cross-complaint were deemed denied.

At the close of defendant's evidence on her cross-complaint, plaintiff moved for a nonsuit as to cross-complainant's cause of action for cancellation of the agreement between the parties. This motion was granted. Upon the merits of the divorce case the defendant and cross-complainant prevailed. There was also an order requiring plaintiff to pay a certain sum monthly for the support of the minor child of the parties to the action. Defendant and cross-complainant appeals, however, from the judgment of nonsuit and from an order denying her motion for a new trial.

The plaintiff and defendant were married in 1907. In September, 1910, Hensley left his wife and went to Canada. He had sold some property in Oregon for about \$30,000. Mrs. Hensley had employed counsel to represent

her, and there had been some investigation on the part of these gentlemen relative to Mr. Hensley's financial affairs. In August, 1912, Mr. Davis, one of Mrs. Hensley's counsel, wrote to his associate in the matter, Mr. H. H. Chase, of San Bernardino, advising him that Hensley had sold the ranch at Ashland, Or., for \$30,000, together with all the furniture and household effects. In a later letter written during the same month to the same correspondent there was information to the effect that Hensley had bought property, placing it in the names of his children. Mr. Davis also wrote that he was quite certain that Hensley had money invested in business with a son in Calgary, Alberta, Canada. Later Mr. Davis wrote again, stating that Hensley was worth \$32,000 when he left Oregon.

On October 10, 1912, Mrs. Hensley filed a suit for separate maintenance. In her verified complaint it was alleged that Hensley had \$31,000 in his pocket when he left Oregon and went to Canada. She also averred in that pleading that her husband owned an equity of \$10,500 in real estate near Colton, Cal., standing in the name of his son, and that he had "more than \$20,000 in other property" the location and manner of investment being unknown to her. Before the filing of Hensley's answer in the suit for maintenance there was further correspondence between Mrs. Hensley's attorneys regarding the amount of money Hensley was known to have possessed and the terms upon which Mrs. Hensley would settle.

On January 4, 1913, Hensley filed his answer, denying the ownership of any equity in the property standing in his son's name in California, admitting that he took \$28,000 to Canada, and averring that he had divided this sum with his children, retaining one-quarter for himself. Regarding his financial ability he alleged that "the only property owned by the defendant, Robert C. Hensley, consists of the claims for money loaned by him to his said son and daughter, amounting to about \$4,500 on open account, the exact amount of which is unknown to this defendant."

Following the filing of the answer in the suit for maintenance, negotiations for a settlement were prosecuted, and in April, 1913, the contract which Mrs. Hensley sought to have set aside in the case at bar was executed. It recited the pending litigation, and Mrs. Hensley agreed to take \$5,000 in settlement of all claims. The sum of \$2,000 was paid at the time, and three promissory notes were executed by Mr. Hensley payable to his wife. It was agreed that, except for the payment of these notes, neither party should ever have any claim against the other for support, alimony, maintenance, or for any other purpose whatever. It was further covenanted that upon payment of the notes Mrs. Hensley would dismiss the suit for maintenance

pending in the superior court of San Bernardino county. The contract was subsequently fully executed, and in her bill praying for rescission Mrs. Hensley offered to restore land of the value of \$3,000, which she declared was all the property remaining of the \$5,000 received from her husband.

[1] Appellant's first contention is that she established a prima facie case of fraud in the procurement of the contract of settlement, and that therefore the court was bound to put the cross-defendant upon proof of his good faith in that transaction. It is to be remembered, however, that this case was tried without a jury. If the evidence was insufficient to support a judgment for cross-complainant, the court properly granted the motion. *Downing v. Murray*, 113 Cal. 455, 463, 45 Pac. 869; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534. We must, then, examine the testimony with a view to determining whether or not the court's order amounted to an abuse of discretion. We have made such examination, and are convinced that there was no such abuse.

[2] Property settlements between husband and wife, when there is no fraud, are highly favored in the law. In *McClure v. McClure*, 100 Cal. 339, 343, 34 Pac. 822, 824, the court quoted with approval a paragraph from Dr. Wharton's work on Contracts, a part of which is as follows:

"The rule is peculiarly applicable in family settlements, where right and wrong on both sides are so often dependent on feeling; in which cases the courts, unless there be an imposition, will not undertake to weigh actual gain or loss."

See, also, *Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 784.

[3, 4] It is true that appellant testified to a belief in and reliance upon the allegations in the verified pleading and an affidavit used in the suit for maintenance that Mr. Hensley was worth less than \$5,000. But she testified upon cross-examination that she had been advised by her counsel that the transfers of property to Hensley's children could be set aside. She said, among other things:

"When the matter of settlement came up and during the negotiations I knew of the actual situation, and that the money had been invested in the name of the children."

She also stated that, when she learned in the fall or winter of 1913 that the property had been reconveyed to her husband, she again employed Mr. Davis. Yet she took no steps to set aside the contract until after the filing of his complaint in the action for divorce in the following year. We cannot say, therefore, that the court was not justified in believing that Mrs. Hensley did not rely upon the representations of her husband at the time of the settlement of the suit for maintenance. The husband and wife had been living apart for years. That they were in hos-

tility the suit for maintenance sufficiently proves. The transactions for settlement of her claim were conducted through her agents and his; so there was no chance for personal influence to be exercised by him upon her. There was no presumption of confidential relation such as was found to exist in cases like *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, and *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186, 191. The parties to the contract were dealing "at arms' length." *Snowball v. Snowball*, supra. The language used in the decision in *Dimond v. Sanderson*, 103 Cal. 97, 102, 37 Pac. 189, in which it was contended that a wife declaring on a note given by her husband must overcome a presumption of fraud seems applicable to the facts in this case:

"It must appear upon the face of the transaction, or by proof, that there was no consideration, or that the marital confidence was used to take an unfair advantage, or that this confidence was subsequently violated, before the burden is cast upon the plaintiff of sustaining the fairness and the consideration of the transaction against the presumption invoked by appellant."

That case emphasizes the fact that the burden of proving fraud was upon the cross-complainant. That the court, in holding that she failed to prove such fraud by clear and convincing testimony, did not abuse judicial discretion, we are persuaded.

This disposes, we believe, of all the material contentions made by appellant.

The judgment and order are affirmed.

We concur: WILBUR, J.; LORIGAN, J.

CALIFORNIA PORTLAND CEMENT CO. v. BOONE et al. (L. A. 4950.)

(Supreme Court of California. Aug. 16, 1919.)

1. MUNICIPAL CORPORATIONS ⇨358(1) — STREET IMPROVEMENT — ACCEPTANCE OF WORK.

Under Improvement Act 1911, § 21, power to accept the work on a street and to make the assessment to cover the cost is vested directly in the street superintendent; the act not providing the assessment shall be ordered or approved by the board of trustees or the city council, except as specified in section 30.

2. MUNICIPAL CORPORATIONS ⇨358(1) — STREET IMPROVEMENT—CERTIFICATE OF ACCEPTANCE—STATUTE.

Improvement Act 1911 does not require a certificate of final acceptance of a street improvement from the street superintendent.

3. MUNICIPAL CORPORATIONS ⇨358(1) — STREET IMPROVEMENT—ACCEPTANCE BY SUPERINTENDENT OF STREETS—STATUTE.

The fact that the contractor for a street improvement requested that the work be accepted piecemeal, as provided in Improvement Act 1911, § 30, and that the board of trustees of the city granted the request, did not change plain provisions of the statute that the work must in all cases be done under the direction and to the satisfaction of the superintendent of streets (section 18) and that he alone has power to accept the work as completed, though if he refuses the contractor may appeal to the council under section 21.

4. MUNICIPAL CORPORATIONS ⇨365—STREET IMPROVEMENT — ACCEPTANCE BY BOARD OF TRUSTEES—BINDING FORCE.

Resolution of board of trustees of a city ordering an assessment to cover the cost of a street improvement in compliance with the contractor's petition, supported by the certificate of acceptance of the street superintendent, amounted to a legal acceptance of the improvement under the contract as completed, binding as between the city and the contractor, and also binding on a materialman seeking to recover on the contractor's bond.

5. MUNICIPAL CORPORATIONS ⇨373(3) — STREET IMPROVEMENT—DATE OF COMPLETION —CERTIFICATE OF ACCEPTANCE.

Street improvement under Improvement Act 1911 held completed on November 11th, as certain witnesses testified, and not on the date of the street superintendent's certificate of final acceptance of the work, made November 30th; the 30-day period within which materialmen and laborers might file claims as provided in section 19 of the act beginning to run from the 11th.

6. MUNICIPAL CORPORATIONS ⇨373(3) — STREET IMPROVEMENT—CLAIM OF MATERIALMAN—TIME FOR FILING.

A materialman on a street improvement is not required to wait for the completion or the acceptance of the work, but can file his claim with the superintendent of streets without waiting for final completion of the entire work.

7. APPEAL AND ERROR ⇨103—ORDER DENYING MOTION—STATUTE.

An order denying a motion to strike out parts of the complaint is not appealable under Code Civ. Proc. § 963.

8. APPEAL AND ERROR ⇨1078(3) — APPEAL FROM ORDER—FAILURE TO MENTION POINT.

Where the point is not mentioned in the briefs, the appellate court will ignore an appeal from order denying motion to strike out certain parts of the complaint.

Department 1.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by the California Portland Cement Company against J. L. Boone, receiver of the Commonwealth Bonding & Casualty Insurance Company, and the Easley Construc-

tion Company. From judgment against the receiver, and from an order denying his motion to strike out parts of the amended complaint, he appeals. Reversed.

A. J. Sherer, Robert Young, and Haas & Dunnigan, all of Los Angeles, for appellant.

G. C. De Garmo and Alexander MacDonald, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by defendant J. L. Boone, receiver of the Commonwealth Bonding & Casualty Insurance Company, from a judgment of the superior court of Riverside county entered in favor of the plaintiff and against this defendant in the sum of \$4,922, with interest thereon, and with costs amounting to \$45.60, and from an order denying his motion to strike out certain parts of the amended complaint.

It appears that on May 21, 1914, a contract was entered into between O. F. Easley, who later assigned the contract to the Easley Construction Company, a corporation, defendant herein, and A. B. Tuthill, as superintendent of streets of the city of Corona, Riverside county, under the provisions of the Improvement Act of 1911 (Stats. 1911, p. 730) for the improvement of a portion of Main street, in that city, by paving, laying sidewalks, gutters, and curbs beginning 22 feet south of the center line of the main track of the Southern California Railway Company and extending to the north line of Lemon street. In compliance with section 19 of the Improvement Act of 1911, O. F. Easley furnished a bond for the benefit of materialmen and laborers, upon which bond the Commonwealth Bonding & Casualty Insurance Company, original defendant in this action, and for which defendant J. L. Boone, receiver, was substituted at the time of the trial, became his surety.

Action was brought on this bond by the plaintiff to recover the sum of \$9,146.21, the balance due on the purchase price of materials used in the work of improvement under the contract, consisting of cement and crushed rock furnished by the plaintiff to the Easley Construction Company, between June 24, 1914, and August 5, 1914. The Easley Construction Company defaulted in the action and judgment was entered against it for the full amount, from which judgment no appeal was taken. The judgment of \$4,922 entered against defendant J. L. Boone, receiver, was solely for the cement; nothing being allowed for the crushed rock alleged to have been furnished, for the reason that the plaintiff in its verified claim did not specify any material except cement.

The principal questions involved in this appeal relate to the form of verified statement required by section 19 of the Improvement Act of 1911, and to the question of whether the verified statement was filed with the superintendent of streets within 30 days

from the time the improvement under the contract was completed, involving as preliminary to the last question the one as to the time of completion of the work of improvement. Section 19 contains the following provision:

"Any materialman, * * * whose claim has not been paid by the said contractor, company or corporation, to whom the contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with the statement that the same, or some part thereof, has not been paid."

Concerning the question as to when the work of improvement was completed, the following facts appear: On September 24, 1914, the board of trustees of the city of Corona, acting under the authority conferred upon it by section 30 of the Improvement Act of 1911, and upon the presentation of certificates by the superintendent of streets and the city engineer, in support of the petition of the contractor, stating that the work had been completed according to the terms of the contract from 22 feet south of the center line of the main track of the Southern California Railway to the center line of Olive street, passed a resolution ordering the street superintendent to make the assessment for that part of the work. Section 30 reads as follows:

"The council, instead of waiting until the completion of the entire improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as provided in the preceding sections."

On November 11, 1914, the city engineer and the street superintendent certified to the board of trustees that the remainder of the work of improvement had been completed according to the terms of the contract. The certificate of the street superintendent, after describing the newly finished portion as that part of Main street lying between the center line of Olive street and the north line of Lemon street, concluded:

"That prior hereto the said Easley Construction Company, to my entire satisfaction and approval and in accordance with said street contract No. 28, has completed the improvement, and all of it, on Main street from a point 22 feet south of the center line of the main track of the Southern California Railway Company to the center line of Olive street. *That all of said improvement under said contract No. 28, per the terms of the contract, have prior hereto been completed and to my entire satisfaction and approval.*

"Dated Corona, California, Nov. 11, 1914." (Italics ours.)

Acting upon this certificate, the board of trustees, on November 17, 1914, passed the following resolution:

"A resolution ordering the street superintendent of the city of Corona to make an assessment for the proportionate amount of the contract for the improvement of Main street from the center line of Olive street to the north line of Lemon street, completed.

"Whereas, as will appear from the records and proceedings of the street superintendent of the city of Corona, O. F. Easley, the original contractor for the improvement of Main street, * * * has improved said Main street from the center line of Olive street to the north line of Lemon street, the amount of the completed portion of said improvement being more than two blocks; and

"Whereas, the work of said improvement has been performed satisfactorily to said street superintendent *and has been accepted by said street superintendent*, as in compliance with the plans, specifications and contract for said improvement; and

"Whereas, said contractor together with the Easley Construction Company, has and have filed with this board of trustees a petition praying that an order issue therefrom to the said street superintendent directing him to make an assessment for the proportionate amount of the contract completed; and

"Whereas, it appears, upon consideration of said petition and the facts in the premises, that it is one that may properly be granted under the provisions of section 30 of an act of the Legislature of the state of California, commonly known as the Improvement Act of 1911, and that such order should issue:

"Now, therefore, be it resolved by the board of trustees of the city of Corona that the street superintendent of said city be and he hereby is ordered and directed to make an assessment for the proportionate amount of the contract completed on said Main street from a point 22 feet south of the center line of the main track of the Southern California Railway to the north line of Lemon street, under said street contract No. 28; and it is further resolved that the amount of work for which an assessment is hereby ordered to be made is as follows, to wit:

"All of the work and improvement as contemplated and as required under said street contract No. 28, together with the plans, profiles and specifications forming a part of said street contract No. 28 on said Main street from the center line of Olive street to the north line of Lemon street.

"Be it further resolved, that the city clerk be and he is hereby directed to transmit a copy of this resolution to the said street superintendent forthwith.

"Introduced, adopted and approved this 17th day of November, 1914." (Italics ours.)

On November 10, 1914, T. J. Fleming, the secretary and general manager of the plaintiff company, wrote to the superintendent of streets as follows:

"Please advise in the inclosed stamped return envelope the exact date of completion of contract of the Easley Construction Co., on Main street, Corona, also date of acceptance

183 P.—29

and date of issuance of the warrant, when the same has been issued, and greatly oblige. Very truly yours, T. J. Fleming, Sec'y & Gen. Mgr."

To which inquiry the street superintendent replied as follows:

"Yours received. Should have answered before but have been very busy on account of the races. The street is about completed and warrant will be issued early next week. Will let you know when same is turned over if you wish. Very truly, A. B. Tuthill."

The plaintiff made further inquiry of the street superintendent on November 19, 1914, as follows:

"Yours of the 16th received, relating to Easley contract on Main street, and we will be under many obligations to you if you will kindly advise us when the street is completed and the warrant turned over. Addressed stamped envelope is inclosed for your reply, and with kindest regards, we are very truly yours, T. J. Fleming, Sec'y & Gen. Mgr."

To this letter the street superintendent made the following reply:

"Your favor of the 19th instant received. In reply will say that work is completed on Main street and I have this day issued warrant, diagram and assessment dated November 30th, 1 o'clock p. m. Trusting the above information is complete, I remain, very truly, A. B. Tuthill, Supt. of Streets."

The above correspondence was admitted in evidence over the defendant's objection that it was irrelevant, incompetent, and immaterial. The following certificate was also admitted over a like objection by defendant:

"28. Improvement of Main street from So. Cal. R. R. track to Lemon street. O. F. Easley, Contractor. Date of contract, May 21st, 1914. September 25th, 1915: I hereby accept the above street from So. Cal. Ry. track to center line of Olive street. November 30 from center line of Olive street to Lemon street.

"A. B. Tuthill, Street Supt.
"____ 190—. Certificate of acceptance issued.

"____, Street Superintendent."

Witnesses, Frank L. Woodling, M. Terpening, city clerk of Corona, O. F. Easley, the original contractor, and A. B. Tuthill, street superintendent, all called on behalf of the defendant, testified that the work was completed on or before November 11, 1914. With this evidence before it the court found that—

"Said company proceeded with the completion of said contract and of said street work and completed the same on the 30th day of November, 1914."

[1] It is urged by appellant that this finding is against the evidence; that all of the oral testimony and the certificates of the street superintendent and the city engineer, dated November 11, 1914, show conclusively that the work of improvement was com-

pleted on that date; and that the resolution passed by the board of trustees of the city of Corona on November 17, 1914, amounted to a formal acceptance of the work. In our opinion this contention must be sustained. Section 18 of the Improvement Act of 1911 provides that—

"The work must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets. * * * The assessment and apportionment of the expenses of all such work, or improvement shall be made by the superintendent of streets in the mode provided by this act." Stats. 1911, p. 738.

Nowhere does the act provide that the assessment shall be ordered or approved by the board of trustees or city council except as provided for in section 30. The power to accept the work and make the assessment to cover the cost thereof is vested in the street superintendent direct, under the provisions of section 21, which reads as follows:

"Section 21. After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract. * * *"

[2, 3] There is no provision in the act that there shall be a certificate of final acceptance such as that made by the street superintendent on November 30th; though it is provided by section 36 that the city council shall by ordinance adopt such streets or parts thereof as may have been completed to the satisfaction of the street superintendent. This might imply that the council or board of trustees may require such a certificate before adopting a street. But no such question is presented here. The question to be decided is: When was the work completed? The fact that the contractor requested that the work be accepted piecemeal as provided in section 30, and that the board of trustees granted the request, cannot change the plain provisions of the act that "the work must in all cases, be done under the direction and to the satisfaction of the superintendent of streets" (section 18), and that he alone, therefore, has power to accept the work as completed. If he refuse to accept, however, the contractor may appeal to the council. Section 21.

[4-6] The board of trustees, in passing the resolution of November 17, 1914, ordering the assessment to cover the cost of improving that portion of Main street lying between the center line of Olive street and the north line of Lemon street, in compliance with the contractor's petition, supported by the certificate of the street superintendent, authorized the payment for all of the work of improvement under the contract. No part remained

unfinished. To quote again from the certificate of the street superintendent:

"All of said improvement under said contract No. 28, per the terms of the contract, have prior hereto been completed and to my entire satisfaction and approval."

This resolution amounted to a legal acceptance of the street improvement under the contract as completed, binding as between the city and the contractor. Such an acceptance of the work as completed must also be considered binding upon the plaintiff, a materialman, seeking recovery on its bond. *Denny-Renton Clay & Coal Co. v. National Surety Co.*, 98 Wash. 103, 160 Pac. 1. We think therefore that the court erred in finding that the work of improvement was completed on November 30th; that the finding should have been that the work was completed on November 11, 1914; and that the 30-day period, within which materialmen and laborers may file their claims as provided in section 19, began to run from that date. Such a construction would work no hardship on a reasonably diligent claimant. He is not required to wait for the completion or the acceptance of the work, but can file his claim without waiting for the final completion of the entire work. *French v. Powell*, 135 Cal. 636, 68 Pac. 92; *Hub Hdwr. Co. v. Aetna Accident, etc., Co.*, 173 Pac. 81.

It is further urged by appellant that, even though it should be conceded that the work was completed on November 30th, the plaintiff did not file its verified claim within 30 days, as prescribed by the act. It appears that a representative of the plaintiff left Los Angeles at about 1 p. m. on December 30th and arrived in the city of Corona at 4:30 on the same afternoon, for the purpose of filing the plaintiff's claim with the superintendent of streets. This messenger found the office of the street superintendent closed and was told that the street superintendent had gone into Los Angeles at 11 o'clock that morning. After waiting until 8 o'clock that night for him to return, the messenger left the verified claim with the city clerk of the city of Corona, who has an office in the same building as the superintendent of streets, with instructions that the claim should be filed with the superintendent of streets at the earliest possible moment. At 9 o'clock the next morning, December 31, 1914, the city clerk filed the claim with the superintendent of streets. This, appellant contends, did not comply with the statutory requirement that a materialman may "within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim." In view of the fact that we are of the opinion that the court erred in finding that the work was completed on November 30, 1914, it is not necessary to discuss this point.

[7, 8] We have ignored the appeal from the

order denying the motion to strike out, for two reasons: First, because such an order is not appealable (section 903, Code Civ. Proc.); and, second, the point is not mentioned in the briefs.

Judgment reversed.

We concur: SHAW, J.; OLNEY, J.

SILVERSTIN et al. v. KOHLER & CHASE
et al. (L. A. 5245.)

(Supreme Court of California. Aug. 18, 1919.)

1. SALES §456—CONDITIONAL SALE—LEASE FORM.

An agreement as to a piano, though in form a lease, providing for bill of sale on payment of certain sum, *held* a conditional sale.

2. SALES §477(4)—CONDITIONAL SALE—ACTION FOR INSTALLMENT OF PRICE—EFFECT ON TITLE.

Seller in conditional sale by bringing action merely for the installments due, only part being due, does not confirm title in buyer; this not being inconsistent with continuance of the contract.

3. SALES §479(2) — RETAKING BY CONDITIONAL SELLER.

Seller in conditional sale not having confirmed title in buyer by suing for installments, his retaking possession, as authorized by contract, on further default, even though forcible, does not amount to conversion.

4. ASSAULT AND BATTERY §15—CONDITIONAL SALE—FORCIBLE RETAKING.

Seller in conditional sale, being justified in retaking possession without process of law only where possession can be secured peaceably, is liable for assault in forcible retaking.

5. APPEAL AND ERROR §757(3)—RECORD—REVIEW.

The point of insufficiency of evidence to support finding cannot be considered; the appeal being based on a typewritten transcript, and the evidence not being printed in the brief, as required by Code Civ. Proc. § 953c.

Department 2.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by I. Silverstin and another against Kohler & Chase and others. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

Lewis Sherman Jones and Henry Wetherhorn, both of Los Angeles (G. C. Ringolsky and H. A. I. Wolch, both of San Francisco, of counsel), for appellants.

Drew Pruitt and John Dennison, both of Los Angeles, for respondents.

WILBUR, J. Plaintiffs, husband and wife, brought this action to recover from defendants the value of a certain piano belonging to the plaintiffs, alleged to have been converted by the defendant, and for damages for personal injuries suffered by the plaintiff Ida Silverstin at the time of the forcible taking of such piano, and for punitive damages. The court rendered judgment for \$350, the value of the piano, and for \$150 actual damages for personal injuries suffered by the plaintiff Ida Silverstin. The controversy between the parties grows out of an agreement entered into between defendants' assignor, S. Borax & Co. and I. Silverstin, relating to said piano, dated October 10, 1913. This contract purports to lease the piano in question for \$500, \$110 of which is acknowledged to have been received, and the balance of \$390 agreed to be paid in monthly installments of \$10, commencing on the 1st day of November, 1913. The contract also provides:

"Third. When all of said rental with interest thereon as aforesaid is paid, then upon the payment by me of one dollar, as consideration therefor, the title of said instrument is to be vested in me, and S. Borax & Co. is to give me a bill of sale of the same.

"Fourth. It is also agreed that in the event that I shall refuse to accept delivery of said instrument, or fail to pay either of said monthly installments, or interest thereon at maturity, or violate any provision of this lease, then at the option of S. Borax & Co. all of said rental, together with interest thereon as aforesaid, shall in either of said cases immediately become due and payable, and S. Borax & Co. may at its option upon such default enforce payment of the entire sum then unpaid and interest thereon, or S. Borax & Co. may, at its option, take possession of said instrument and cancel this lease, and in that event I hereby agree to surrender and return said instrument to it in as good condition as when received, customary wear by careful usage excepted."

S. Borax & Co. assigned their interest in the contract and in the piano to the defendants Kohler & Chase. The plaintiffs paid \$20 and no more. In June, 1915, defendant sued I. Silverstin for the monthly payments then due, amounting to \$140 principal and \$27.30 interest, obtaining a judgment therefor, which judgment has never been paid. Plaintiffs failed to pay any subsequently accruing installments, and on July 19, 1916, defendants took possession of the piano.

[1-4] It is asserted that the trial court decided the case on the theory that the contract in question was a conditional sale; that the sellers by bringing suit for the installments of the purchase price elected to recover the purchase price, thereby confirming title in the plaintiffs, and thereafter had no right to recover possession of the property, and that their act in taking possession

thereof was a conversion of the property. This agreement is a conditional sale of the piano, although in form a lease. *Van Allen v. Francis*, 123 Cal. 474, 56 Pac. 339; *Perkins v. Mettler*, 128 Cal. 100, 58 Pac. 384; *Lundy Furniture Co. v. White*, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; *Muncey v. Brain*, 158 Cal. 307, 110 Pac. 945; *Wiley B. Allen Co. v. Wood*, 32 Cal. App. 76, 162 Pac. 121; *Adams v. Anthony*, 172 Pac. 592; *American Can Co. v. White*, 130 Ark. 381, 197 S. W. 695; *Young v. Phillips*, 203 Mich. 566, 169 N. W. 822. The authorities throughout the United States are not uniform on the question as to when a vendor in a conditional sale must be held to have elected to pursue the remedy of collecting the purchase money rather than the recovery of the property itself. In many states it is held that where the full amount of the purchase price is due and the seller brings an action to recover the same he thereby confirms the title in the purchaser. This rule has been recognized in this state. *Parke, etc., Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Holt, etc., Co. v. Ewing*, 109 Cal. 357, 42 Pac. 435; *Bailey v. Hervey*, 135 Mass. 172; *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144; *Galbreath v. Mayo* (Okla.) 174 Pac. 517, and cases cited; *Jordan v. Peek*, 103 Wash. 94, 173 Pac. 726. In *Parke, etc., Co. v. White River Lumber Co.*, supra, we followed the Massachusetts rule as announced in *Bailey v. Hervey*, supra. That court in a recent case has clearly indicated the difference between a suit for the whole purchase price under such a contract after the entire purchase price has become due and such an action for a part of the purchase price where some of the installments alone are due. *Russell v. Martin*, 232 Mass. 379, 122 N. E. 447. In that case it was said:

"The plaintiff [vendor] undoubtedly could have sued on each note as it fell due, and still retained title."

It was expressly so held in *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467. The recovery of possession of the property and of the purchase price thereof are not always inconsistent remedies under such contracts. In recent decisions of this court we have pointed out that the retaking of possession by a seller under a conditional sale, for default of the purchaser is not always to be considered an election to waive pursuit of the purchase price, and may be entirely consistent with the rights of the purchaser to recover such price. *Matteson v. Equitable M. & M. Co.*, 143 Cal. 436, 77 Pac. 144. See,

also, *Muncey v. Brain*, supra; *Adams v. Anthony*, supra.

In the case at bar the seller sued for installments of the purchase price which were due under the terms of the contract, and allowed the purchaser to remain in possession according to the contract. There was nothing in this inconsistent with the terms of the contract. The money was due, by its terms, and the seller had a right to recover the same. Section 1047, Civ. Code. Such recovery was not inconsistent with a continuing contract between the parties. *Peun-rung v. Carter-Crume Co.* (C. C. S. D. Ohio) 110 Fed. 107. There is no difference in principle, in favor of the purchaser, between such recovery of the installments due and the payment of those installments by the purchaser without suit. The seller was not therefore put to his election between two inconsistent remedies. If he had exercised the option given him under the contract to declare the whole of the purchase price due, and sued for the amount, the situation would have been entirely different, under the authorities cited. Here he acted in accordance with the contract. When, therefore, the purchaser subsequently defaulted in the payment of other installments, defendants had a right, under the terms of the contract, to retake possession, and such taking, even though forcible, did not amount to a conversion of the property. 38 Cyc. 2021, note 10. Plaintiff's judgment, therefore, for the value of the piano, upon the theory that the title thereto had passed to the purchaser by reason of the seller's suit to recover installments of the purchase price, is erroneous. Defendants are only liable for the assault upon the person of the plaintiff *Ida Silverstin*, as they were only justified in taking possession of the property without process of law, where such possession could be secured peaceably. *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121.

[5] The judgment for the personal injuries suffered by the plaintiff *Ida Silverstin* is attacked because of an alleged failure of the evidence to support the finding. This point cannot be considered for the reason that the appeal is based on a typewritten transcript, and the evidence on that subject is not printed in the brief, as required by law. Code Civ. Proc. § 953c.

The judgment is modified by reducing the amount thereof to \$150, with interest from the date of the judgment, and is affirmed as modified, appellant to recover costs of appeal.

We concur: LENNON, J.; MELVIN, J.

Cal.)

APPEAL

YOLO WATER & POWER CO. v. SUPERVISORS OF DISTRICT COURT et al. (S. F. 1912)

(Supreme Court of California. Aug. 1, 1912)

1. COURTS §212—TRANSFER OF CAUSE—DISTRICT COURT—PROHIBITION.

If the Supreme Court has power to order the transfer of a prohibition proceeding from the District Court of Appeal prior to final judgment by the latter court, it is not warranted in exercising such power after respondent's demurrer to the petition has been overruled and an alternative writ directed to issue, if a final judgment has been given; petition acts in the case not constituting such an emergency as requires an immediate decision by the latter court.

2. COURTS §99(2)—ORDER OF TRANSFER—LAW OF CASE.

Order of the District Court of Appeal overruling demurrer to a petition for prohibition, and the views stated by the court in making the order, do not constitute a ruling of the case so far as further proceedings in the court are concerned, or on any petition for review in the Supreme Court that may be filed after the proceeding is finally determined in the District Court of Appeal.

In Bank.

Petition for prohibition by the Yolo Water & Power Company against the District Court of the state of California, resulting in order overruling demurrer and directing an alternative writ. Application for immediate transfer for hearing in the Supreme Court denied.

See, also, 185 Pac. —.

H. B. Churchill, of Lancaster, for appellant.
Duncan, of Ukiah, for respondents.

PER CURIAM. This is an appeal from the transfer of a prohibition proceeding now pending in the District Court of Appeal of the Third Appellate District to the District Court of Appeal. The respondents show cause why such order should be issued, in response to which the appellant interposed a demurrer. This demurrer the District Court overruled on August 8, 1911, and directed the writ of prohibition to issue, accompanied by a statement of the facts in the District Court. The appellant has since that judgment having filed this application for immediate transfer for hearing herein, on the ground that it is an emergency case, as required by the higher courts.

[1, 2] Cal. —

of his own motion, the court has no power to transfer the case to the District Court of Appeal, but it is not warranted in exercising such power after respondent's demurrer to the petition has been overruled and an alternative writ directed to issue, if a final judgment has been given; petition acts in the case not constituting such an emergency as requires an immediate decision by the latter court.

It is the duty of the court to see that the bill is properly amended, which body flow the bill as it saw fit and other or conta- spent on a te board of bill with the county within ed, which body how the bill as eting. After pay- given a lien for the so paid against the ein, and upon which for the purpose spec- defendants demurred to three grounds, and judg- upon the demurrer, the refused to amend its com-

necessary under the conclusion ned to consider one ground of ed in the demurrer, as that decisive of the present action. the alleged cause of action is bar- provisions of section 342, Code of edure, which section reads as fol-

ons on claims against a county which been rejected by the board of supervisors, be commenced within six months after the rejection thereof by such board."

We fail to see the force of the distinction ought to be made by the appellant between demand presented to the board of and a claim presented to that complaint stated that certain of which the action is found- he board of supervisors December 27, 1915, fected on March 6, was not commenced months after

of lim-

BY-NUMBER

symptoms of insanity which later necessitate his commitment to an insane asylum; hence, though certificates of medical examiners attached to a judgment committing one as an insane person stated the attack of insanity began 1½ months ago, deeds made by the one committed approximately 30 days earlier, are not voidable on that account, etc.

Appeal from Superior Court, Alameda County; William M. Conley, Judge.

Action by Manuel Avery against Franklin L. Avery and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. W. Sawyer, of San Francisco, for appellant.

A. J. Woolsey, of Oakland, for respondent Schmidt.

F. J. Castelhun, of San Francisco, for respondent Avery.

F. H. Bartlett, of Oakland, for respondent Esparza.

LANGDON, P. J. This is an action to quiet title to five lots described in the complaint and situated in Berkeley, Alameda county. From a judgment for the defendants, the plaintiff appeals.

The defendants answered separately, each claiming a different portion of the land described in the complaint as grantees of Fidelius Avery, deceased. It is conceded that on the 26th day of May, 1915, title to this land was in Fidelius Avery, the foster father of the plaintiff. Plaintiff claims title thereto as his heir at law, asserting, first, that the deeds under which the defendants claim as grantees were never delivered during the lifetime of the grantor; and, second, that, if such deeds were delivered, they were nevertheless executed and delivered at a time when the grantor was insane, and therefore incompetent to make any contract.

[1, 2] The first contention may be very briefly disposed of. The evidence upon the question of delivery was such that different inferences might reasonably have been drawn therefrom, and under such circumstances the finding of the trial court is conclusive. The fact that the grantor requested that the deeds should not be recorded until the happening of some future event would have no effect upon their delivery. *Lewis v. Brown*, 22 Cal. App. 38, 133 Pac. 331. The deeds would pass title without recording. In so far as the deeds to Franklin Avery are concerned, there can be no doubt that there was an unconditional delivery to him which passed title. These deeds were delivered to him personally, and section 1056, Civil Code, provides that:

"A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

See *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17; *Lewis v. Brown*, 22 Cal. App. 38, 133 Pac. 331.

As to the delivery to the other defendants, some question might arise from the evidence as to whether Franklin Avery, in receiving the deeds from the grantor, was acting as the agent of the grantor or as the agent of the grantees; but, as stated before, either inference would be warranted from the evidence, and the trial court has resolved the doubt in favor of the defendants by its finding.

[3-5] This leaves for our consideration only the contention of appellant that the evidence does not warrant the finding that, at the time the said deeds were executed and delivered by the grantor, the said grantor was of sound and disposing mind. The evidence shows that the deeds were all executed on May 26, 1915, and that the grantor was judicially declared insane and ordered confined in the Agnews State Hospital for the Insane on June 23, 1915. The testimony of Franklin Avery and the testimony of the notary public who made out the deeds at the request of the grantor, and before whom said deeds were executed, was to the effect that at the time the deeds were executed and delivered the grantor was of sound mind. It is true the record discloses contradictory testimony upon this question, and the appellant relies especially upon the record in the insanity hearing, which was introduced in evidence in this case. The judgment therein established the insanity of the grantor only as of the date of the judgment. It has been held that it is not conclusive as to even that fact against those who were not parties. *Den v. Clark*, 10 N. J. Law, 217, 18 Am. Dec. 417. But, be that as it may, it is clear that such judgment is not proof of insanity at a time prior to the date stated therein, for there is a legal presumption of sanity in regard to every man, and therefore proof of insanity at one time carries no presumption of its past existence. *Estate of Dolbeer*, 8 Cal. Prob. Dec. 249.

Appellants argue that, as the certificates of the medical examiners attached to the judgment of the court stated, among other things, that the "present attack began 1½ months ago," the plaintiff may not introduce evidence contrary to this recital. The answer to this objection is that the statement of the medical examiners has not even the force of a judgment, and it is clearly not conclusive of the fact recited against persons not parties to the proceeding. Furthermore, it appears from the same certificate that the following question appearing thereon was left unanswered by the examiners: "Was the present attack gradual or rapid in its onset?" We therefore have in the record no statement by the examiners as to whether the insanity stated by them to have begun 1½ months previously came on suddenly, render-

ing the subject incompetent from that time, or whether its effects were gradual and slow or intermittent, which latter conditions might be consistent with capacity to make the deeds at the time they were made; for it is not every symptom or indication of insanity which will render one incompetent to dispose of his property. It has been said that if one is able to understand and carry in mind the nature and situation of his property, and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been mostly interested, capable of understanding the act he is doing and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would, if he knew and understood what he was doing, he has the capacity to dispose of his property. *Whitney v. Twombly*, 136 Mass. 145; *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Estate of Houston*, 163 Cal. 169, 124 Pac. 852.

We cannot, therefore, disturb the finding of the trial court in regard to the competency of the grantor, and the judgment is affirmed.

We concur: BRITAIN, J.; HAVEN, J.

STATE BOARD OF HEALTH OF CALIFORNIA v. ALAMEDA COUNTY. (Civ. 2796.)

(District Court of Appeal, First District, Division 2, California. July 10, 1919.)

COUNTIES \Rightarrow 216—CLAIM AGAINST COUNTY— "CLAIM"—"BILL"—"DEMAND."

Under Code Civ. Proc. § 342, outlawing claims against counties six months after rejection by the supervisors, which section is made applicable to actions by the state by section 345, *held*, that a demand or bill by state board of health against a county under St. 1913, p. 868, for cost of eradicating rodents and other vermin from county, is barred six months after rejection, since there is no difference between "bill" or "demand," and a "claim."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill; Claim; Demand.]

Appeal from Superior Court of Alameda County; Wm. H. Waste, Judge.

Action by the State Board of Health of the State of California against the County of Alameda. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Kemper B. Campbell, of Los Angeles, for appellant.

Ezra W. Decoto and Theo P. Wittschen, both of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff, state board of health, from a judgment rendered against it in an action brought to recover from the county of Alameda the amount of three bills or demands presented by said board to the board of supervisors of Alameda county, which had been rejected by said board of supervisors. The demands were for the amount of money expended by plaintiff for the eradication of rodents on lands situated in the county of Alameda, and arose by reason of the provisions of a certain act entitled "An act to prevent the introduction, and provide for the investigation and suppression of contagious or infectious diseases, and appropriating money to be used for such purpose," which is found in the Statutes of 1913, at page 868. This statute, as it read at the time of the expenditures represented by the demands, provided an appropriation of \$100,000, which was to be used by the state board of health in such way as it saw fit for the eradication of rodents and other vermin liable to spread infectious or contagious diseases. For the amount spent on a given piece of property the state board of health was authorized to file a bill with the board of supervisors of the county within which the property was situated, which body is directed by the act to allow the bill as filed at its next regular meeting. After payment by the county, it is given a lien for the amount of the demands so paid against the property mentioned therein, and upon which the money was spent for the purpose specified in the act. The defendants demurred to the complaint upon three grounds, and judgment was entered upon the demurrer, the plaintiff having refused to amend its complaint.

It is only necessary under the conclusion we have reached to consider one ground of objection stated in the demurrer, as that objection is decisive of the present action. It is that the alleged cause of action is barred by the provisions of section 342, Code of Civil Procedure, which section reads as follows:

"Actions on claims against a county which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board."

We fail to see the force of the distinction sought to be made by the appellant between a bill or demand presented to the board of supervisors and a claim presented to that body. The complaint stated that certain of the demands upon which the action is founded were rejected by the board of supervisors of Alameda county on December 27, 1915, and that others were rejected on March 6, 1916. The present action was not commenced until June 1, 1917, almost 15 months after the last claim had been rejected.

Appellant argues that the statutes of lim-

itation are not applicable to the state in any case where the cause of action arose in the exercise of its governmental functions, and cites numerous authorities in which this common-law rule is announced. The answer to this objection is that the rule has been changed in this state by express code provision. Section 345, Code of Civil Procedure, which is found in the same chapter as section 342, Code of Civil Procedure, above quoted, reads:

"The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state in the same manner as to actions by private parties. * * *

Clearly the state board of health is but an arm of the state, and comes within the provisions of the last quoted section.

The demurrer was properly sustained, and the judgment is affirmed.

We concur: HAVEN, J.; BRITTAI, J.

HAND v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 2976.)

(District Court of Appeal, Second District, Division 1, California. July 10, 1919.)

PROCESS \Leftrightarrow 119—SERVICE—IMMUNITY.

Where plaintiff in action pending in another state comes into this state to attend the taking of a deposition by his adversary he is subject to service of a summons.

Petition for writ of prohibition by James D. Hand against the Superior Court of Los Angeles County and Grant Jackson, Judge of said court. Proceeding dismissed.

Edmon G. Bennett and Lewis D. Collings, both of Los Angeles, for petitioner.

Reginald W. Clapp, of Los Angeles, for respondents.

SHAW, J. This is an application for a writ of prohibition. Petitioner, who is a resident of Illinois, was plaintiff in an action wherein Edwin M. Allen et al. were defendants, then pending in one of the courts of that state. He came here to attend the taking of depositions to be used in the trial of the case, and while present in the office of the commissioner before whom the depositions were made he was served with a summons in an action brought against him in the superior court of Los Angeles county. Claiming that by reason of the facts he was privileged from service of such process, he appeared specially and moved the court to quash and vacate service of the summons. This motion was denied, whereupon he filed this petition to restrain the court from further proceedings in the action.

The authorities of other jurisdictions involving the question as to what extent a non-resident party to an action attending the trial of the case is exempt from service of process issued in another action therein brought, are by no means uniform. Many of them relate to the question of immunity granted witnesses from arrest while attending as such upon the trial of cases, the rights of whom, however, in this state are fixed by section 2067, Code of Civil Procedure. As to the rights of parties to actions, where they are nonresidents of the state wherein the trial is had, one line of argument is illustrated by *Burroughs v. Cocke & Willis*, 56 Okl. 627, 156 Pac. 196, L. R. A. 1916E, 1170, and *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731, upholding the privilege of immunity to parties, while other cases, such as *Guyon v. McDanel*, 4 Idaho, 610, 43 Pac. 74, 95 Am. St. Rep. 158, *Baldwin v. Emerson*, 16 R. I. 305, 15 Atl. 83, 27 Am. St. Rep. 741, *Balsley v. Balsley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726, and *Bishop v. Vose*, 27 Conn. 1, may be cited in support of a contrary view. The reason for granting immunity to suitors is varied. By some of the authorities it is based upon a personal privilege of the suitor, and by others upon the fact that public policy demands that the courts should not be hampered by having those in attendance upon trials interfered with by other litigants.

These reasons, however, have no application to the instant case, for the reason that petitioner was not a party to the trial of any action in this state; he was not a witness, nor was he in attendance upon any court whose proceedings could be hampered by the service of process upon him. He was merely, of his own volition and for his own interest, an attendant at the taking of a deposition on behalf of his adversary, and the notary public acting as commissioner before whom the depositions were taken was not answerable to the court before which the action was pending for anything said or done; the entire proceeding being outside of its jurisdiction. *Greer v. Young*, 120 Ill. 184, 11 N. E. 167. Hence, while it may be, for the purposes of this case, conceded that in furtherance of justice parties to actions and their witnesses should be privileged, not only from arrest, but from service of summons, while in attendance upon the trial of a cause, such rule has no application to the case of a party living in a foreign state, where he is a party to litigation there pending, and attends in this state for the purpose of taking testimony out of court. In order to come within the rule, the proceeding must in any event be one in court or a similar tribunal. Quoting from *Parker v. Manco*, 61 Hun, 519, 16 N. Y. Supp. 325, the courts of which state fully recognize the rule invoked by petitioner:

"We think, therefore, that the coming into this state, for the purpose of being present upon the taking of testimony to be used in an action in another state, neither comes within the spirit nor the letter of the rule to which attention has been called, and that the defendant [petitioner here] was liable to service of process, and the service of summons herein."

The proceeding is dismissed.

We concur: CONREY, P. J.; JAMES, J.

MELICHAREK v. COLKINS et al.
(Civ. 2291.)

(District Court of Appeal, Second District, Division 1, California. July 10, 1919.)

1. VENDOR AND PURCHASER — RESCISSION OF CONTRACT—COMPLAINT.

Where purchaser failed to tender a reconveyance of lots or of money received by purchaser for them, he had no cause of action for rescission of the purchase contract.

2. VENDOR AND PURCHASER — RESCISSION OF CONTRACT—MISREPRESENTATION.

A vendor's representations that tax deed affidavits upon which the validity of his title depended were correct according to advice he had received, etc., held not a misrepresentation of fact authorizing rescission of the sales contract.

3. VENDOR AND PURCHASER — FAILURE OF CONSIDERATION — WHAT CONSTITUTES.

Where lots bought by plaintiff from a tax sale purchaser were redeemed by the owner upon payment of accrued taxes, interest, etc., there was not a total failure of consideration, authorizing the plaintiff to recover from his vendor in an action for money had and received.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Frank Melicharek against Anna M. Colkins and A. J. Daniels, as administrator of the estate of A. Colkins, deceased. Judgment for plaintiff, and defendants appeal. Reversed.

James Brunken, of Los Angeles, for appellants.

Charles H. Mattingly, of Los Angeles, for respondent.

CONREY, P. J. Prior to the year 1913, at a sale for delinquent assessments for the widening of Figueroa street, in the city of Los Angeles, under the Street Opening and Widening Act of 1903, four lots of land in said city were sold to the defendant Anna M. Colkins, and certificates of sale thereon were issued to her. Thereafter she made assignments of said certificates of sale to A. Col-

kins. In the month of October, 1913, the street superintendent of the city of Los Angeles conveyed to A. Colkins, as assignee of defendant Anna M. Colkins, the four lots above mentioned. On or about the 3d day of November, 1913, A. Colkins sold and by grant deeds (one for each lot), conveyed to the plaintiff said four lots; plaintiff paying for each of said lots the agreed price of \$275. Anna M. Colkins, who was the wife of A. Colkins, joined with him in the execution of the deeds to plaintiff. Without describing the several tracts in which the lots were located, we will designate them by their lot numbers only. While the plaintiff and A. Colkins were negotiating for the sale, they took the tax deeds to the office of Mr. Mattingly, an attorney at law, and asked him if they were valid. He told them that it depended upon whether or not the affidavits of Mr. Colkins were sufficient, and that if those affidavits were not sufficient the deeds were not good. The affidavits referred to were those required by section 28 of the Street Opening and Widening Act of 1903, which affidavits must be made and filed with the street superintendent. The affidavits were not present at that time and were not examined, but Colkins said that "everything is correct."

Testifying in this action for the plaintiff, Mr. Mattingly states that "then Mr. Colkins stated that he knew that the affidavits were correct—all correct, because he said that he had obtained advice on the subject." This and similar testimony of the plaintiff constituted all of the evidence of representations made by the defendant concerning those affidavits. Mr. Mattingly informed them that, even though the tax deeds were absolutely correct in every particular, in order to obtain a marketable title it would be necessary to have an action to quiet title. With this information Melicharek paid the consideration and accepted the deeds from the defendants, and employed Mr. Mattingly to go ahead and quiet title. Before commencing such action, however, Melicharek, for a consideration of \$150 paid by him, obtained a quitclaim deed from the owner of lot 330, and afterwards sold that lot. He also commenced actions to quiet title upon two of the lots and was made defendant in an action to quiet title to the remaining lot. In those cases it was determined that such affidavits were insufficient and that solely by reason thereof the tax deeds were void. As a condition of the quieting of the title of the owner in each of said cases, the owner was required to and did pay to Melicharek the amount of taxes and penalties constituting the purchase price, which Mrs. Colkins had paid at the tax sale. These sums so received by Melicharek amounted in all to the sum of \$40.76.

In the present action the plaintiff seeks to recover judgment against the defendants

for the sum of \$825, with interest from November 3, 1913, on account of the consideration paid by him for lots 287, 288, and 51. The complaint alleged that for the purpose of deceiving and defrauding the plaintiff, and inducing plaintiff to purchase said lots from said defendant for the sum of \$825, defendant A. Colkins represented to plaintiff that said affidavits were sufficient, and that grant deeds from himself and wife to the plaintiff would convey a good and sufficient title, and would enable the plaintiff to quiet his title against the record owners of the property; that said representations were not true, and were known to the defendant to be not true, and were not warranted by the information of said defendant A. Colkins; that plaintiff believed and relied upon said representations, and except for those representations would not have paid to the said A. Colkins the said sum of \$825; that plaintiff received no consideration for said sum of \$825; that said deeds were void and of no effect by reason of the insufficiency of said affidavits and each of them; and that said grant deeds from defendants to plaintiff conveyed to plaintiff no title, all of which defendants at all times knew.

[1] The complaint did not refer to the fact that a fourth lot was included in the transaction, or that said sum of \$40.76, or any portion thereof, had been received by plaintiff from the owners of the lots. No tender of said money, or of a reconveyance to the defendants of said lots, or any of them, was made by the plaintiff to the defendants, or either of them. Although the plaintiff had perfected his title to lot 330, and had exchanged that lot for other property of a value not appearing herein, he excluded from his complaint in this action that part of his transaction with the defendants, and did not offer to reconvey lot 330 to defendants, or to account in any way for the proceeds thereof. On these facts it is clear that the complaint has not stated a cause of action for rescission.

[2] And even if the plaintiff had herein offered to do all that must be done by a party seeking to rescind a sale, the facts of the case do not show that plaintiff has any right of rescission. The only misrepresentation claimed by him was that to which we have referred. This on its face was not a representation of fact, but merely an expression of opinion, which at the time was stated to be made upon advice theretofore received. There is no evidence that the defendant A. Colkins had not received such advice, or that he did not believe the same, or that he was not warranted in believing the same.

[3] But respondent claims that he is entitled to recover as upon an action for money had and received by the defendant for the use of the plaintiff; this claim being based upon the allegation that the plaintiff received

no consideration whatever for the money paid by him and which he seeks to recover. But there was not a total failure of consideration. Even if the tax deeds were void, it is conceded that the vendor was the owner of a valid interest in the property conveyed, and had acquired that interest by virtue of a valid tax sale of the property to his assignor. At the time of the conveyance to plaintiff there existed no facts constituting a breach of any covenant, stated or implied, in the deeds made by defendants to the plaintiff. The utmost that can be said in favor of plaintiff's case is that the consideration which he received for the money paid by him was less valuable than it would have been if the tax deeds had been sufficient to carry the title. Having taken the property with this contingency before his eyes, and there being no equitable ground for rescission of the transaction, he is not entitled to recover. Neither the complaint nor the facts proved are sufficient to support the judgment. It should be noted that in computing the amount of its judgment the court gave credit to defendants for said sum of \$40.76; but that does not affect our conclusions, herein stated.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

STUBBS v. ABERCROMBIE et al. (Civ. 2128.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1919.)

FALSE IMPRISONMENT § 7(1)—LEGALITY OF ARREST—COMPLAINT FOR LARCENY OF DEED.

Complaint, under Pen. Code, § 492, for larceny of deed, on which was issued warrant under which arrest was made, held to state an offense, so that there was no false imprisonment; it alleging stealing of deed executed by A. to J., conveying a certain lot, of a certain value, and the personal property of A.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Ira H. Stubbs against Mary E. Abercrombie and others. Judgment for plaintiff, and defendants Abercrombie and Palmer appeal. Reversed.

A. J. Hill, David R. Faries, and Dian R. Gardner, all of Los Angeles, for appellants. Frank A. McDonald, of Los Angeles, for respondent.

THOMAS, J. This is an action whereby the plaintiff seeks to recover from the defendants the sum of \$50,000 for damages al-

leged to have been sustained by him by reason of false imprisonment.

The material allegations of the amended complaint, so far as the gist of the present action is concerned, were denied. Demurrers interposed by defendants were overruled by the court. When the case came on for trial, the defendant Lyons, the constable, and Palmer, the justice of the peace, moved to strike the amended complaint from the files, so far as they were concerned. This motion was denied. The court granted a motion on the pleadings to dismiss as to the defendant Lyons, and the action thereupon proceeded against the defendants Mrs. Mary E. Abercrombie, who swore to the criminal complaint, which was the basis of the issuance of the warrant of arrest, and Harlan G. Palmer, the justice of the peace, who issued the said warrant. Judgment was given to plaintiff against the defendants in the sum of \$50.

Each of these two defendants has appealed separately. By proper order of the court, made on stipulation of all parties concerned herein, both appeals were consolidated, and it was further stipulated that the transcript and briefs on appeal filed herein for the defendant and appellant Palmer might be used by all the parties hereto as the transcript and briefs in such consolidated appeals. The appeals are taken by the alternative method.

The facts, so far as material here, are as follows: Plaintiff, at the time of the transaction out of which this case arose, was a real estate dealer. He offered to defendant Mrs. Abercrombie an equity in a bungalow in the city of Hollywood and \$800 in cash in exchange for a lot owned by her in Culver City, which she accepted, and thereupon she executed and conveyed her property to one Margaret Turner, who, as plaintiff informed her, was the owner of the Hollywood property. This deed and certain escrow instructions were placed in escrow. Shortly thereafter plaintiff told Mrs. Abercrombie that the lot she was transferring to Margaret Turner, and the building thereon, had been resold to Mr. Amenzo W. Brown, that this new deed should be substituted in escrow for the former deed, and that in this way the expenses of recordation and escrow fees could be saved. Mrs. Abercrombie, being apparently of an obliging disposition, consented to this arrangement, which was by her carried out. Plaintiff thereafter procured the first deed referred to above, and pretended to, and apparently did, destroy and throw it into a waste basket. In fact, however, he did not do so, but put the same into his pocket, and later placed it in escrow with another title company, with instructions to have the same recorded. At the same time and place plaintiff also placed in escrow a deed from Margaret Turner to Amenzo W. Brown, executed by himself as attorney in

fact for said Margaret Turner. Shortly thereafter plaintiff called and obtained from the escrow company the deed from Mrs. Abercrombie to Margaret Turner, and himself had it recorded, thereby causing the records in the county recorder's office to show a transfer of the property from Mrs. Abercrombie to Margaret Turner. After being recorded, this deed was returned to the escrow company, and its escrow completed, Mrs. Abercrombie's lot being sold to Amenzo W. Brown, and the plaintiff received a check for \$1,615, that being the amount paid by Brown, less escrow and recordation fees. Meanwhile the first escrow failed because of Mrs. Abercrombie's loss of record title. From what has been said it would appear that the result of this ledger-main in reality is that Mrs. Abercrombie conveyed her lot in compliance, as she supposed, with her understanding with the plaintiff, but received nothing in exchange therefor, while Mr. Brown got the lot and the plaintiff the money. The record nowhere discloses that Margaret Turner has ever transferred the Hollywood property or paid any money to Mrs. Abercrombie.

It is not necessary for this court to brand the foregoing transaction by any designation. The brand is obvious. Upon discovering the foregoing facts, Mrs. Abercrombie went to the office of the district attorney and stated the facts, after which she was advised that a public offense had been committed by plaintiff, and by one of the deputies in that office a criminal complaint was prepared, charging plaintiff with the crime of grand larceny. Before affixing her signature thereto, Mrs. Abercrombie took the complaint to the defendant Harlan G. Palmer, the justice of the peace aforesaid, and signed and swore to it before said Palmer as justice of the peace. A warrant of arrest was issued thereon, and the plaintiff arrested, arraigned, and, in default of bail, committed to the county jail. Three days later, before another justice, plaintiff was given a preliminary hearing, and the said charge dismissed, on the ground that the criminal complaint did not state facts sufficient to constitute a public offense. Shortly thereafter he brought this action.

From the record before us it appears that plaintiff brought this action originally against Mrs. Abercrombie alone for alleged malicious prosecution. A demurrer was interposed to the complaint and sustained by the court. The plaintiff then, by way of alleged amendment, filed an amended complaint against Mrs. Abercrombie, and included with her as defendants George W. Lyons, the constable who arrested him, and Harlan G. Palmer, the justice of the peace aforesaid, and changed his cause of action from one for malicious prosecution to one for false imprisonment.

On the trial it appears that the court refused to permit the defendants Abercrombie and Palmer to show that they, or either of them, were not actuated by malice, or that they acted in good faith, or under advice of counsel, or that there was probable cause for the arrest. The court held that the defendants were liable to the plaintiff, and that the liability could not be measured in merely nominal damages, but must be for a reasonable attorney's fee and actual compensatory damages. Three "fundamental questions," as appellants designate them, are presented to us, viz.:

(1) "Should the plaintiff's change of cause of action have been authorized?"

(2) "Did the criminal complaint [referred to in this action] state a public offense?"

(3) "When is a justice of the peace liable for false imprisonment, and to what extent?"

The first question presented is a close one. Under the common law the courts had no power to allow an amendment which introduced a new and distinct cause of action to an existing pleading.

"In a majority of the states the courts have established the doctrine that the powers conferred upon them, under the Codes and practice acts, in respect to amendments which set up a new and distinct cause of action, are no greater than that existing at common law, and that they are not authorized to grant such amendments at any stage of the proceedings." 31 Cyc. 409 et seq.

Our Supreme Court has held, in the case of *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53, that—

"all that can be required * * * is that 'a wholly different cause of action' shall not be introduced; * * * that 'a complainant is not at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment,'" and that "the matter of the amendment must not be 'entirely foreign to the original complaint.'"

"In false imprisonment the essence of the tort consists in depriving the plaintiff of his liberty without lawful justification, and the good or evil intention of the defendant does not excuse or create the tort. The plaintiff's grievance is the use against him of force, actual or threatened. Consequently, in the common-law procedure, the action must be brought in trespass. But in the case of malicious prosecution, or abuse of process, the process is valid, and in itself justifies the restraint or imprisonment. To deprive the defendant of its protection, it is necessary to show malice, want of probable cause to institute the proceeding, or some oppressive or fraudulent use of the machinery of the law. Consequently the malice or evil intent is the gist of the tort, the injury suffered by plaintiff resulting only indirectly from the wrongful act—that is, the evil intent—of the defendant, and the common-law action to be used is trespass on the case. Of course, the common-law classification of the different causes of action has ceased to be important in itself, but it illus-

trates the entirely different legal nature of the two classes of torts." 11 R. C. L. 792.

To the same effect, but in different language, our own Supreme Court has held, in the case of *Davis v. Pacific Telephone & Telegraph Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698, which was an action for malicious prosecution, wherein the court cites with approval the case of *Nebenzahl v. Townsend*, 10 Daly (N. Y.) 235, and quoting from that decision says:

"The complaint was for false imprisonment and malicious prosecution, which was uniting two causes of action that were inconsistent with each other, for, if the arrest was without legal authority, it was not a case of malicious prosecution, * * * and if under lawful process there was no false imprisonment, the imprisonment being by lawful authority. Each cause of action is distinct from the other. Thus, formerly for false imprisonment the remedy was trespass, and for malicious prosecution it was case. * * * Both cannot exist upon the same state of facts, or, to put it more clearly, if the one lies upon the facts, the other does not."

The following cases, we think, support this conclusion: *Davis v. Pacific Telephone & Telegraph Co.*, supra; *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695; *Krause v. Spiegel*, 94 Cal. 374, 29 Pac. 707, 15 L. R. A. 707, 28 Am. St. Rep. 137; *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45; *Hackett v. Bank of California*, 57 Cal. 335; *Ramirez v. Murray*, 5 Cal. 222; *Wilson v. Lassen*, 5 Cal. 114.

On the other hand, under section 427, Code of Civil Procedure, it appears that such causes of action as those under discussion may be joined in the same pleading, and in 11 R. C. L. 791, it is expressly stated that—

"Very often a single transaction may constitute both a false imprisonment and a malicious prosecution, and the plaintiff at common law might have his election to sue in trespass for false imprisonment or in case for malicious prosecution; and in jurisdictions where the strict separation of the forms of action has been abolished, two or more of the above causes of action may be joined in the same suit."

There is, we think, no doubt but that in either case—malicious prosecution or false imprisonment—so far as the case at bar is concerned, the alleged injuries to plaintiff "arose out of the same transaction." From what appears to us as the weight of authority, it would seem, although we do not so hold, that the trial court erred in granting leave to amend the complaint.

As to the second question, the answer must be in the affirmative. In passing upon this phase of the case courts are limited, we think, to the contents of the original complaint. It is not a question as to what the evidence on the trial may disclose. So considered, the complaint here measures up to every statutory requirement. It follows that

the justice of the peace erred in dismissing the case aforesaid. The justice issuing the warrant, therefore, acted legally in issuing the warrant, and the arrest of plaintiff under and by virtue thereof was legal. This being true, the present action must fail.

This case is distinguishable from that of *People v. Dadmun*, 23 Cal. App. 290, 137 Pac. 1071, relied upon by respondent, in this: In the *Dadmun* indictment, though the defendant *Dadmun* was named as the grantee in the deed, it did not appear that the deed had been delivered. If it had been delivered, it became the defendant's property, and the taking of it was not larceny. If it had not been delivered, it was not an executed instrument, and had no intrinsic value, particularly in the absence of an allegation to that effect. In the present case the criminal complaint, which gives rise to the action for false imprisonment, alleges that the defendant "did steal, take, and carry away a certain bargain and sale deed executed by Mary E. Abercrombie to Margaret Turner, conveying lot 10, in block 19, Tract 2444 of Culver City, of the value of \$1,000, * * * and the personal property of Mary E. Abercrombie." Here was an executed deed. The value is alleged. The fact that the deed was averred to be the property of the grantor does not change the nature of the transaction. The real property may have been retransferred to her by Margaret Turner, and the deed from herself may thus have become an important link in her chain of title. At any rate, the facts alleged bring the instrument in question within the provisions of section 492 of the Penal Code.

It is unnecessary to discuss the third question.

In view of the audacious and reprehensible conduct of plaintiff, as disclosed by the record here—he having caused Mrs. Abercrombie to lose her property, and then bringing this action against her because, after discovering his duplicity and the fraud he had perpetrated upon her, she had gone to the office of the district attorney of Los Angeles county, and, so far as the record here discloses, had in good faith, and without malice, placed before that officer her complaint, although that point is not raised in the briefs here—we think we ought to say a word. Even if the criminal complaint had lacked the proper allegations to set forth facts sufficient to constitute a public offense, still, under the facts disclosed by the record here, the defendant, Mary E. Abercrombie, would not be liable. *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 818; *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904, and an exhaustive note in reference to the same

case in 18 L. R. A. 356. For these reasons, and many others which appeal to us, but which we do not discuss, we are unable to agree with the learned trial court in its conclusions.

The judgment is reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

MARTINELLI v. BOND et al. (Civ. 2799.)

(District Court of Appeal, First District, Division 2, California. July 14, 1919. Rehearing Denied by Supreme Court Sept. 11, 1919.)

1. MASTER AND SERVANT §302(1)—AUTO ACCIDENT—OWNER'S LIABILITY.

Neither ownership of an auto, nor the fact that the use and care of it was intrusted by the owner to an employé, renders the owner liable for injuries inflicted by it while in use by the employé for a purpose entirely unconnected with the owner's business.

2. MASTER AND SERVANT §330(3)—AUTO ACCIDENT—OWNER'S LIABILITY—OVERCOMING PRIMA FACIE CASE.

The presumption arising from the prima facie case against the owner of an auto, by proof of his ownership and that the driver, at the time of its collision, was his employé, is overcome, without leaving any conflict of evidence, by uncontradicted proof that the auto was in use by the employé for his personal pleasure.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Laureno Martinelli, a minor, by Lorenzo Martinelli, his guardian ad litem, against Vincent Bond, transacting business under the fictitious name of Bond Bros. & Co., and another. Judgment for plaintiff, and the named defendant appeals. Reversed as to named defendant.

Watt, Miller, Thornton & Watt, of San Francisco, for appellant.

Hoefler, Cook & Snyder, of San Francisco, for respondent.

HAVEN, J. Plaintiff suffered personal injuries caused by a collision between a motorcycle which he was riding and an automobile driven by the defendant Noonan and owned by his employer, the defendant Bond. In this action, brought to recover damages for such injuries, a verdict was rendered in favor of plaintiff against both defendants. From the judgment following such verdict, the defendants prosecute separate appeals. This appeal is by the defendant Bond.

The appellant contends, first, that any judgment against him was erroneous, for the reason that the automobile was being used at the time of the accident by the defendant Noonan for a pleasure trip, and was not then

engaged in the transaction of his employer's business; and, secondly, that the evidence shows that the injuries complained of were caused solely by the negligence of plaintiff, and not by or through any carelessness or negligence on the part of either defendant. Under the conclusions that have been reached, it will be necessary on this appeal to consider the first contention only.

The automobile which collided with plaintiff's motorcycle was purchased by the defendant Bond for use in the business transacted by him under the name of Bond Bros. & Co. The defendant Noonan was in the employ of the defendant Bond as manager of such business. The automobile, when purchased, was turned over by Bond to Noonan for the latter's exclusive use, and was kept by him at a garage at or near his home, at the expense of the appellant Bond. Noonan never informed appellant where the automobile was kept, nor did the latter make any inquiry with regard thereto. The defendant Noonan had entire charge of the automobile, using it as he desired without restriction. Appellant testified that he had instructed Noonan that said automobile should not be used by him for pleasure purposes. Noonan stated that he did not remember such instructions. The collision which caused the injuries to plaintiff occurred on Sunday, December 23, 1917, between 6 and 7 o'clock in the evening, at or near the junction of San Jose avenue and Mission street, in San Francisco. Upon that day the defendant Noonan had taken two friends for a pleasure outing to Camp Fremont. He testified:

That the trip was made "for the purpose of taking an outing," and that "when I was using it [the automobile] on this Sunday, when I was out for a ride, it was not being used for any purpose connected with the business of Mr. Bond."

The appellant had no knowledge of the use of the automobile for the purpose stated upon the day of the accident, nor for several days thereafter.

[1] The test of an owner's liability for the tortious act of his employé, while driving the former's automobile, is the nature of its use at the time of the accident, whether or not it is then being used in the transaction of the owner's business. The very basis of the rule of respondeat superior, as applied to automobile accidents, is that the driver of the machine is acting for the owner, and not for himself personally, at the time of the accident. As soon as the driver steps aside from the owner's business, and enters upon the performance of some independent purpose of his own, he ceases to act as the agent of the owner, and the latter's responsibility for his acts terminates. Appellant cites a large number of cases in which owners of automobiles have been relieved from liability for damages resulting from accidents, by reason of the

fact that, at the time of such accident, the automobile was in use for a pleasure ride or other personal purpose of the driver. This rule is so well established that there can hardly be said to be conflict of authority thereon. The citation of the following authorities is sufficient to indicate the basis of the rule and its wide application: Thompson on Negligence, § 526; Berry on Automobiles (2d Ed.) §§ 601 and 618; Babbitt on the Law Applied to Motor Vehicles (2d Ed.) §§ 872 and 891; Davids on the Law of Motor Vehicles, § 216; Mullia v. Ye Planry Bldg. Co., 32 Cal. App. 6, 161 Pac. 1008; Mauchle v. Panama-Pacific, etc., Co., 174 Pac. 400; Brown v. Chevrolet Motor Co. of Cal., 179 Pac. 697; Maupin v. Solomon, 183 Pac. 198; Power v. Arnold Engineering Co., 142 App. Div. 401, 126 N. Y. Supp. 839; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Morier v. St. Paul, etc., Ry. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; Gousse v. Lowe, 183 Pac. 295.

Upon principle and authority, neither the ownership of the automobile by appellant, nor the fact that the use and care of the same were intrusted by appellant entirely to the defendant Noonan, renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with the appellant or his business.

Respondent relies upon cases which hold that, when an employé is intrusted with an automobile, with permission to use it at his discretion in the business of the employer, under what has been termed a "roving commission," it is not necessary, in order to establish the owner's liability, to prove that, at the time the injuries were received, the employé was engaged in performing any particular business of the principal. The authorities so relied upon recognize that, even under that rule, it is still necessary to show that, at the time of the commission of the tort, the employé was acting within the general scope of his employment. Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 354, 123 Pac. 219; Berry on Automobiles (2d Ed.) § 626.

[2] It is further contended by respondent that he made a prima facie case against appellant by proof of the latter's ownership of the automobile, and the fact that the driver, Noonan, was his employé at the time of the accident. The presumption arising from such prima facie case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. Maupin v. Solomon, *supra*; Brown v. Chevrolet Motor Co. of Cal., *supra*. In this case there is no conflict in the evidence as to the fact that, at the time of the accident, the automobile was in use by the employé for his personal pleasure. Uncontradicted proof of that fact dispelled the pre-

sumption of liability on the part of the owner.

The judgment against the appellant Bond is reversed.

We concur: LANGDON, P. J.; BRIT-TAIN, J.

MARTINELLI v. BOND et al. (Civ. 2808.)

(District Court of Appeal, First District, Division 2, California. July 14, 1919.)

1. MUNICIPAL CORPORATIONS §706(5)—COLLISION OF AUTO—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence in connection with requirement of Motor Vehicle Act, § 20g, that driver of motor vehicle, in turning to left at street intersection, shall go beyond the center thereof, passing to its right, before turning to the left, *held* sufficient to support jury's finding of negligence of driver of auto colliding with plaintiff's motorcycle.

2. APPEAL AND ERROR §1002—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Jury's finding cannot be disturbed on appeal, on a mere conflict in the evidence.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Laureno Martinelli, a minor, by Lorenzo Martinelli, his guardian ad litem, against Vincent Bond, transacting business under the fictitious name of Bond Bros. & Co., and P. C. Noonan. From an adverse judgment, the last-named defendant appeals. Affirmed as to last-named defendant.

Watt, Miller, Thornton & Watt and Edward J. Lynch, all of San Francisco, for appellant.

Hoefler, Cook & Snyder, of San Francisco, for respondent.

HAVEN, J. This is an appeal by the defendant Noonan from a judgment against him and his codefendant Bond, entered upon the verdict of the jury in an action for damages for personal injuries. The appeal of the defendant Bond is considered in action No. 2799, 183 Pac. 461, and the judgment as to that appellant is reversed in an opinion this day filed. This appeal is submitted upon the same record and briefs as the appeal of Bond.

The facts concerning the accident which caused the injuries to plaintiff are partially stated in the opinion on the other appeal. The appellant Noonan was the driver of the

automobile at the time of the collision which caused the injuries. The question of his liability depends upon whether the accident was caused by his negligence or by the negligence of plaintiff. The testimony was conflicting as between plaintiffs and defendants' witnesses, which conflict the jury resolved in favor of the plaintiff. Its verdict cannot be disturbed, if it finds support in the evidence. The collision which caused the injuries occurred at or near the junction of San Jose avenue and Mission street, in the city of San Francisco. At the point where these two thoroughfares intersect at an acute angle is located a monument, known as the "Daly Monument." Shortly to the east of this monument, and near the small end of the triangle caused by the intersection of the two streets, stood a small building used as a real estate office. Between this building and the monument was a space of from 12 to 14 feet in width. Upon the evening of the accident appellant started easterly on San Jose avenue, but, finding the road rough, turned his machine and returned to the vicinity of the intersection of that street with Mission street, preparatory to turning down Mission street and proceeding easterly thereon. The plaintiff, his companion upon his motorcycle, and another witness to the accident, all testified that, instead of returning to the corner of the two streets and making the turn there, the appellant drove his machine across the passageway upon private property, between the monument and the real estate office, and came into Mission street from that unused and private shortcut, rather than from the intersection of the two streets. There is also testimony to the effect that the automobile "dashed out from this small street," and that no horn was blown when it did so. [1, 2] This testimony, in connection with the provisions of the Motor Vehicle Act to the effect that the driver of a motor vehicle, in turning to the left at an intersection with another street, "shall run beyond the center of such intersection, passing to the right thereof, before turning such vehicle toward the left" (Stats. 1915, p. 407, § 20 [g]), is sufficient to support the finding of the jury of negligence on the part of the driver of the automobile. The witnesses for the defendants all contradicted the statements made on the part of the plaintiff above referred to, but the verdict and judgment cannot be disturbed upon a mere conflict in the evidence.

The judgment against the appellant Noonan is affirmed.

We concur: LANGDON, P. J.; BRIT-TAIN, J.

SONOMA COUNTY NAT. BANK v. SKINNER. (Civ. 2567.)

(District Court of Appeal, First District, Division 1, California. July 12, 1919.)

1. APPEAL AND ERROR ⇨1056(1)—HARMLESS ERROR—RULING ON EVIDENCE.

Exclusion of evidence, in action on note transferred as collateral security for certain indebtedness, to show that certain of the indebtedness was not due, was harmless; the balance due exceeding the note.

2. APPEAL AND ERROR ⇨1058(2)—HARMLESS ERROR—RULING ON EVIDENCE.

Sustaining objection to question is harmless; the fact sought to be elicited thereby appearing by subsequent testimony of the witness.

3. BILLS AND NOTES ⇨430—PAYMENT—RENEWAL NOTES.

Debt remaining, after crediting on a note a payment of part of it, is not extinguished, in the absence of agreement to that effect, by marking the note "Paid," surrendering it, and taking a new note for the balance.

4. BILLS AND NOTES ⇨357—ASSIGNMENT AS COLLATERAL—BONA FIDE HOLDING.

The assignee of a note as collateral for present and subsequent debts is, as regards subsequent debts, a bona fide holder of the note only as to such of those debts as are incurred before maturity of the note.

5. BILLS AND NOTES ⇨525—ASSIGNMENT AS COLLATERAL—DEBTS SECURED—EVIDENCE.

Evidence that the maker of a note assigned as collateral for subsequent debts of the payee paid it to the payee after its maturity with no knowledge of the assignee's claim has no tendency to show that debts of the payee to the assignee, incurred after assignment, were incurred after maturity of the note, and so not secured by it, as against the maker.

Appeal from Superior Court, City and County of San Francisco; John H. Hunt, Judge.

Action by the Sonoma County National Bank against R. M. Skinner. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Morrissey, of San Francisco, and Frederick H. Shepper, for appellant.

Reuben G. Hunt, of San Francisco, for respondent.

WASTE, P. J. Defendant appeals from a judgment in favor of plaintiff, upon a directed verdict, for money due on a promissory note.

On November 28, 1914, C. F. Fury, being at the time already indebted to plaintiff, borrowed from it the sum of \$500. He executed and delivered to it his promissory note for

that amount. As collateral security for the payment of this note, for what he already owed, and for future advances, he transferred to the bank a claim, for the sum of \$400, held by himself against the Helling estate, and transferred to it by indorsement the note in suit, executed to Fury by defendant. This note was dated November 27, 1914, and was payable May 27, 1915.

Some time thereafter the Helling estate paid to the banker the sum of \$400, the amount of Fury's claim against it. This money the bank applied on the Fury note for \$500, leaving a balance of \$100 due thereon, for which Fury, at the time, executed a new note. The bank then canceled the \$500 note, and credited it on the books of the bank as paid. It marked as "Paid" and delivered the canceled \$500 note to Fury.

Subsequent to the transfer of the Skinner note by Fury to the bank, a number of transactions were had between them, resulting in the giving by Fury of several promissory notes. According to the uncontradicted testimony of the plaintiff's cashier, it was the custom of the parties that these notes "would run for a period of time, and were then afterwards canceled and new notes taken." It appears from the record to be equally well established that these dealings amounted to one continuous transaction, and that the collateral, pledged at the time Fury obtained the advance of \$500, was held by the bank as security for the repayment of the varying aggregate amounts of Fury's indebtedness.

The present action was commenced on February 23, 1917, by plaintiff, to collect the sum of \$400, alleged to be due on the note; the purpose being to thus foreclose on the collateral to that extent, and apply the amount on the total sum claimed by the bank to be due from Fury, amounting at that time to approximately \$1,200, including the \$100 note given on the surrender of the \$500 obligation, as before stated.

[1] After the suit was instituted, but before the trial, the bank took from Fury a new note, dated April 19, 1917, for \$100, marked the old note for that amount "Paid," and returned it to Fury. It does not appear when the new obligation matured. On the trial the defendant sought to ascertain when this last note became due, but the court sustained a general objection to the testimony. In seeking to show the maturity and disposition of this note, defendant was attempting to support the allegation of his answer, and the contention made here, that plaintiff was only entitled to hold the note of defendant as collateral for the \$100 remaining unpaid on the original \$500 note, and that by the terms of the new note for \$100, executed after suit brought, the time of payment had been extended, and the suit, therefore, prematurely brought.

This contention, sound, if resting on proper foundation, loses its force in the present case, in view of the established fact that the note sued upon was collateral, not only for the payment of the \$500, obtained from the bank by Fury at the time it was pledged, but also for repayment of whatever prior amount Fury owed the bank and all subsequent advances. At the time of the trial his total indebtedness amounted to about \$1,200. Defendant did not attempt to prove, and apparently does not contend, that the indebtedness of Fury to the bank was different, or any less, than as testified to by the bank's cashier. We are therefore unable to find any harm done to defendant by this particular ruling of the court. *San Luis Obispo County Bank v. Greenberg*, 116 Cal. 467, 470, 48 Pac. 386.

[2, 3] The defendant, on cross-examination of the bank cashier, asked if it were not a fact that at the time of the trial the plaintiff was holding the Skinner note as security for the payment of the note for \$100 (the balance unpaid on the \$500 note), dated April 19, 1914. An objection, made by plaintiff, which we do not approve as being sufficient, was sustained by the court, and appellant specifies the ruling as error. He has no ground for complaint, for subsequent to the objection and ruling it appeared from the witness' testimony that the said note for \$100 was included in the indebtedness of Fury to the bank, and was regarded merely as an unpaid balance on the original obligation for which the note in suit was pledged as collateral. The bank does not appear to have received the \$100 note with any intention or agreement that it should constitute payment of the old obligation. In the absence of such agreement, it did not extinguish the debt. *Bridge v. Connecticut, etc., Co.*, 167 Cal. 774, 141 Pac. 375.

[4, 5] At the conclusion of plaintiff's case, defendant offered testimony to show that the plaintiff bank at no time notified or advised him that it held the note in suit, and that long after the same became due, and without knowledge of the bank's claim, defendant paid and discharged his note by payment to Fury, the payee thereof. Plaintiff objected to this testimony, and the objection was sustained by the court. Respondent's cashier had testified, as to the advances made to Fury after the note in suit was pledged as collateral:

"I am not sure of the date of the other advances, but I think they have been subsequent to the maturity of that note."

Appellant contends that, to entitle respondent to the privilege of a holder in due course, the burden was on respondent to show that as to those "other advances" they were made prior to the maturity of the collateral note.

"Where a note is taken as collateral security for future advances the holder can assume a bona fide character only as to advances made previously to the maturity of the instrument." 8 C. J. 477; *Texas Banking, etc., Co. v. Turnley*, 61 Tex. 365.

The Skinner note was available to the bank as security, therefore, for the indebtedness of Fury, which began before the collateral note was given, or was thereafter incurred before its maturity, and which indebtedness continued unpaid at the time suit was commenced.

As we understand the offer made by defendant as his defense in the court below, however, we fail to perceive how the fact that he had paid the note to Fury after maturity, without knowledge of the bank's claim, would establish when, or under what circumstances, any of the advances were made by plaintiff to Fury. If the record brought here does not properly convey the real offer, appellant is unfortunate in not having correctly enlightened this court. If the record is correct, appellant's offer was not sufficiently comprehensive to make the point on which he relies.

On the record, as we review it, the lower court was correct in directing the verdict as it did. There was nothing in the transactions between the bank and Fury indicating that the note of \$100 was taken in payment of the indebtedness remaining on the \$500 note after crediting thereon the Helling claim, other than the cancellation and surrender of the old note. This, in the light of the evidence as to the circumstances of the giving of the new note, was insufficient to require a conclusion that there was any agreement to the effect that the new note was received by way of payment. *Bridge v. Connecticut, etc., Co.*, supra. There was, therefore, nothing to submit to the jury.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

JACOBSON-REIMERS CO. v. TOZAI CO.
et al. (Civ. 1998.)

(District Court of Appeal, Third District, California. July 11, 1919.)

1. PLEADING \S 36(5)—**ANSWER—ADMISSION BY FAILURE TO DENY.**

Failure of answer, in action for breach of contract of sale, to deny demand for delivery, alleged in complaint, not only excuses plaintiff from making the fact clear, but justifies the finding of such demand.

2. SALES \S 71(5)—**QUANTITY—ALTERNATIVE—RIGHT OF DETERMINATION.**

Under Civ. Code, $\S\S$ 1448-1450, as to right of selection where an obligation requires performance of one of two acts in the alternative, defendant, who contracted to sell to plaintiffs turkeys "numbering from 200 head to 1,200," to be delivered "between now and Thanksgiving," having delivered none, and refused to deliver any, lost his right of determining the number, and was liable for damages on the basis of the maximum number.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by the Jacobson-Reimers Company against the Tozai Company, a partnership composed of K. Hayashi and another, and the partners individually. Judgment for plaintiff, and defendants appeal. Affirmed.

U. W. Brown, and Harmon M. Albery, both of Colusa, for appellants.

E. H. Wakeman, of San Francisco, for respondent.

CHIPMAN, P. J. The action is to recover judgment for damages alleged to have been the result of defendants' failure to perform their covenants under a contract for the sale of turkeys, reading as follows:

"Colusa, Cal., Nov. 5, 1917.

"We agree to sell Jacobson-Reimers Company, of S. F., at twenty-seven and half cents per pound for choice dressed turkeys f. o. b. station numbering from two hundred head up to twelve hundred between now and Thanksgiving. Hens to weigh seven pounds and over and gobblers twelve pounds and over per piece.

"Tozai Co.

"By K. Hayashi."

It is alleged in the complaint that demand was made by plaintiff of defendants, within the period mentioned in said contract, that defendants comply therewith by delivering 1,200 turkeys, but defendants refused to do so, or to deliver any turkeys whatsoever; that the market price of turkeys had advanced at that time to 42 cents per pound, and that by reason of defendants' failure to deliver said turkeys plaintiff was damaged in the sum of \$1,653. The complaint is verified. Defendants filed a general and special demurrer, which being overruled, they answered. The answer is

a specific denial of the averments of the complaint, except that they do not deny that demand was made upon defendants to comply with the terms of the said contract, and their refusal to do so, and alleged as further answer that defendants delivered to plaintiff "the written offer set forth in plaintiff's complaint," but alleged that plaintiff at no time "accepted said offer in accordance with the terms thereof." The cause was tried by the court without a jury.

The court found that defendants executed and delivered to plaintiff the written agreement set forth in the complaint, by virtue of which "the defendants agreed to sell and deliver to the plaintiff f. o. b., meaning free on board cars at Colusa station, California, 1,200 choice dressed turkeys of the kind and weight in said agreement specified, that is to say, not less than 600 choice dressed hen turkeys weighing not less than 7 pounds apiece and 600 choice dressed gobblers weighing not less than 10 pounds apiece, in all weighing 11,400 pounds at least, at the price of 27½ cents per pound, to be delivered as aforesaid between the said 5th day of November, 1917, and Thanksgiving Day, to wit, the 29th day of November, 1917, who executed and delivered to said defendants a written acceptance of said offer of sale and delivery"; that in accordance with said offer of sale and acceptance thereof "the plaintiff at the city of Colusa, California, demanded of the said defendants the delivery of said 1,200 turkeys of the kind and weight and at the price specified in said written offer of sale, and in accordance with the terms thereof and plaintiff's written acceptance thereof, but that the defendants then and there refused, and ever since have refused, to deliver the said 1,200 turkeys, or any number thereof, or any at all, as provided in said written agreement; that on the said 29th day of November, 1917, the value of the aforesaid 11,400 pounds of turkeys, of the kind and weight specified in said written agreement of sale, to the plaintiff herein, was the sum of 5.4 cents per pound on said 11,400 pounds of turkeys in excess of the price of 27½ cents per pound, the price at which said defendants so offered to sell and deliver the same to plaintiff as aforesaid"; that by reason of the foregoing facts plaintiff has suffered damages in the sum of \$615.60. It was further found that plaintiff, on said 29th day of November, 1917, was ready, able, and willing to accept and receive and pay for said turkeys specified in the said agreement, and on that day demanded the delivery of said turkeys from defendants, and offered to comply with all the terms of said agreement and plaintiff's acceptance thereof. The conclusion of law as found was that plaintiff is entitled to recover from defendants the sum of \$615.60, with costs of the action, and judgment was entered accordingly. Defendants appeal from this judgment.

[1] Some question is raised as to the sufficiency of the evidence to support the finding that plaintiff made demand for the delivery of the turkeys, and while the evidence is not very clear on that point, the answer failed to deny demand as alleged in the complaint, and thus not only excused plaintiff from making this fact clear, but it justified the court in making the finding; the fact being that what occurred took place on the 28th of November, instead of on Thanksgiving Day, which was the 29th. It sufficiently appeared that defendants did not offer to furnish 200, or any number of, turkeys, but, in effect, repudiated their contract entirely, thus excusing plaintiff from making further demand.

[2] We do not find it necessary to set forth the testimony given in support of the findings. Appellants state as follows in their opening brief:

"There is virtually but one question in this case: That is, whether or not the findings and judgment of the trial court can be sustained in awarding damages based upon the maximum amount in said offer of sale and acceptance thereof. * * * Defendants did not deliver any turkeys to plaintiff, and the contention of respondent and the judgment of the trial court is that the damage suffered by plaintiff by reason of such failure thereof is to be based upon the maximum amount specified in said offer of sale. Our contention in this matter is that any damage that may have occurred can only be based upon the minimum amount as specified therein."

Resulting from appellants' view of the case their claim is:

"That the judgment in this case should be modified and reduced from the sum of \$615.60 to the sum of \$77.60."

What, then, is the rule governing alternative obligations? Counsel seem to have explored the cases and the text-books with diligence for light, and the written opinion of the learned trial judge shows that he examined with much care the authorities upon the question. The provisions of our Civil Code seem to have been overlooked, although they apparently state the rule applicable to the present case:

"If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation." Civ. Code, § 1448.

"If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party." Id. § 1449.

"The party having the right of selection between alternative acts must select one of them

in its entirety, and cannot select part of one and part of another without the consent of the other party." Id. § 1450.

Referring to the number of turkeys to be delivered, the language of the obligation is, "numbering from two hundred head up to twelve hundred"; and as to the time of delivery the obligation is, "between now [its date] and Thanksgiving" (November 29th). Plainly the statute gave defendants the right to deliver any number of turkeys from 200 to 1,200 "between" the date of the obligation and November 29th. Defendants, admittedly, neither offered to nor did deliver any number of turkeys "between now and Thanksgiving," or at all, but, as the court found, refused to deliver any. In such a case, by the terms of the statute, "the right of selection passes to the other party." It is not necessary to resort to text-books or to the decisions of the courts. Sufficient to say, however, that our Code states the rule accepted generally by writers upon the law of contracts and by the courts. We agree with the statement made by the learned trial court in the concluding paragraph of his written opinion:

In this case, there being no pretention that performance was even as much as attempted, it seems that under well-recognized principles of equity the defendant should not be permitted to limit his liability to the minimum delivery required by this agreement. To do so would allow the most flagrant abuse of such an agreement."

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

LEMMERMANN v. POPE & TALBOT.
(Civ. 2883.)

(District Court of Appeal, First District, Division 2, California. July 11, 1919.)

1. TRIAL ~~§~~ 139(1)—NONSUIT—WHEN PROPER.

Nonsuit may be granted only when there is no evidence of sufficient substantiality to support a verdict for plaintiff, indulging in every legitimate inference from plaintiff's evidence, and disregarding conflicting evidence.

2. MASTER AND SERVANT ~~§~~ 245(5)—CONTRIBUTORY NEGLIGENCE—OBEYING ORDER.

Order of master to experienced employé to get down from lumber pile to wagon by means of a plank extending between the two, with one end held by the master, did not excuse employé from negligence in so doing, there being no evidence that it amounted to coercion or duress, the danger of the course being as apparent to the employé as to the master, and there being no question but that he could have adopted other and safer methods of going between the two objects.

3. MASTER AND SERVANT §278(9) — INJURY TO SERVANT—NEGLIGENCE OF MASTER—SUFFICIENCY OF EVIDENCE.

Evidence in servant's action for injury held insufficient to warrant a finding of negligence of the master in losing hold of plank, while servant was descending on it from lumber pile to wagon.

4. MASTER AND SERVANT §265(15) — SERVANT'S KNOWLEDGE OF DANGER—PRESUMPTION.

It must be presumed that an employé engaged in like occupations for four years had equal knowledge with the master's representative of the danger of going from a lumber pile to a wagon, as ordered by the representative, by a plank extending between the two, held by the representative merely by a lumber hook.

5. MASTER AND SERVANT §204(1), 228(1) — INJURY—SOLE NEGLIGENCE OF SERVANT.

Relative to defense that injury to servant was caused solely by his negligence, the effect of Employers' Liability Act on the defenses of assumption of risk and contributory negligence is immaterial.

6. MASTER AND SERVANT §286(17), 289(37) — SERVANT'S ACTION FOR INJURY—NONSUIT.

Evidence in servant's action for injury in descending, on order, from lumber pile to wagon by plank held by lumber hook held to warrant nonsuit, as showing no negligence of master, but sole negligence of servant in adopting an unsafe instead of a safer method.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by William H. Lemmermann against Pope & Talbot. Judgment for defendant, and plaintiff appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

HAVEN, J. Plaintiff appeals from a judgment of nonsuit rendered upon motion of the defendant at the close of the trial.

[1] It is settled law in this state "that a court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." *Perera v. Panama-Pacific International Exposition Co.* (Sup.) 175 Pac. 454; *Estate of Caspar*, 172 Cal. 147, 155 Pac. 631. The question presented by the appeal is whether or not the facts disclosed by the evidence brought this case within the rule above stated.

The suit was for the recovery of damages resulting from personal injuries received by plaintiff while employed as a clerk's helper in the lumber yard of defendant, in which business he had been engaged for about four years prior to the accident. In the course of his employment he was ordered by the foreman in the lumber yard to help a certain tally clerk, named Lynch, who is designated by plaintiff as his "colaborer," in moving lumber from a pile upon which Lynch was standing to an adjacent wagon. Plaintiff testified that this pile was about 9 feet high. The pieces of lumber forming the same were not of uniform length, and, when piled, left uneven projections at the rear of the pile. Upon receiving instructions to report to Mr. Lynch, plaintiff climbed up the rear end of the pile. He testified that he took that as "the best way to get up." The wagon, which was being loaded, was standing at a distance of 5 feet from the lumber pile upon which Lynch and the plaintiff stood. Between that pile and the wagon was a small pile of lumber about 3 feet in height and 4 feet in width. At the time of the accident the lumber on the wagon had been plied to a distance of 4 feet from the ground. The driver of the wagon desired assistance in placing the lumber on his wagon, and Lynch instructed plaintiff to go to the wagon for that purpose. A plank of lumber 3 inches thick, 12 inches wide, and 16 feet long had been placed across the top of the pile of lumber and the lumber upon the wagon, extending beyond both the pile and the wagon. Plaintiff testified that, when Lynch told him to go down and help the teamster, he walked to the rear of the pile with the intention of going down the same way that he had come up, but just then there was a crane coming over with a load of lumber, which temporarily interfered with his descent. On that account he walked back to Lynch and waited a few minutes, when the latter drove a lumber hook into the plank and grabbing hold of it said: "Go ahead down, and I will hold the plank." In response to that request, and while the plank at the upper end was so held by Lynch, and with no one holding the lower end thereof, plaintiff sat upon the plank and shoved himself down with his hands. When he was between the lumber pile and the wagon the plank slipped out of Lynch's grasp and fell, precipitating plaintiff to the ground and causing his injuries. Asked why he attempted to slide down the plank instead of returning to the ground in the same manner in which he had come up, or instead of jumping from the piled lumber upon which he was standing to the smaller pile nearer the wagon, plaintiff stated that he did so because he had orders to go down the plank, and that it looked safer to him "to slide down that plank than to drop down 4 or 5 or 6 feet in the way

that you have indicated to the 4-foot pile below."

The charge of defendant's negligence in the complaint is: First, the order from defendant, through Lynch, to plaintiff to go from the lumber pile to the wagon by means of the plank; and, secondly, that—

"Said Daniel Lynch negligently and carelessly failed and neglected to maintain a firm hold upon said plank by means of his said hand and said lumber hook which he then and there held in his other hand, and by reason thereof said plank upon which said plaintiff was located, as aforesaid, slipped and slid along the top of said pile of lumber on said wagon, then and there causing said plaintiff to fall off and from said plank, and with great force and violence upon the ground, inflicting upon him severe personal injuries."

The answer denied the essential allegations of the complaint, and pleaded the following affirmative defense:

"That the accident to the plaintiff, referred to in said complaint, was caused and brought about solely by and through the negligence of the plaintiff in attempting to get down from the said pile of lumber, by means of the plank referred to in said complaint, instead of climbing down from said pile of lumber at either end thereof, or by jumping therefrom to the lumber pile on the wagon, referred to in said complaint. That plaintiff was not ordered or directed by defendant to get down from said pile of lumber by means of said plank, but voluntarily and of his own motion adopted said plank as the way and means of getting down from said pile of lumber, and his said carelessness and negligence in so doing was the sole and proximate cause of said accident, and any injuries which resulted to him therefrom."

[2] Assuming that Lynch represented the defendant in ordering plaintiff to slide down the plank, such order did not compel plaintiff to adopt that method of transportation to the wagon. The danger of the course adopted being equally apparent to the plaintiff and to Lynch, the latter's order did not excuse the plaintiff from negligence, unless it amounted to coercion or duress on the part of Lynch, of which there was no proof. In *Hall v. Clark*, 163 Cal. 392, 395, 125 Pac. 1047, 1049, it is said:

"It is thoroughly settled that an employé is not warranted in following the direction of an employer, except where he acts under what under the law amounts to duress or coercion, where the danger to be encountered in doing so is at once so obvious and so serious that no ordinarily prudent person of similar age and experience, situated as was the employé, would have obeyed the order."

There can be no question but that plaintiff could have adopted other and safer methods than the plank of proceeding from the lumber pile to the wagon. Under those circumstan-

es, the order of Lynch cannot be said to have been the cause of the accident.

[3] The failure of Lynch to maintain a firm hold upon the plank is the only remaining charge of negligence against the defendant. As to this issue there was no proof of negligence. Plaintiff testified:

"As I was going down from the pile marked 'B' to the wagon all of a sudden I felt the plank going, and I landed in the gangway, and that is all I know."

Lynch stated:

"The plank got away from me because my hook pulled out. * * * As a matter of fact I don't know very much about what caused this accident other than the fact that the hook came out of the plank, and the plank got away from me. * * * I had the best hooking that I could have on the plank at the time Mr. Lemmermann started down. I put the hook down as we put it in at all times, about the same way—a jab and the hook generally holds."

This being all the testimony as to the immediate cause of the accident, a finding of negligence on the part of Lynch in failing to maintain a firm hold upon the plank would not have been warranted. Without such finding a verdict in favor of plaintiff would not have been supported under the pleadings.

[4, 5] Furthermore, the facts disclosed by the evidence sustained the affirmative defense pleaded by defendant. It must be presumed that plaintiff, having been engaged in like occupations for four years, had equal knowledge with Lynch as to the danger of intrusting his safety to the precarious hold of one man with a single lumber hook upon a slanting 16-foot plank with plaintiff's weight added thereto. The facts bear close resemblance to those involved in *Hall v. Clark*, supra. In that case the employé was ordered to drive his team over an embankment. It was held that in obeying such order he was guilty of negligence, for the reason that the danger was as apparent to the injured employé as to the foreman who gave the order. It is true that, at the time that case was decided, the defense of assumption of risk had not been abolished by the Employers' Liability Act. The defense here pleaded is neither that plaintiff assumed the risk of his employment, which "is said to rest on contract" (*Tubbs v. Stone & Webster C. Co.*, 30 Cal. App. 705, 709, 159 Pac. 242, 244), nor is it a pleading of contributory negligence on the part of plaintiff, which assumes negligence on the part of defendant, but is a charge that the accident was caused solely by the plaintiff's negligence. *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 505, 143 Pac. 714. The effect of the Employers' Liability Act (Stats. 1911, p. 796) upon the two designated defenses is therefore not material.

[6] Appellant relies upon the case of *Tubbs v. Stone & Webster C. Co.*, 30 Cal. App. 705,

159 Pac. 242, as authority for his position that the question of negligence in the instant case should have been submitted to the jury. The case referred to is distinguished by the learned writer of that opinion from the case of *Hall v. Clark* in the following language:

"The conclusions we have reached on this branch of the case are not at all in conflict with the decision in *Hall v. Clark*, 163 Cal. 392, 125 Pac. 1047, but are in harmony with it. The two cases are readily differentiated. In that case the plaintiff could know and appreciate the dangers incident to obeying the order as soon as it was made. The situation was visible, apparent, and known. In this case the danger was not known or appreciated until the risk had been well entered upon. In that case the plaintiff, with full knowledge of all the facts, did a manifestly dangerous act."

The above comment on the case of *Hall v. Clark* is equally applicable to the case at bar. In this case the plaintiff could know and appreciate the dangers incident to obeying the order of Lynch as soon as it was given. As a man of experience in lumber yards, he must have known the risk assumed in the method of transportation which he adopted. According to his own testimony he chose that method because he deemed it safer. His judgment upon that matter was erroneous, and for that mistake on the employe's part the law does not hold the employer responsible. Under the facts as disclosed by the evidence and the rule of law stated at the commencement of this opinion, the granting of the motion for nonsuit was not erroneous.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

TITLE GUARANTEE & TRUST CO. v. GARROTT. (Civ. 2916.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1919. Rehearing Denied by Supreme Court Sept. 8, 1919.)

1. CONSTITUTIONAL LAW §206(1)—DISCRIMINATION—CONTRACTS.

Const. U. S. Amend. 14, so far as it prohibits any abridgment of the privileges and immunities of citizens, and guarantees the equal protection of the laws, addresses itself to the state government and its instrumentalities, and not to contracts between individuals.

2. DEEDS §149—CONDITIONS—REPUGNANCY TO INTEREST CREATED—SALE TO NEGROES.

Condition in deed of fee-simple absolute against leasing or selling to negroes within a certain time is within the common-law rule, of which Civ. Code, § 711, is declaratory, that "conditions restraining alienation, when repugnant to the interest created, are void."

3. DEEDS §149—CONDITIONS RESTRAINING ALIENATION.

Civ. Code, § 711, declaring that conditions restraining alienation, when repugnant to the interest created, are void, is applicable, whether the provision be a condition subsequent, a conditional limitation, or a covenant.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Title Guarantee & Trust Company against H. L. Garrott. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. T. Blakely, of Los Angeles, for appellant.

Willis O. Tyler, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment against plaintiff after a demurrer to its complaint had been sustained without leave to amend. The appeal involves the validity of a condition in a deed providing for a forfeiture of the title conveyed in the event that the grantee should lease or sell to persons of African descent prior to January 1, 1925.

Plaintiff, being the owner of 127 lots in the Angelus Park Tract, in the county of Los Angeles, conveyed one of the lots to Pauline Kasanofska, under whom defendant claims title, by a deed the provisions of which, after the granting clause, so far as material to the question presented, are as follows:

"It is provided, however, and the said party of the second part [the grantee] by the acceptance hereof, for herself, her heirs and assigns, hereby covenants and agrees to and with the said party of the first part [the grantor], its successors and assigns, as follows: That neither the said party of the second part, nor her heirs or assigns, shall or will * * * lease or sell any portion of said premises to any person of African, Chinese, or Japanese descent, and that if at any time the said party of the second part, her heirs, assigns, or successors in interest, or those holding or claiming thereunder, shall violate any of the provisions herein named, whether directly or under some evasive guise, thereupon the title hereby granted shall revert to and be vested in the said party of the first part, its successors and assigns, and its successors and assigns shall be entitled to the immediate possession thereof, which covenants shall be construed to be covenants running with the land, but shall cease and terminate, at option of the owner for the time being, after January 1, 1925."

The deed, which bore date November 12, 1910, was duly recorded on November 26, 1910. Thereafter, by mesme conveyances, the lot was conveyed to defendant, a negro of African descent, subject to the covenants and conditions in the deed to Pauline Kasanofska. Prior to and since the grant of the lot to Pauline Kasanofska, plaintiff, by deeds

containing similar covenants or conditions, has conveyed many of the other lots to various persons, who have erected homes on their respective lots and have complied with the conditions contained in their deeds. The whole tract is now thickly settled with persons of the Caucasian race. Claiming that the provision inhibiting a conveyance to persons of African descent created a condition subsequent, that by reason of its violation the fee conveyed to defendant's predecessor, Pauline Kasanofska, has been forfeited, and that, therefore, it is entitled to re-enter for condition broken and to a reconveyance under section 1109 of the Civil Code, plaintiff brought this action, praying the court to compel a reconveyance and that it be placed in possession.

We think the provision in the deed relied upon by plaintiff as the basis of its claim for relief created a condition subsequent, and not a covenant. Where, as here, it clearly appears by the deed that it was the intention of the parties that, upon a breach of the restriction, the estate conveyed to the grantee should be defeated and should return to the grantor, the restriction is a condition subsequent. *Ball v. Miliken*, 31 R. I. 36, 76 Atl. 789, 37 L. R. A. (N. S.) 623, Ann. Cas. 1912B, 30. But, whether the provision be construed as a condition or a covenant, we think it is a nullity, and that the demurrer to the complaint very properly was sustained.

[1] We do not base our conclusion upon any supposed constitutional right of respondent; we do not think that the condition in the deed violates any provision of the state or federal Constitution. Upon this aspect of the case we agree with what is said by the Louisiana Supreme Court in *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 South. 641, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248. The Fourteenth Amendment, in so far as it prohibits any abridgment of the privileges or immunities of citizens of the United States and guarantees the equal protection of the laws to all persons, addresses itself to the state government and its instrumentalities, to its legislative, executive, and judicial authorities, and not to contracts between individuals. It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. *Civil Rights Cases*, 109 U. S. 18, 3 Sup. Ct. 18, 27 L. Ed. 835. The Fourteenth Amendment, it is true, applies to the judicial as well as the legislative department of the state government. But the judiciary does not violate this provision of the federal Constitution merely because it sanctions discriminations that are the outgrowth of contracts made by individuals. A different question would be presented if the court, while sanctioning such a provision against persons of African descent as we find in the deed in ques-

tion here, were subsequently to hold to be invalid a similar provision directed against Hindoos, Cingalese, and Maoris, or any other class of persons except negroes. The equal protection clause of the Fourteenth Amendment makes but one demand upon the state, and gives to the state but one right. It is that the state shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another. Upon this phase of the question see the note to *Queensborough Land Co. v. Cazeaux*, supra, L. R. A. 1916B, p. 1208.

[2] We think, however, that the condition against leasing or selling to persons of African descent violates the common-law rule of which section 711 of the Civil Code is declaratory:

"Conditions restraining alienation, when repugnant to the interest created, are void."

The deed is not set forth in full in the complaint. We shall assume, however, as counsel themselves have in their briefs, that the deed to Pauline Kasanofska, both in its granting clause and its habendum clause, conveyed to the grantee the full fee title, so that the interest created by the deed was title in fee simple absolute. This being so, the real question is whether the condition forbidding alienation to persons of African descent at any time before January 1, 1925, is such a restraint on alienation as to be repugnant to the interest created by the granting and habendum clauses, within the meaning of section 711, or of the common law of which that section is declaratory.

Two cases, and two cases only, have come under our notice wherein the courts have passed directly upon a condition in a deed imposing a restraint on alienation such as that now before us. Those two cases are *Queensborough Land Co. v. Cazeaux*, supra, and *Koehler v. Rowland*, 275 Mo. 573, 205 S. W. 217. In each of these cases it was held that a condition in a deed providing for forfeiture in case the premises should be sold or leased to a negro is not an unlawful restraint upon the power of alienation. As we are constrained to disagree with each of these cases, a somewhat more elaborate presentation of the reasons for our conclusion is demanded than ordinarily would suffice.

Ever since the statute *quia emptores*, the tying up of real property has been regarded as an evil. Prior to that statute, restraints upon alienation of lands held in fee simple were practically an inseparable part of the ancient feudal system. All land in the kingdom was holden mediately or immediately of the king, styled the lord paramount; and the great lords, holding immediately under the king, when they granted portions of their lands to others, were still tenants with respect to the king, and were called *mesne*,

or middle, lords. The lord had an interest in having a brave and loyal tenant, capable of rendering military service; and, on the other hand, the tenant was interested in living under the military chief of his own choice and adoption. The result was that certain reciprocal rights and incidents sprung out of these feudal tenures, among which were fealty and escheat. The tenant owed fealty to his lord; escheat was the reversion of the estate on a grant in fee simple upon a failure of heirs of the owner. These grants by the mesne lords were called subinfeudations. The grantee, owing fealty to his lord and grantor, could not alienate his land without the license or consent of his lord, who was the owner of the reversionary interest contingent upon the death of the grantee without heirs. All this was changed in the reign of Edward I by the statute *quia emptores*, which provided:

"That from henceforth it shall be lawful for any freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffor held before."

By declaring that every freeman might sell his lands at his own pleasure, parliament, by one stroke of the pen, broke down the last remnant of the feudal restrictions upon alienation that formerly had prevented the tenant from selling his land without the license of his grantor and feudal lord. By changing the tenure from the immediate to the paramount lord, the king, the statute took away the reversion from the immediate lord, and thus deprived him of the power of imposing any restraint, by contract or condition, expressed in the deed of conveyance.

Whether the statute *quia emptores* ever became effectual in any of the United States by express or implied adoption, or as a part of the common law, we need not stop to inquire, since it is clear that with us no such statute is needed, as here all lands are held in allodium, and with us no such right of escheat or possibility of reverter ever existed in the party conveying the estate. Here all sovereignty is in the state, and escheat, can only accrue to the state as the sovereign. Therefore, the question of the right to impose conditions or restrictions upon alienation stands upon common-law reasons, as it has stood in England since the statute *quia emptores*. See the able and elaborate opinion of Mr. Chief Justice Ruggles in *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470, for a complete commentary upon this topic.

Ever since the statute *quia emptores*, the tying up of real property has been regarded as an evil that is incompatible with the free and liberal circulation of property as one of the inherent rights of a free people. In order to prevent this evil, two doctrines were

established: One, that all interests should be alienable; the other, that all interests must arise within certain limitations of time. The latter doctrine is known as the rule against perpetuities. It is the first doctrine with which we are concerned.

The rule that conditions restraining alienation, when repugnant to the estate conveyed, are void, is founded on the postulate that the conveyance of a fee is a conveyance of the whole estate, that the right of alienation is an inherent and inseparable quality of an estate in fee simple, and that, therefore, a condition against alienation is repugnant to, and inconsistent with the estate conveyed. To transfer a fee, and at the same time restrain the free alienation of it, is to say that a party can grant, and not grant, in the same breath. But the rule is not founded exclusively on this principle of natural law. It rests also on grounds of clear public policy and convenience in facilitating the exchange of property, in simplifying its ownership, and in freeing it from embarrassments which are injurious, not only to the possessor, but to the public at large.

In the deed in question here, the restraint upon alienation is not absolute, either as to persons or time. As to persons, it is partial; as to time, it is temporary. The restraint, as to persons, is limited to three classes, namely, persons of African, Chinese, and Japanese descent. As to time or duration, the restraint is limited to a little over 14 years, or until January 1, 1925.

The decisions respecting the validity of a restraint that is only partial as to persons or temporary as to time, are in a state of conflict and hopeless confusion. Some, particularly the Kentucky cases, which admittedly are against the weight of authority (*Bonnell v. McLaughlin*, 173 Cal. 216, 159 Pac. 590), hold that if the restraint be total as to persons, but only temporary as to the time of its duration, and the time is not unreasonable, the condition is valid (*Lawson v. Lightfoot*, 84 S. W. 739, 27 Ky. Law Rep. 217). Others hold that if the restraint be total as to persons, but temporary as to time, the condition is utterly void, no matter how short the time may be. *Mandlebaum v. McDonnell*, 29 Mich. 78, 18 Am. Rep. 61; *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668, and note; *O'Connor v. Thetford* (Tex. Civ. App.) 174 S. W. 680. And there are other cases that hold that if the restraint be partial as to persons, and the restricted class is so large that the restraint is unreasonable, the condition is void. *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311. Still others hold, or seem to hold, that any restraint whatever as to persons, however partial, is void. *Barnard's Lessee v. Bailey*, 2 Har. (Del.) 56; *Williams v. Jones*, 2 Swan (Tenn.)

620. See, also, *Bradford v. Leake*, 124 Tenn. 312, 137 S. W. 96, Ann. Cas. 1912D, 1140.

We think that, on principle, any restraint on alienation, either as to persons or time, is invalid; and while there is no case in this state directly in point—or at least none to which our attention has been called—there is one case in which the Supreme Court says though by way of dictum, that any restraint whatever is void. *Murray v. Green*, 64 Cal. 367, 368, 28 Pac. 118. In all, or almost all, of the cases in which it is held that a condition restraining alienation for any time, however short, is void, the restraint was total as to persons, though but partial or temporary as to time. We think, however, that the reasoning whereby those courts reach the conclusion that a condition is void that imposes a total restraint upon the power of alienation for any time, however short, applies with equal force to a condition that imposes a restraint that is but partial as to the persons or classes of persons to whom the title may not be conveyed, and that the reasoning in those cases leads logically and inevitably to the conclusion that any restraint whatever on alienation, either as to persons or time, is void. In *O'Connor v. Thetford*, supra, the Texas Court of Civil Appeals, speaking of the generally accepted doctrine that the suspension of the power of alienation for any time, however short, is void, says that it "is the more logical and presents no difficulties such as will be encountered in determining what is a reasonable time." In *Mandlebaum v. McDonnell*, supra, the court, speaking of the same rule, propounds these pertinent questions:

"Who can say whether the time is reasonable, until the question has been settled in the court of last resort, and upon what standard of certainty can the court decide it? Or, depending, as it must, upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury?"

These questions are equally pertinent when propounded with respect to a restraint on alienation that is partial as to persons. There are two English cases—*Doe v. Pearson*, 6 East, 173, and *In re Macleay*, L. R. 20 Eq. 156—that lend some support to the doctrine that, if the restraint on alienation be not total as to persons, the condition is valid. The authoritative force of those cases, however, was considerably shaken by the decision in the later case of *Atwater v. Atwater*, 18 Beav. 330. For an elaborate and learned discussion of the question, see *Manierre v. Welling*, supra, where, however, the restraint was so general and so nearly absolute in character as to amount to practically a total inhibition on the power of alienation.

If, as is held by the majority of the cases supported by principle and reason, a con-

dition is void that imposes a total restraint on the power of alienation for any time, however short, then why should not a condition be void that imposes any inhibition on alienation to persons, however few, or to classes of persons, however limited the classes may be? Upon what principle can a restraint partial as to persons and a restraint partial as to time be put upon different bases? In one case, as in the other, the rule that any limitation, however partial, voids the condition, is the more logical, and presents no difficulties such as necessarily must be encountered in determining whether the restriction be reasonable or otherwise. The right of alienation is an inherent and inseparable quality of an estate in fee simple. *Potter v. Couch*, 141 U. S. 315, 11 Sup. Ct. 1005, 33 L. Ed. 721. Therefore any and all restraints on alienation necessarily must tend to deprive the granted estate of an incident inseparably inherent in it, and necessarily must be repugnant to and inconsistent with the grant, and, as such, void.

"The general rule is that where a devise is made in fee, either of a legal or an equitable interest, all limitations tending to deprive the estate of any of the incidents appertaining to the interest created are held to be repugnant to the devise, and void. To transfer a fee, and at the same time to restrict the free alienation of it, is to say that a party can give and not give, in the same breath." *Johnson v. Preston*, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564.

If the continuation of the estate in the grantee may be made to depend upon his not selling or leasing to persons of African, Chinese, or Japanese descent, it may be made to depend upon his not selling or leasing to persons of Caucasian descent, or to any but albinos from the heart of Africa, or blond Eskimos. It is impossible, on any known principle, to say that a condition not to sell to any of a very large class of persons, such as those embraced within the category of descendants from African, Chinese, or Japanese ancestors, shall not be deemed an unreasonable restraint upon alienation, but that the proscribed class may be so enlarged that finally the restriction becomes unreasonable and void. Where shall the dividing line be placed? What omniscience shall tell us when the restraint passes from reasonableness to unreasonableness? Who can know whether he has title to the land until the question of reasonableness has been passed upon by the court of last resort? No matter how large or how partial and infinitesimal the restraint may be, the principles of natural right, the reasons of public policy, and that principle of the common law which forbids restraints upon the disposition of one's own property, are as effectually overthrown by the one as by the other. The difference is of degree, not principle.

Though there is no case in this state, to which our attention has been called, that is directly in point, we think the reasoning of the California cases leads necessarily to the conclusion that a condition against alienation, such as we have presented to us in this case, is void. See *Murray v. Green*, supra, *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451, *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908, and *Bonnell v. McLaughlin*, supra. In *Murray v. Green* the court expressly declares against the doctrine that any partial restraint on alienation may be valid, saying:

"But it is claimed that, while a general restraint upon alienation is bad, a partial restraint is valid. But is it not obvious that in case of a grant in fee simple, where there is no possibility of reverter, any restraint whatever on the power of alienation would be repugnant to the interest created by the grant? In commenting upon the clause in which Littleton says, 'But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., there such condition is good,' Chancellor Kent says: 'But this falls within the general principle, and it may be very questionable whether such a condition would be good at this day.' 4 Kent's Com. 131."

The counsel who has appeared as amicus curiæ has filed a brief in support of the validity of the condition against selling to persons of African descent, and has cited, among other cases, *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547. In that case it was held that a condition in a deed that intoxicating liquors shall not be manufactured or sold on the granted premises, and that if the condition be broken the title shall revert to the grantor, is not repugnant to the estate granted, and the condition is not invalid. There the condition in the deed made no attempt directly to restrict the power of alienation, but only placed a restriction upon use of the premises, not upon alienation. There is a clear distinction between a restriction on use of the premises by the grantee in a deed conveying the fee, imposed by a condition or covenant whereby reasonable building restrictions are created, and a direct restraint on alienation. It is true a restriction upon use may narrow the circle of possible purchasers. Whether it does or not is, in most cases, largely a matter of speculation. Certain it is that a restriction upon use only is not within the letter or spirit of section 711 of the Civil Code, or of the common-law doctrine of which that section is a codification.

"Restrictions against particular use of particular parcels of land do not restrict the alienation, for the owner of the fee can convey it at his pleasure; and they do not tend to perpetuity, for the person who is entitled to the rights

or privileges created or secured by the restrictions can at any time release them." 8 R. C. L. p. 1116.

Counsel for appellant relies confidently upon the case of *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190. That was a case involving the breach of a building restriction affecting the use of the land by the grantee and his assignees. Speaking of this restriction, the court said:

"* * * It is not repugnant to the granting clause, nor does it come within the terms of the Code sections prohibiting or limiting restraints on alienation;" also: "The power of alienation is not restrained."

There can be no doubt that "the power of alienation is not restrained" by a restriction upon use. It doubtless is true that a restraint upon use is inconsistent with ownership in fee simple absolute. And it is probable that one of the reasons that gave rise to the rule now embodied in section 711 of the Civil Code, namely, that the grantor cannot both give and not give—cannot grant the fee and still retain an essential incident to title in fee—is as applicable to a restriction upon use as to a restraint on alienation. But, even so, there is another reason that lies back of the rule respecting restraint on alienation that is not applicable to reasonable restraints upon use, and that is that, ever since the statute *quia emptores*, courts and Legislatures, in the interest of the public, have sought to strike the old feudal fetters from the power of alienation. The rule of the common law against restraints on alienation is based on considerations of great public convenience and policy as much as upon the natural law that a man cannot both give and not give. The only safe rule is to hold that a condition that restrains the power of alienation to any extent whatever, either as to persons or time, is inconsistent with the estate granted, as, indeed, it necessarily must be if the estate granted be title in fee simple absolute, and if, as all must admit, the power of alienation is an inseparable incident to, and a necessary concomitant of, ownership. Chancellor Kent says:

"It [a fee simple] is an estate of perpetuity, and confers an *unlimited* power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple; and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple, and becomes a fee subject to a condition." Kent's Com. vol. 4, p. 5. (The italics are ours.)

We cannot resist the conclusion that, by the positive, unqualified, and uncompromising language of section 711 of our Code, the Legislature intended that the rule in this state should be the definite and unequivocal

rule so emphatically stated by Chancellor Kent. It is the more logical rule, and presents no difficulties such as must be encountered in determining when a restraint on alienation, partial as to the persons, passes out of the wide, uncharted, crepuscular region that lies between unquestionable reasonableness and unreasonableness.

Notwithstanding the obvious distinction between a restriction upon use, as in the case of a building restriction, for example, and a direct restraint upon the power of alienation, as in the present case, we find Mr. Justice Field, in *Cowell v. Colorado Springs Co.*, supra, after saying that "the owner of property has a right to dispose of it with a limited restriction on its use," giving expression to this dictum:

"Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character."

What Mr. Justice Field said, to the effect that restraints upon use do not tend to the subversion of the estate granted, was pertinent to the facts of that case and a correct statement of the law. What that learned jurist said about restraint upon alienation was dictum, pure and simple, and not in accord with the weight of authority nor the better-reasoned cases. That that part of the excerpt from the opinion of Mr. Justice Field wherein he animadverts on restraints upon alienation is dictum the federal Supreme Court itself has declared in the subsequent case of *Potter v. Couch*, supra.

Turning, now, to the two cases that are the most nearly identical with the facts of this case—*Queensborough Land Co. v. Cazeaux*, supra, and *Koehler v. Rowland*, supra: Each of these cases supports appellant's position. With neither of them, however, do we agree. The Louisiana case was decided in accordance with the principles of the civil law, and can throw but little, if any, light upon the construction of our Code provision, based, as it is, on the common law of England—a body of law that, ever since the statute *quia emptores*, has more and more treated land as an article of sale and traffic, as much so as personal property. In the Missouri case, the court, in one brief paragraph, disposes of this difficult question out of hand, citing but one case, *Cowell v. Colorado Springs Co.*, supra, to sustain its statement that—

"It is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases

to certain persons, or for a certain time, or for certain purposes."

In short, the Missouri court's decision is based upon a dictum of Mr. Justice Field—a dictum by one of the country's most learned jurists, it is true, but a dictum, nevertheless, which, in so far as it refers to a time limitation upon alienation, is contrary to all the best-reasoned cases, such as *Mandlebaum v. McDonnell*, supra, and, in so far as it refers to restraints that are partial as to persons or classes of persons, is, we believe, contrary to logic and contrary to the clear implication of the Supreme Court of this state in *Murray v. Green*, supra, that any restraint whatever upon the power of alienation, however partial or temporary, or of whatever character, is violative of section 711 of our Civil Code, and, furthermore, it is dictum that is pregnant with uncertainties that necessarily would produce the greatest inconvenience in the world of trade and commerce, for no one could say whether any particular restriction was reasonable until the question had been litigated to the court of last resort, and no judge could know what standard of certainty should be employed to determine the question.

For these reasons, we hold that the condition against alienation in the grant from appellant to respondent's predecessor, Pauline Kasanofska, is a condition repugnant to the fee-simple estate created by the granting clause of the deed, and is void.

[3] We have treated the clause against leasing or selling to persons of African descent as a condition subsequent. Whether it be regarded as a condition subsequent or as a limitation over—a limitation conditioned upon the lease or sale of the premises to persons of the proscribed class—or as a covenant running with the land, as the deed itself declares it to be, the result must be the same. If it is a condition, it is void for the reasons already given. If it is a conditional limitation, it is equally within the condemnation of the common law and Code, § 711. *Potter v. Couch*, supra; *Diamond v. Rotan*, 58 Tex. Civ. App. 263, 124 S. W. 196; *O'Connor v. Thetford*, supra. If the language of the deed be construed as creating a covenant, it is equally void, for the rule respecting restraints on alienation does not depend upon the mere form whereby the restraint is imposed.

"It avoids, as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor." *Prey v. Stanley*, supra.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

DUNCAN LUMBER CO. v. WILLAPA LUMBER CO.

(Supreme Court of Oregon. Sept. 9, 1919.)

1. PLEADING \S 93(1) — **INCONSISTENT DEFENSES—JOINING PLEAS IN ABATEMENT AND TO MERITS—EFFECT.**

L. O. L. \S 74, as amended by Laws 1911, c. 99, providing defendant may set forth by answer as many counterclaims as he has, including pleas in abatement, does not change the rule that defenses must be consistent, and that, where answer first denies a thing and then admits it, the latter controls; so a plea in abatement, on the ground that jurisdiction of the person had not been acquired, is overcome by a plea to the merits, in effect an allegation of general voluntary appearance.

2. COURTS \S 17, 37(1)—**"JURISDICTION OF THE SUBJECT-MATTER"—HOW CONFERRED.**

"Jurisdiction of the subject-matter" means authority of the court to hear and determine the kind of case presented, is conferred by law, and lack of it, under L. O. L. \S 72, cannot be waived.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction of the Subject-Matter.]

3. COURTS \S 11—**JURISDICTION OF PERSON—HOW CONFERRED.**

Jurisdiction of a person *sui juris* depends either on proper service of summons on him or on voluntary appearance.

4. APPEARANCE \S 10—**GENERAL APPEARANCE AFTER SPECIAL APPEARANCE.**

Though defendant's appearance be a special one, limited to a particular purpose, yet if he appears and offers contest on the merits of the complaint, it is a general appearance, giving jurisdiction of the person as to all matters in controversy.

Department 1.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

On rehearing. Denied.

For former opinion, see 182 Pac. 172.

Welsh & Welsh, of Raymond, Wash., and Angell & Fisher, of Portland, for appellant.
J. G. Arnold, of Portland, for respondent.

BURNETT, J. By its petition for a rehearing the defendant urges that this court was wrong in the conclusion that, having answered to the merits of the controversy between the parties and gone to trial on the issues so raised, after having been defeated on the trial of its plea in abatement, the latter defense was waived. Section 74, L. O. L., as amended by chapter 99, Laws 1911, and as finally changed by chapter 8, Laws 1915, reads thus:

"The counterclaim mentioned in section 73 must be one existing in favor of a defendant, and against a plaintiff, between whom a several

judgment might be had in the action, and arising out of one of the following causes of action:

"(1) A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim.

"(2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

"The defendant may set forth by answer as many counterclaims as he may have, including pleas in abatement. Such defenses shall each be separately stated and shall refer to the causes of action which they are intended to answer, in such manner that they may be intelligently distinguished: Provided, that the defendant shall not be required to admit in his answer any liability or indebtedness to the plaintiff in order to be permitted to plead a counterclaim."

The defendant relies upon the clause:

"The defendant may set forth by answer as many counterclaims as he may have, including pleas in abatement."

It maintains that this is a warrant for joining in one answer all manner of pleas and defenses, and concludes that in no case can waiver of any plea be predicated on such joinder.

[1] Conceding that the Legislature made a new rule of pleading as to the matters that may be set forth in an answer, it did not undertake to construe the legal effect of what any defendant should put into that pleading. The statute does not dispense with the common-sense rule that the different defenses must not be inconsistent with each other, and particularly that where a defendant by his answer first denies a thing, and then further on in the pleading admits the same thing, the admission will control, and the denial will be disregarded. *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Brown v. Feldwert*, 46 Or. 363, 80 Pac. 414; *Dutro v. Ladd*, 50 Or. 120, 91 Pac. 459; *Johnson v. Sheridan Lumber Co.*, 51 Or. 35, 93 Pac. 470; *Peters v. Queen City Insurance Co.*, 63 Or. 382, 126 Pac. 1005.

In the instant case the effect of the defendant's pleading is for it to say in one breath, "The court has not acquired jurisdiction of my person," and in the other to declare, "The court has jurisdiction of my person, seeing that I am here voluntarily defending on the merits of the case." The defendant was either in court, or it was not in court. Both could not be true at the same time, and the admission to be drawn as a legal conclusion from its general answer that it is in court must prevail over its contention in the plea in abatement that it is not in court.

[2-4] Jurisdiction is of the person and of the subject-matter. The latter means the authority of the court to hear and determine the kind of case presented, and is conferred by law, independent of the act or consent

of the parties. The lack of this element of jurisdiction is never waived, but may be urged at any time during the progress of the litigation. L. O. L. § 72, and authorities cited in note. On the other hand, jurisdiction of a person *sui juris* depends either upon proper service of summons upon him or upon his voluntary appearance in court. Indeed, his appearance may be a special one, limited to a particular purpose; but, if he appears and offers contest on the merits of the complaint, it is universally held to be a general appearance, giving the court sanction to hear and determine all the matters in controversy, providing, of course, that the court has authority in law over the kind of case presented.

In substance, plainly stated, the defendant's position, as disclosed by its pleading, is that it is in court by its own consent, but was not brought in by service of summons. Being in court generally of its own volition is an admission of the court's jurisdiction over its person, which must prevail over its denial of jurisdiction embodied in its plea in abatement.

The petition for rehearing is denied

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

SHAW et al. v. HUTTON et al. (No. 10008.)
(Supreme Court of Oklahoma. July 15, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. JOINDER OF CAUSES OF ACTION — SAME TRANSACTION.

The plaintiff may unite several causes of action in the same petition, where they all arise out of the same transaction.

2. WRITTEN CONTRACT — MERGER OF PRIOR ORAL NEGOTIATIONS.

The execution of a contract in writing supersedes all oral negotiations or stipulations concerning its matter, which precede or accompany the execution of the instrument.

3. TRIAL — 170 — DIRECTED VERDICT — EVIDENCE.

Where the court properly excludes the evidence offered by defendant, and the evidence offered by plaintiff is sufficient to entitle him to judgment, it is not error to direct a verdict in favor of the plaintiff.

(Additional Syllabus by Editorial Staff.)

4. EVIDENCE — 429 — DELIVERY.

Parol proof is always admissible to show that a negotiable instrument was not in fact delivered, and never in fact took effect.

5. EVIDENCE — 444(7) — PAROL EVIDENCE — ACCEPTANCE OF DRAFT — CONDITIONS.

Where defendants accepted a draft, and it was indorsed "We guarantee payment," signed by defendants, the unconditional guaranty was a complete contract, and parol evidence was inadmissible to vary its terms, by showing that it was in fact conditional.

6. EVIDENCE — 397(1) — PAROL EVIDENCE — WRITTEN CONTRACT.

In the absence of accident or mistake of fact, parol evidence is inadmissible to vary the terms of a written contract.

Error from District Court, Tulsa County; Conn Linn, Judge.

Suit by Henry Hutton, as guardian of Robert Hutton and others, minors, against Thomas R. Shaw and another. Judgment for the guardian, and defendants bring error. Affirmed.

Philip Kates, of Tulsa, for plaintiffs in error.

Geo. T. Brown, of Tulsa, and Fred M. Carter, of Okmulgee, for defendants in error.

OWEN, C. J. This suit was brought by Henry Hutton, as guardian of his minor children, the other defendants in error, to collect the purchase price of oil and gas leases on lands belonging to the minors. The leases were sold through the probate court of Okmulgee county, a draft for the purchase price was drawn on plaintiffs in error, at their suggestion, attached to the leases, and transmitted to a bank in the city of Tulsa. This draft was indorsed, "We guarantee payment," signed by plaintiffs in error. After presentation and demand for payment, this action was brought to enforce payment of the draft.

In defense to the action plaintiffs in error alleged: (1) Misjoinder of causes of action; (2) that the draft was indorsed with the understanding it would not be paid unless their attorney approved title to the leases, which he refused to do. From a judgment in favor of the guardian, plaintiffs in error appeal.

To reverse the judgment it is urged the court erred (1) in overruling the demurrer to the petition on the ground of misjoinder of causes of action; (2) in refusing to permit defendants to prove the draft was indorsed with the understanding it was to be paid on approval of title by their attorney; (3) in directing a verdict for plaintiff.

[1] Under the first contention it is urged that, because the leases covered four separate tracts of land belonging to the minors, there were four separate causes of action, which could not be joined. The sale of the leases and the acceptance and indorsement of the draft was one transaction. This was had with the guardian, not with the individual minors. Section 4738, R. L. 1910, provides:

"The plaintiff may unite several causes of action in the same petition, * * * where they all arise out of * * * the same transaction."

[2, 4-8] In support of the second contention authorities are cited which support the rule that parol evidence is admissible to show the conditional delivery of negotiable instruments. Proof is always admissible to show that a negotiable instrument was not, in fact, delivered, and never, in law, took effect. The rule has no application to the facts in this case. The acceptance of the draft was admitted. The unconditional guaranty of payment, signed by plaintiffs in error, constituted a complete contract, and parol evidence was not admissible to vary its terms by showing that it was in fact conditional. Section 942, R. L. 1910, provides:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument."

In the absence of accident, fraud, or mistake of fact, parol evidence is not admissible to vary the terms of a written contract. *Colonial Jewelry Co. v. Bridges*, 43 Okl. 813, 144 Pac. 577; *Huster v. Newkirk Mch. & Ice Co.*, 42 Okl. 440, 141 Pac. 790, L. R. A. 1915A, 390.

[3] The court did not err in excluding the evidence in support of the defense pleaded, and, the evidence offered by plaintiff being sufficient to support the judgment, it was not error to direct a verdict for plaintiff.

The judgment of the trial court is affirmed.

SHARP, RAINEY, PITCHFORD, and HIGGINS, JJ., concur.

ST. LOUIS & S. F. RY. CO. v. FRASER. (No. 6606.)

(Supreme Court of Oklahoma. June 27, 1916.
On Rehearing, Sept. 9, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \Leftrightarrow 284(1)—FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS—INJURY IN INTERSTATE COMMERCE—QUESTION FOR JURY.

In the trial of a cause arising under the federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623), when there is testimony raising an issue of fact on the question as to whether or not the defendant railway company was at the time engaged in interstate commerce and whether or not the plaintiff at the time of the injury was so engaged in interstate commerce, it becomes a question to be submitted to the jury for their determination.

2. MASTER AND SERVANT \Leftrightarrow 284(1)—FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS—INJURY IN INTERSTATE COMMERCE—QUESTION FOR JURY.

The record shows that there was sufficient testimony tending to show that the plaintiff, as well as the defendant, at the time of the injury, was engaged in interstate commerce, to authorize the submission of this issue for the determination of the jury. *Held*, the court committed no error in overruling the motion for a directed verdict.

3. MASTER AND SERVANT \Leftrightarrow 291(1)—FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS—INSTRUCTIONS.

Instructions submitted to the jury by the court examined, and found to fairly state the law as applicable to the facts; hence the court committed no prejudicial error in its instructions to the jury.

4. TRIAL \Leftrightarrow 260(1) — GIVEN INSTRUCTIONS —REQUESTED INSTRUCTION.

The court having fairly covered the issues involved in its general instructions to the jury, *held*, did not err in refusing to submit to the jury special requested instructions of the defendant.

5. JURY \Leftrightarrow 32(4)—CONCURRENCE OF PART OF JURY—ACTION UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

The court did not err in instructing the jury that nine or more of their number concurring could return a verdict; neither did the court err in refusing to instruct the jury that, because the cause of action arose under the federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623), that it would require a concurrence of the entire panel to render a verdict.

(Additional Syllabus by Editorial Staff.)

6. APPEAL AND ERROR \Leftrightarrow 930(1)—TRUTH OF TESTIMONY—ASSUMPTION ON APPEAL.

In a cause arising under the federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623), based on negligence of defendant's employes in charge of train, plaintiff's testimony, after a verdict in his favor, must be assumed to be true.

Commissioners' Opinion, Division No. 5. Error from District Court, Carter County; S. H. Russell, Judge.

Suit by Thomas C. Fraser against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed on rehearing.

R. A. Kleinschmidt, of Oklahoma City, and E. H. Foster, of Muskogee, for plaintiff in error.

Johnson & McGill and W. F. Bowman, all of Ardmore, for defendant in error.

LINN, C. The parties will be designated as they were on the docket of the trial court.

[1, 2] The plaintiff, Thomas C. Fraser, instituted suit in the district court, basing his cause of action upon the federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 6657-8665, and sections 8605-8615, 8617-8619, 8621-8623), claiming damage as the result of an accident caused by the negligence of the defendant while engaged as an employé in interstate commerce. The injury occurred while switching cars in the town of Ft. Townsend, on the line of road owned and operated by the defendant running from Ardmore, Okl., to Hope, Ark. The plaintiff's testimony tended to show that, after they had finished switching the cars on the house track, he went to the main track, where a portion of the crew were trying to make a coupling; that three or four efforts were made to couple the cars, but that they were unable to make the coupling; that he signaled the fireman, and the train was pulled up; that the coupler was an old coupler, and raised or opened with a lever; that he worked the lever two or three times, and saw it would not open; that he and the conductor and another brakeman gave the signal to the fireman to back up and stop, and it was while it was stopped that he went in to adjust the coupling; that the only way he knew the fireman saw his signal was that he answered his signal by stopping; that the coupler was an old one, and it was the second time he had ever seen one like it. That it was what is called a "slide puller"; that he never signaled the fireman to move after he had signaled him to stop. He then turned to go to a car just west of him, and as he turned the engineer pulled up and hit him, knocked him down, and he fell on his back and was injured; that they had some cars in the train for Hope, Ark; and that it was an interstate train they were making up at the time of the injury.

There was but little controversy as to the manner in which the plaintiff was injured. There was testimony on the part of the defendant tending to show the plaintiff guilty of contributory negligence and violation of some of the rules of the company, and that there were no cars in the train the destination of which was beyond the state line. These were controverted questions of fact and were submitted to the jury. The questions raised on this record require a consideration of assignments of error 5, 6, and 8, which present for consideration: First, errors asserted in overruling the defendant's motion for peremptory instruction; second, in retaining jurisdiction of the cause, since it is said that the evidence showed that the train upon which plaintiff was working was a local train, and was not engaged in interstate commerce; and in refusing to submit to the jury requested instruction No. 29.

It is the contention of the defendant that it affirmatively appears from the undisputed evidence that the cause was not one arising

under the Employers' Liability Act, for the reason the defendant was not at the time of the alleged injury engaged in interstate commerce, and that plaintiff at such time was not engaged in interstate commerce. We are of the opinion that this contention is not supported by the record. While it is not entirely clear that the train, or some of the cars in the train in question, was destined for points beyond the limit of the state, yet there was sufficient testimony on this point to raise an issue of fact and the court did not err in submitting this issue to the jury.

[3, 4] Under this assignment it is further contended that, even if there were sufficient evidence to submit this issue to the jury, the court erred in refusing to give instruction No. 29. This instruction was framed by counsel for the defendant as applicable to the facts in submitting this point to the jury. It seems the trial court found no particular objection to the instruction as framed, but refused to submit the same to the jury, for the reason that issue had been covered by appropriate language in the court's general charge, in an instruction as follows:

"You are instructed that the first question to be determined by you, after entering upon your deliberations, is whether the plaintiff, at the time he sustained the injuries alleged, was employed by the defendant in interstate commerce. In order to so find, it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that he was at the time of the alleged injuries actually engaged in assisting in the movement or transportation of a car or cars of freight destined for movement from a point in one state to a point in another state. It is immaterial whether there was any freight in any of the other cars of the train that was to be transported between interstate points; but plaintiff must show by a fair preponderance of the evidence that the car or cars that he was engaged in switching at the time of the injury, or the freight in such cars, was destined for movement between interstate points. If you so find, then the act of Congress of April 22, 1908, will apply to this case. If, on the other hand, plaintiff has not proven that he was employed in interstate commerce at the time of the injury, then the act of Congress of April 22, 1908, would not apply in this case, and in such event the plaintiff cannot recover."

The criticism lodged against this instruction is that it did not give the jury a clear understanding as to what was meant by the term "interstate commerce," and for this reason it was error for the court to refuse the instruction requested. We are unable to agree with counsel, but we are of the opinion that, taking this instruction as a whole, the jury could not have reasonably misconstrued its purport. The court specifically, in clear and unequivocal language in this instruction, told the jury it was necessary for the plaintiff to show that he was engaged in assisting in the transportation of cars or freight destined for movement from a point in one state to a point in another state. Therefore the

court committed no error in submitting this issue to the jury, or in refusing to give the requested instruction nor in giving the instruction quoted. *St. L. & S. F. Ry. Co. v. Brown*, 45 Okl. 143, 144 Pac. 1075.

[8] There is no merit in the contention of the defendant, made under assignment of error No. 5, that there was no testimony of negligence warranting the court in submitting this issue to the jury. *St. L. & S. F. Ry. Co. v. Brown*, supra. Assuming plaintiff's testimony to be true, and, the jury having found in his favor, it must be assumed to be true, we think it strongly tends to show negligence in the employes of the defendant company in charge of the train resulting in the injury complained of, and we might say the same regarding the second and third points made under this assignment.

It is next contended that the plaintiff could not recover for the reason it affirmatively shows that he was violating rule of the company No. 636, at the time of the injury. This rule has reference to the signals given to the engineer, and provides that an employe must not assume that such signals have been seen; and as we said in regard to plaintiff's testimony, if it is true, then there can be but little doubt that his signal was seen, for he testifies that it was acted upon by the fireman and engineer, and of course it would not be an unwarranted assumption that if the signal was obeyed, it must have been seen.

It is next contended that the court should have submitted to the jury requested instructions Nos. 15 and 21. We are of the opinion that the court fairly covered this point in instructions 6 and 11 of the general charge, as the court plainly told the jury in these instructions that it was the duty of the plaintiff to obey the rules of the company, and that if his injuries were due to or contributed to by his disobedience of such rules, that such would constitute contributory negligence; and further told the jury in part of paragraph 11, that if the train was in motion when the plaintiff went between the cars; by reason of which he received the injuries, he would not be entitled to recover.

It is next insisted that the court committed error in submitting to the jury instruction No. 8. This is practically the instruction submitted to the jury in the case of *St. L. & S. F. Ry. Co. v. Brown*, supra, which was held by this court to be without error, and the decision of this court was on May 22, 1916, affirmed by the federal Supreme Court, and a similar instruction to this one was affirmed and held by that court to be specifically in the language of the statutes.

[8] It is next contended that the court committed error in refusing to instruct the jury that a concurrence of all the jurors was essential to a verdict, and in instructing the jury that a verdict might be rendered by

nine or more of their number. This point was also raised in the case of *St. L. & S. F. Ry. Co. v. Brown*, supra, and held to be without merit by the federal Supreme Court. *Minneapolis & St. L. & S. F. Ry. Co. v. Bambois*, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505.

We might say that the facts in this case are very similar to the facts in the case of *St. L. & S. F. Ry. Co. v. Brown*, supra, and the instructions of the court given in the case were very similar to the instructions given in this case.

Finding no merit in any of the contentions made by the defendants, the judgment of the trial court should be affirmed; and it is so ordered.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. On rehearing this cause, and upon a careful re-examination of the record, the court is convinced that the opinion of Commissioner LINN, filed June 27, 1916, affirming the cause, was a correct and proper disposition of same. Therefore the opinion is adhered to and the judgment of the lower court affirmed.

WEBB v. VADEN et al. (No. 8196.)

(Supreme Court of Oklahoma. June 24, 1919.)

(Syllabus by the Court.)

1. DECISION PENDING MERITS—STATUTE.

In all cases except those mentioned in section 5125, Rev. Laws 1910, upon trial of the action, the decision must be upon the merits.

2. JUDGMENT ~~§~~948(2)—FORMER ADJUDICATION—MOTION RAISING QUESTION.

In an action to foreclose a mortgage lien, it is error to dismiss the action on a motion alleging former adjudication. In such case, if upon proper proof the plea of res adjudicata is sustained, judgment should be for defendants upon the merits.

3. JUDGMENT ~~§~~951(1)—RES JUDICATA—BURDEN OF PROOF.

The burden of proof rests upon the party who alleges a former adjudication.

Error from District Court, Tulsa County; Conn Linn, Judge.

On rehearing. Reversed and remanded for a new trial.

For former opinion, see 186 Pac. 1045.

Burford, Miley, Hoffman & Burford, of Oklahoma City, and G. W. Hutchins, of Tulsa, for plaintiff in error.

Randolph, Haver & Shirk, of Tulsa, for defendants in error.

OWEN, C. J. Plaintiffs brought this action to foreclose a mortgage lien on certain described premises in the city of Tulsa. A motion was filed by one of the defendants, alleging, in substance, that in another cause plaintiffs were enjoined and restrained from asserting any right, title, or interest in the described premises, and praying plaintiffs be cited for contempt of court and their petition dismissed with prejudice. Upon consideration of this motion the action was dismissed with prejudice. From that judgment plaintiff appeals.

[1-3] The only question necessary for determination is whether the court erred in dismissing the action on consideration of the motion. There is considerable discussion in the briefs as to whether the motion amounted to a plea of *res adjudicata*. We deem it unnecessary to determine that question. Even assuming it was sufficient as such plea, it was error for the court to dismiss the action. *State ex rel. Morrison v. City of Muskogee*, 172 Pac. 796. Our statute (section 5125, R. L. 1910) provides for the dismissal in certain instances, and also provides that in all other cases, upon the trial of the action, the decision must be upon the merits. *Case v. Hannahs*, 2 Kan. 490. The burden of proof rests upon the party who alleges a former adjudication. *Van Fleet's Former Adjudication*, p. 606. Had the court treated the motion as such a plea, and upon proper proof sustained the same, and rendered judgment for defendants, that would have amounted to a decision on the merits. But it does not appear that any such action was taken. There is nothing in the record indicating any evidence was heard on the plea. The recital is that upon consideration of the motion it was adjudged defendants were entitled to have the action dismissed with prejudice.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

KANE, RAINEY, HARRISON, and JOHN-SON, JJ., concur.

**MORTGAGE & DEBENTURE CO. v.
RHODES et al. (No. 8578.)**

(Supreme Court of Oklahoma. March 25, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. PUBLIC LANDS §135(2)—HOMESTEAD ENTRY—DISPOSITION OF HOMESTEAD BY WILL.

Where a homestead entryman complies fully with the homestead laws of the United States, but dies before making final proof, he is entitled to dispose of his homestead by will.

2. PUBLIC LANDS §125—ACTION OF LAND DEPARTMENT—EQUITABLE RELIEF.

Courts of equity may furnish, in proper cases, relief to a party, where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the Land Department.

3. PUBLIC LANDS §128—ACTION OF LAND DEPARTMENT—EQUITABLE RELIEF.

H., a homestead entryman, after earning the right to have a patent issued to her, disposed of her homestead by will and died before making final proof. Subsequent to the death of H., the entryman, M., one of her daughters and one of the devisees named in the will, made application to "prove up" the land as an heir, which, upon *ex parte* hearing before the Land Department, resulted in the issuance of a patent to the heirs of H. In an action by one of the devisees to declare a resulting trust, it appeared that there was no dispute as to the existence of the will, and that the Land Department issued the patent to the heirs, either erroneously, knowing of the existence of the will, or upon final proof which, through inadvertence or design, failed to disclose that fact. *Held* to present a proper case for relief in equity.

(Additional Syllabus by Editorial Staff.)

4. PUBLIC LANDS §106(1) — DECISION OF LAND DEPARTMENT—CONCLUSIVENESS.

Decisions of officers of the Land Department on controverted questions of fact, in the absence of fraud, imposition, or mistake, are final, except as they may be reversed on appeal to that department.

Error from District Court, Logan County;
B. C. Bassett, Judge.

Action to foreclose a mortgage by the Mortgage & Debenture Company against Florence Rhodes, Laura McNeil, Adele Hamilton, and Ella Doss. Judgment in part for defendant Florence Rhodes, as devisee, and in part for Ella Doss, and for Laura McNeil conditionally, as heirs, and plaintiff brings error. Laura McNeil having died, Henry McNeil, as her sole heir and administrator, was substituted defendant in error. Judgment for defendant Florence Rhodes affirmed and judgment for defendants Ella Doss and Laura McNeil reversed; otherwise, modified and remanded, with directions.

Tibbetts & Green, of Guthrie, for plaintiff in error.

Hiram A. King, of Tulsa, and H. A. Kroe-ger and Milton Brown, both of Oklahoma City, for defendant in error Rhodes.

S. A. Horton, of Oklahoma City, for defendant in error Doss.

Dale & Bierer, of Guthrie, for defendant in error Henry McNeil.

KANE, J. This is a four-sided controversy, involving title to the land covered by the homestead entry of Harriet Hamilton, de-

ceased. The facts necessary to disclose the claims of the respective parties, and to pass upon the vital questions presented for review, may be summarized as follows:

Harriet Hamilton, the homestead entryman, died after having fully complied with the homestead laws of the United States, but before she made her final proof; her application for final proof being pending before the local land office at the time of her death. After she had earned the right to have a patent issued to her, the entryman made a will, bequeathing 40 acres of her homestead to Florence Rhodes and 120 acres thereof to Laura McNeil. Immediately after the death of Harriet Hamilton, Laura McNeil, one of the devisees named in the will, and who was also a daughter of the entryman, made application for final proof before the land office at Guthrie, with the result that thereafter in due time a patent was issued "to the heirs of Harriet Hamilton, deceased." After the patent was issued, the will was formally probated, and thereafter Laura McNeil executed a mortgage covering the entire tract of land to the Mortgage & Debenture Company, Limited, a corporation, which seeks to foreclose the same. The other parties to this action, not hereinbefore specifically named, claim under the patent as heirs of Harriet Hamilton, the homestead entryman.

Neither the findings of fact and conclusions of law, nor the judgment and decree of the trial court, are abstracted by counsel in their respective briefs, as required by rule 26 of this court; but from what is stated we are able to gather that the trial court decreed 40 acres of the land to Florence Rhodes, as a devisee under the will, and decreed the remaining portion to Laura McNeil and Ella Doss, as heirs of the entryman, the undivided interest of Laura McNeil to be subject to the mortgage of the Mortgage & Debenture Company. It is a little difficult to state briefly the precise grounds of error relied upon by the various plaintiffs in error, but it is apparent from the foregoing statement that the case turns upon the vital question whether, in the foregoing circumstances, the action of the Land Department in issuing the patent to the heirs of Harriet Hamilton must be held to be conclusive upon the courts.

[4] As the solution of this question will disclose beyond controversy the rights of the respective claimants, we do not deem it necessary to consider in detail the specific assignments of error. It is well settled that, when officers of the land office decide controverted questions of fact, in the absence of fraud, imposition, or mistake, their decisions on those questions are final, except as they may be reversed on appeal in that department. *Ross v. Stewart*, 25 Okl. 611, 106 Pac. 870; *Id.*, 227 U. S. 520, 33 Sup. Ct. 345, 57 L. Ed. 626.

[1] As counsel for the respective parties to

this controversy have but partially complied with rule 26 of this court (165 Pac. 1x) we are unable to say, without an examination of the record itself, upon what evidence the Land Department acted in issuing the patent. That the homestead entryman died leaving a will, as hereinbefore stated, is undisputed, and as the party making application for final proof was one of the devisees named therein, and was also one of the heirs of the entryman, it is fair to assume that she knew of the existence of the will and that she conveyed this information to the officers of the Land Department before whom final proof was taken. If she did this, then the patent was issued to the wrong party by the Land Department by an erroneous view of the law. The homestead entryman, having earned the land by residence, improvement, etc., was at liberty to dispose of the same by will, and the patent, upon proof of this, should have been issued to her devisees, instead of to her heirs. Section 2291, Rev. Stat. U. S. (U. S. Comp. St. § 4532); *Trueman v. Bradshaw*, 43 Land Dec. 242.

[2, 3] It seems to be the view of counsel representing the parties claiming as heirs that, since there was no affirmative showing made at the trial as to whether the will of the entryman was brought to the notice of the officers of the land office, before whom final proof was made, it must be assumed that they did not know of it, and that in these circumstances, the Land Department having issued the patent to the persons appearing to be entitled to it by the evidence presented to it on final proof, the court was bound to consider the action of the Land Department in issuing the patent to the heirs as conclusive upon it, notwithstanding it was conceded that, if the facts concerning the will had been disclosed, it would have been the duty of the Land Department to issue the patent in the name of the devisees as a matter of law. We are unable to agree with this contention. It is quite true that the ruling of the Land Department on disputed questions of fact, made in a contested case, must be taken, when that ruling is collaterally assailed, as conclusive. *Ross v. Stewart*, supra; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424. But in the case at bar the final proof before the land office was taken ex parte, and as the existence of the will was not in controversy, there was neither a contested case nor a disputed question of fact presented and ruled upon. Whether there was a will in existence was undisputed. Whether or not it was called to the attention of the Land Department was the only matter left in doubt in the trial court, and this seems to us to be immaterial. If the existence of the will was called to the attention of the Land Department, it was clearly its duty to issue the patent to the devisees named therein, as a matter of law. If this fact

was kept from the Land Department, either by inadvertence or by design, then this case must be ruled by the class of ex parte cases mentioned in *Shepley v. Cowan*, supra, which hold that the courts may furnish, in proper cases, relief to a party where new evidence is discovered which, if possessed and presented at the time, would have changed the action of the land officers. In the case of *Svor v. Morris*, 227 U. S. 524, 33 Sup. Ct. 385, 57 L. Ed. 623, where the proceedings were ex parte, the court held the patent subject to correction, saying:

"Had the real facts been disclosed, * * * viz. that the defendant was residing upon and occupying the land in virtue of a lawful homestead settlement antedating the second indemnity selection, it would have been the duty of the Secretary of the Interior to disapprove the selection, and no doubt he would have done so. But the real facts were not disclosed."

From the briefs of counsel we gather that the court below rendered judgment in favor of Florence Rhodes for the 40 acres devised to her by the will, but refused to permit Laura McNeil to take as a devisee, for the reason that she made application to "prove up" the land as an heir. We do not believe that the latter position is tenable. It was immaterial who made the application to "prove up," or whether presented by one claiming as an heir or as a devisee. In either event it was the duty of the land office to either reject the proof or to issue the patent to the persons entitled to it under the facts. If the true facts were disclosed, then undoubtedly the patent should have been issued to the devisees. If they were not known, and the patent by this omission was issued to the wrong parties, a proper case is presented for relief in equity.

Entertaining this view of the law, it follows that the part of the judgment awarding 40 acres of the land to Florence Rhodes as devisee must be affirmed; that the part of the decree allowing Ella Doss to take as an heir is reversed, as is also that part of the decree which denies the right of Laura McNeil to take 120 acres of the land as a devisee under the will; and also that the part of the decree affecting the loan of the Mortgage & Debenture Company must be modified in accordance with the views herein expressed.

There may be other material questions involved in this case, but it seems to us that the ones passed upon are the vital questions, and that their decision will enable the trial court to enter such decree as will finally determine the respective rights of the parties. At any rate, we feel that we have passed upon all the questions presented for decision which we are able to get a full understanding of from the abstract and abridgment of the record contained in the briefs of the respective counsel, without making an exami-

nation of the record itself. This is all we are required to do. Rule 26, supra.

The cause is remanded to the trial court, with directions to proceed in accordance with the views herein expressed; the costs of this proceeding in error to be taxed against the defendant in error, Henry McNeil, the sole heir and administrator of the estate of Laura McNeil, deceased, and the balance of the costs to await the final determination of the cause.

All the Justices concur.

RENNIE v. GIBSON. (No. 8996.)

(Supreme Court of Oklahoma. July 1, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. COVENANTS \S 94—LIMITATION OF ACTIONS \S 47(2)—COVENANT OF "SEISIN"—COVENANT OF "GOOD RIGHT TO CONVEY"—BREACH.

Covenants of "seisin" and "good right to convey" are synonymous, and, if broken at all, are broken when made, yet where the grantee takes and remains in the undisturbed possession of land conveyed by a general warranty deed, which is afterwards cancelled by the final judgment of a court of competent jurisdiction, the statute of limitations does not begin to run in favor of the grantor on the warranty of title until after the date of such judgment.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Good Right to Convey; First and Second Series, Seisin.]

2. COVENANTS \S 121(2)—WARRANTY DEED—TITLE OF ADVERSE CLAIMANT—JUDGMENT.

In an action where there is a recovery of land, or any interest therein, adverse to any warranty deed thereto, and where the grantor was a party to the action, the record of such judgment is conclusive evidence of the paramount title of the adverse claimant.

3. COVENANTS \S 88 — ACTION AGAINST GRANTEE UNDER WARRANTY DEED—NOTICE TO GRANTOR—STATUTE.

Under section 1166, Rev. Laws 1910, where an action is brought against a grantee to recover real estate conveyed to him by a warranty deed, and the grantor is made a party to the action, and is duly served with summons therein, the grantee is relieved of the necessity of giving the grantor written notice that such action has been brought.

4. ALLOWANCE OF COSTS—STATUTE.

Where it is not otherwise provided by statute, costs shall be allowed, of course, to the plaintiff upon a judgment in his favor in actions for the recovery of money only, or for the recovery of specific real or personal property.

5. COVENANTS \Leftrightarrow 132(1)—BREACH OF COVENANT OF WARRANTY—COSTS—RIGHTS OF GRANTEE.

The grantee in an action for breach of a covenant of warranty contained in a deed executed and delivered in 1905 for certain lands in that part of Oklahoma then known as Indian Territory can recover costs and necessary expenses, including reasonable attorney's fees incurred in a bona fide defense, or assertion of his title, though there was no express agreement by the grantor in addition to his covenant to pay such expenses.

(Additional Syllabus by Editorial Staff.)

6. LIMITATION OF ACTIONS \Leftrightarrow 47(2)—COVENANTS OF TITLE—BREACH.

Eviction, either actual or constructive, is necessary to set in motion the statute of limitations as to general covenants or warranty of title.

7. COVENANTS \Leftrightarrow 121(2)—BREACH OF WARRANTY OF TITLE—JUDGMENT—FINALITY.

Where land was conveyed by defendant to plaintiff by general warranty deed, and in an action against them there was a judgment that defendant never had title and canceling the deed, the defendant had same right to appeal from such judgment as the plaintiff had and when neither appealed, the judgment became final.

8. TRIAL \Leftrightarrow 260(1)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

The refusal of requested instructions tendered by defendant was not error, where those to which he was entitled were covered by the instructions given.

Error from District Court, Garvin County; F. B. Swank, Judge.

Action by John W. Gibson against Albert Rennie. Judgment for plaintiff, motions for judgment non obstante verdicto and for a new trial overruled, and defendant brings error. Affirmed.

Jno. A. McClure, of Sulphur, and Marlon Henderson and Yerker E. Taylor, both of Pauls Valley, for plaintiff in error.

O. W. Patchell, of Pauls Valley, and Earl Q. Gray, of Ardmore, for defendant in error.

PITCHFORD, J. This action was commenced on December 2, 1913, by the defendant in error as plaintiff, against the plaintiff in error as defendant, in the district court of Garvin county, Okl. The parties for convenience will be designated as they appeared in the court below. In his petition, plaintiff alleged that on or about the 24th day of April, 1905, the defendant, by a general warranty deed of that date, in consideration of \$3,500, conveyed to the plaintiff certain described real estate situated in Pontotoc county, Okl.; that in an action in the United States court for the Eastern District of Oklahoma, wherein the United States was

plaintiff and the plaintiff and defendant herein were defendants, it was adjudged by the court that the title to said lands was at all times vested in the United States and the Choctaw Nation, and the court further decreed the cancellation of all deeds attempting to convey title to the same. Plaintiff further alleged that the defendant at no time had any title to convey, and this action is brought to recover on breach of the warranty. Defendant demurred to plaintiff's petition. The demurrer was overruled, and the defendant thereupon filed his answer.

The proof in the case discloses that during the year 1901 Mrs. Elliott and Mrs. Durkee, claiming to be entitled to citizenship in the Choctaw Nation, made application for enrollment as Mississippi Choctaw Indians. At that time they were residing upon the land herein involved. They failed to get on the rolls, and, desiring to purchase the lands, arrangements were made with the defendant, Albert Rennie, to devise ways and means by which the purchase could be made. Thereupon the defendant arranged with one Hybarger whereby the latter was to be appointed administrator of one Wesley Hoparkentubbi, a deceased Choctaw. After being appointed as such administrator, Hybarger filed upon these lands for the said Wesley Hoparkentubbi, deceased. Thereafter, it appears the defendant purchased from Isabella Hoparkentubbi and Sisley Homer their interests in the said allotment, they claiming to be the only surviving heirs at law of the said deceased. The defendant claims that the lands were bought for Mrs. Durkee and Mrs. Elliott, and he furnished a portion of the consideration, and in order to secure him in the amount so advanced for them, the deed was taken in his name. Thereafter, Mrs. Durkee and Mrs. Elliott borrowed certain sums from Henry M. Beard, and in order to secure the payment of these sums, it seems, directed the defendant to execute a deed to Mr. Beard covering the lands in question. While it does not appear that the defendant was paid the amount of his outlay by this last transaction, we are to presume, however, that he was. After the deed was executed and delivered to Beard, the lands were placed for sale in the hands of Hybarger, Moore & Paul, real estate agents, who negotiated the sale of the same to the plaintiff. The legal title at that time being in Beard, he refused to execute a deed to any one except the defendant from whom he had received the deed. Beard then executed a deed to the defendant, and the defendant executed and delivered to the plaintiff a general warranty deed. Upon the delivery of this deed, the plaintiff delivered his check for \$3,500 to the defendant. This check was given to Mr. Moore, who immediately turned the same over to the defend-

ant, there being present at the time the plaintiff, defendant and Mr. Moore.

On the 19th day of March, 1909, there was filed in the United States Court at Muskogee an action against the plaintiff, defendant, and others on the part of the United States; the petition seeking the cancellation of the allotment of Wesley Hoparkentubbi, deceased, on the ground that fraud had been practiced by the administrator, Hybarger, and others, in that the said Wesley Hoparkentubbi had died prior to the 25th day of September, 1902, and was therefore not entitled to enrollment as a citizen of the Choctaw Nation and was not entitled to share in the lands of said nation. After being served with summons, the plaintiff notified the defendant orally to defend said action and to pay all costs thereof as he had in his warranty agreed to do. Answers were filed in the United States District Court by both plaintiff and defendant; the same attorney appearing for each. The federal court rendered judgment canceling the said allotment on the grounds set forth in the petition. No appeal was taken from this judgment, and the plaintiff herein was permitted to buy the land from the government at the appraised value, \$1,011. At the trial of the cause in the district court, the jury returned a verdict in favor of the plaintiff for \$1,519.11, whereupon the defendant moved for judgment non obstante veredicto, which motion was overruled by the court. The defendant then filed motion for a new trial, which was overruled and defendant appeals. The assignments of error are classified as follows:

"First. That the court erred in overruling the special demurrer of the defendant to plaintiff's petition.

"Second. That it was error to admit evidence of the voluntary payment of costs upon the judgment of the United States court.

"Third. That the court erred in sustaining the objection of the plaintiff to competent and relative questions as to what became of the money that the plaintiff paid for the land.

"Fourth. That the court erred in refusing to instruct the jury as requested by the defendant.

"Fifth. That it was error to admit evidence as to the amount of attorney's fee."

We shall treat the assignments of error in the order named.

[1, 2] One of the contentions of the defendant is that the deed was executed and delivered to the plaintiff prior to statehood, and, the covenant of seisin being broken on the delivery of the deed, the statute of limitations was set in motion, and more than five years having elapsed before the institution of the present action, the same is barred. We cannot agree with this view of the defendant. The covenant warranting the title was not broken, so as to start the running of the statute, until the title of the plaintiff had been canceled by the decree of court. Had the plaintiff failed to gain possession of the

land by reason of the defect in the title, then the covenant of seisin would have been broken, and he could then immediately have proceeded against the defendant for such breach. So far as the questions herein involved are concerned, the laws of Arkansas in force in the Indian Territory at the date of the deed herein, and the laws of Oklahoma at the date of the trial of this cause in the lower court, are not in conflict. If it should be admitted that the covenant of seisin was purely personal, and did not run with the land, and was broken as soon as made, in our judgment, the statute of limitations would not begin to run until the grantee had notice of the breach. The petition is not susceptible of the construction placed upon it by the defendant, nor can any one justly infer, merely because of the statement in the petition that the United States court had canceled the allotment of Wesley Hoparkentubbi, and that the defendant was not lawfully seised of the lands at the date of the deed, that the plaintiff thereby confessed full knowledge that the title to the lands was at that time in the Choctaw Nation and the United States, and that the defendant had no right to convey. In *Brawley v. Copelin*, 106 Ark. 256, 153 S. W. 101, it is said:

"The effect of a judgment evicting a grantee in a deed containing a covenant that the land is free from incumbrances is that the grantor never had any title."

It nowhere appears that the plaintiff had the least intimation or suspicion of any defect in the title conveyed to him by the defendant prior to the action filed in the United States Court in Muskogee. Probably the contention of the defendant would have been successful in the early days of English jurisprudence. In ancient times, livery of seisin, which means only delivery of possession, was purely ceremonial and symbolical. Where it was sought to transfer the title, the vendor and vendee, with witnesses, would enter upon the land to be conveyed, and there the vendor would solemnly hand to the vendee a clod of earth or a twig. That constituted a livery in deed. However, there were occasions when it was not found convenient to go upon the lands to be sold; then the ceremony of conveyance might be performed at some place in view of the premises. This livery of possession was known as livery in law, and was equally as valid as that performed on the land itself; but, in order to complete the conveyance, it was required that the vendee enter upon the premises within the lifetime of the vendor; hence we have had handed down to us covenants which go with the land and covenants which are personal. At that time no provision was made for recording titles.

In *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338, the court said:

"The vendee is supposed to rely on the vendor's deed, and, if he suspect the title to be defective, he is not bound to wait until he is lawfully evicted, but may commence suit at any time, and maintain his action, unless the vendor show he has performed the condition of his bond. What is that condition? 'The vendor has covenanted he had a good right and lawful authority to convey, which is equivalent to a covenant of seisin; and that being the case, the law will not permit him to shift the responsibility from his own shoulders on to those of the vendee.' It is immaterial in whom the title is vested; the grantor has declared that it vests in him, and he is bound by his deed, and the legal presumption arising from it, to show what title he possessed, when his grantee questions it in a court of justice. His authority to execute the covenant is derived from the legal interest he had in the claim, and where there is no right or title there can be no authority to sell. It is therefore unnecessary for the plaintiff in declaring on a covenant of seisin, where a defendant binds himself that he has good right, full power, or lawful authority to grant, to allege eviction, in order to maintain the action, for the covenant is broken, if at all, the very moment it is executed, and a right of action accrues instantly upon the breach of it. All covenants that are not prospective, and that do not pass with the land, are strictly personal covenants, and if there is no right or authority in the party executing them, they are declared to be broken so soon as made, and may be sued on at any time, and a recovery had without alleging an eviction, or an interruption in the title."

Happily the ancient methods have now become obsolete. Not only in England, but in the United States, we have statutes defining just what is included in a warranty of title. Section 1162, R. L. 1910, provides:

"A warranty deed made in substantial compliance with the provisions of this chapter shall convey to the grantee, his heirs or assigns, the whole interest of the grantor in the premises described, and shall be deemed a covenant on the part of the grantor that at the time of making the deed he is legally seized of an indefeasible estate in fee simple of the premises and has good right and full power to convey the same; that the same is clear of all incumbrances and liens, and that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession thereof, and will defend the title there-to against all persons who may lawfully claim the same; and the covenants and warranty shall be obligatory and binding upon any such grantor, his heirs and personal representatives, as if written at length in such deed."

In *Arnold v. Joines*, 50 Okl. 4, 150 Pac. 130, the court said:

"Our own Supreme Court, by Justice Sharp, in an able and comprehensive opinion in *Faller v. Davis*, 30 Okl. 56, 118 Pac. 382, Ann. Cas. 1913B, 1181, and also in *Brady v. Bank of Commerce*, 41 Okl. 473, 138 Pac. 1020 [Ann. Cas. 1915B, 1019], has taken the broad and sensible view of the law of covenants and cleared away, to a large extent, the mysteries that have for years hung around the uncertainties

of the various covenants of warranty, and declared that: 'Covenants of "seisin" and "good right to convey" are synonymous, and, if broken at all, are broken when made, and an actual eviction is unnecessary to consummate the breach.' And that: 'In an action for breach of the covenants of seisin and good right to convey, an eviction need not be alleged; but it is sufficient in charging a breach to negative the words of the covenant generally.'

"Certainly a most sensible, wholesome, and refreshing doctrine, after groping about among the dusty old 'myths' of uncertain and incomprehensible covenants. Counsel for plaintiff in error was simply following some of the old mysterious and hazy theories, concerning which there is a very great variety of opinions as to the different kinds of covenants, and as to whether they run with the land or are simply personal; but these old troublesome questions are swept away by the statutes and decisions above referred to, and the covenant of general warranty provided for by the laws in this state binds the grantor to warrant and forever defend the title to the grantee, his heirs and assigns, and by this is meant a covenant which accompanies a conveyance of the land and passes from one purchaser to another through each successive link of the chain of title."

In *Douglass v. Lewis*, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53, it is said:

"The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the one, while disturbance of possession is requisite to recover upon the other."

[6] As to general covenants of title, or general warranty of title, the doctrine is well settled that eviction, actual or constructive, is necessary to set in motion the statute of limitations. This doctrine was recognized and applied in the following cases, wherein it was held that the statute of limitations did not commence to run against a right of action for the breach of a general covenant of title or warranty of title until there had been an eviction, either actual or constructive. *Hanlin's Estate*, 133 Wis. 140, 113 N. W. 411, 17 L. R. A. (N. S.) 1189, 1190, 126 Am. St. Rep. 938; *Moore v. Vall*, 17 Ill. 185; *Watkins v. Gregory*, 69 Miss. 469, 13 South. 696; *Eustis v. Fosdick*, 88 Tex. 615, 32 S. W. 872.

It has been held that an adjudication adjudging an outstanding title to be paramount amounts to a constructive eviction, and the statute of limitations will run against a right of action for the breach of the covenant from the time of such adjudication. *Finton v. Egelston*, 61 Hun, 246, 16 N. Y. Supp. 721. In *Kramer v. Carter*, 136 Mass. 504, it was held that a covenant of warranty was breached when the judgment was satisfied by the grantee, and from that date on the statute of limitations commenced to run against the right of action for the breach.

[3] The defendant further contends that, inasmuch as the plaintiff failed to give him

written notice to defend the title in the action in the United States Court, he cannot now maintain an independent action for the breach of warranty. To support this contention, we are cited to section 1166, R. L. 1910. This section must be construed in connection with the sections immediately preceding and following, and, when read together, the meaning of each is made manifest. Section 1165, Id., provides:

"In all cases where there is a recovery of land or any interest therein, adverse to any warranty deed thereto, the judgment by which such recovery is had shall not be effective or become the basis of an action against previous grantors, other than those who are parties thereto or have been notified in writing of the pendency thereof twenty days before such judgment is entered."

We have seen that the defendant was not only notified orally by the plaintiff to protect the title, but was served with summons in the action in the United States Court, and further he appeared by attorney and filed an answer. He was a party to that action, and bound by the judgment therein to the same extent as was the plaintiff. Being a party, it was not necessary to serve him with the written notice required in section 1166, Id., which provides:

"Where an action is brought against a grantee to recover real estate conveyed to him by warranty deed, he must notify the grantor or person bound by the warranty that such suit has been brought, at least twenty days before the day of trial, which notice shall be in writing and shall request such grantor or other person to defend against such action; and in case of failure to give such notice there shall be no further liability upon such warranty, except when it is clearly shown that it was impossible to make service of such notice."

Section 1167, Id., gives the defendant the right to apply and be made a party, so that he may have an opportunity to defend his warranty, or if he fails to appear after due notice, the court shall determine all the rights of the parties, and in case recovery is adverse to the warranty, the warrantee shall recover of the warrantor the price of the land paid for the conveyance at the time of the warranty, and all sums necessarily expended, including reasonable attorney's fee and interest at the rate of 10 per cent. per annum on all sums so paid from the time of payment. The defendant, being a party to the action in the federal court, knowing that his warranty was involved, and failing to avail himself of the privilege at that time to have the rights adjusted between himself and the plaintiff, ought not now to be heard to say that, because the plaintiff failed in that action to have his rights against the defendant adjudicated, he is now estopped from instituting the case at bar. We are not prepar-

ed to say that the United States Court could have adjusted the differences between this plaintiff and defendant in that action. We have serious doubts whether or not the court was clothed with this jurisdiction; however, when the plaintiff was sued in that court, it was as much the duty of the defendants to defend his title there as if the action had been brought in the state court. In 8 Am. & Eng. Encyc. of Law, p. 203, it is said:

"Where the covenantor has been notified of the pendency of such suit, or appeared or was a party thereto, the record of such judgment is conclusive evidence of the paramount title of the adverse claimant."

To the same effect, see 11 Cyc. 1157.

[4] This cause of action did not arise prior to statehood. So far as the evidence discloses, plaintiff's right to relief under the warranty was born on the date of the judgment of the United States Court, canceling the allotment of Wesley Hoparkentubbi. It follows, therefore, that the laws of Oklahoma apply. The judgment of the United States Court, introduced in the trial of this cause in the court below, failed to include the costs of the trial. The court admitted evidence on the part of the plaintiff tending to prove that the costs were paid, and defendant assigned as error the action of the court in admitting evidence on this point. Section 5229, R. L. 1910, provides:

"Where it is not otherwise provided by this and other statutes, costs shall be allowed, of course, to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific, real or personal property."

It was said in Dillahunt v. L. R. & F. S. Ry. Co., 59 Ark. 629, 27 S. W. 1002, 28 S. W. 657:

"Where a grantee is in possession at the time of receiving a conveyance, and thereafter voluntarily acquires the paramount title, the damages for breach of covenant of warranty in the conveyance is the amount necessarily paid for the outstanding title, with any other necessary expenses in procuring it."

If the judgment as originally rendered failed to include costs, the plaintiff could easily have filed a motion to tax costs, and the court could have ordered the plaintiff to do just what he did do. Besides, there is no evidence that the costs were not demanded. The defendant sought to prove the disposition made of the \$3,500 received from the plaintiff as the consideration for the deed. The court sustained objection to this evidence, to which the defendant excepted. Under the theories of the respective parties and under the evidence, we cannot see that the court committed error in excluding testimony of this nature. We cannot see wherein the substantial rights of

the defendant were thereby affected, or how the jury would have been assisted in any way by this evidence.

One of the questions submitted to the jury by the instructions of the court was as to the knowledge of the plaintiff regarding the capacity in which the defendant held the title to the lands. We find there were no dealings directly between the plaintiff and the defendant prior to the execution of the deed by the latter. The land was sold to the plaintiff by real estate agents. The defendant claims that he only held the title as trustee for Mrs. Durkee and Mrs. Elliott, and further that the plaintiff had knowledge of this fact. This the plaintiff positively denied, and asserts that he had no communication whatever with the defendant regarding the sale; that he had J. B. Thompson, an attorney, to pass upon the deed. The deed in all respects was regular upon its face. There is nothing, as disclosed by the deed, to indicate that the defendant was dealing for any person except himself. The burden of proof was upon the plaintiff to establish his cause against the defendant. The defendant was required to establish his contention by a preponderance of the evidence; that is, that he held the title as trustee, and that knowledge of this was brought home to plaintiff.

From a careful reading of the record, we are forced to say that the plaintiff is strongly corroborated in his contention, and the defendant is wholly uncorroborated, as it is clearly shown that, at the time of the execution of the deed, he had been a practicing lawyer for 25 years. He himself had prepared the deed, and, as a lawyer of long experience, must have fully realized the meaning and consequences of a general warranty. It would appear that the position of the defendant is somewhat inconsistent in now claiming that when he executed the deed he had no other interest in the land than that of a mere trustee, and especially when he voluntarily, and with no request from the plaintiff, or any one representing him, executed and delivered this deed warranting the title thereby conveyed against the whole world. Besides, the admission of this testimony would have been merely cumulative and a repetition of that which the defendant had already given wherein he had testified that he was only a trustee and did not derive any personal benefit from the consideration.

[7, 8] The defendant requested an instruction, which was refused by the court, to the effect that, if the plaintiff compromised the cause in the United States Court, then the verdict should be for the defendant. We have examined the record and fail to find any evidence tending to show that the judgment was the result of a compromise. The plaintiff was under no obligations to

the defendant to appeal from the judgment. The defendant had the same right to appeal as the plaintiff had, and, when neither appealed, the judgment became final. *Elliott v. Saufley*, 89 Ky. 52, 11 S. W. 200; 11 Cyc. 1135, 1336. In no event could the defendant complain of the refusal of the court to give this instruction, as the same was completely covered by the fifth instruction given by the court. In 7 R. C. L. 1149, it is said:

"It is not necessary that there should be an actual dispossession of the grantee from the land. It is sufficient if the paramount title is so asserted that he must yield to it, or go out; and, where this is the case, it is held in most of the states that the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach."

In our judgment, the court gave instructions more favorable to the defendant than he was entitled to. The jury was instructed that, if the defendant held the land in trust and the plaintiff knew that fact, and also that if the defendant had no legal title to the land and executed the deed for the purpose of facilitating the purchase of the land for the plaintiff, and that these facts were within the knowledge of the plaintiff, then the verdict should be for the defendant.

[5] Defendant further contends that the court erred in permitting the plaintiff to introduce evidence as to the amount of attorney's fees paid for defending the action in the United States Court. We hold this was not error. It seems to be the uniform rule that where a vendor sells lands, and the title fails, and the purchaser, to protect himself, acquires an outstanding title, the purchaser is allowed to recover against his vendor what he reasonably expended in acquiring the outstanding adverse or superior title. He is entitled to interest and expenses necessarily incurred. *Lewis v. Boskins*, 27 Ark. 61; *Stephens v. Black*, 77 Pa. 138; *Kindley v. Gray*, 41 N. C. 445; *Dilahunt v. Little R. & F. S. Ry. Co.*, *supra*.

In *Beach v. Nordman*, 90 Ark. 59, 117 S. W. 785, it is said:

"The grantee, in an action for breach of a covenant of warranty, can recover costs and necessary expenses, including reasonable attorney's fees, incurred in a bona fide defense or assertion of his title, though there was no express agreement by the grantor, in addition to his covenant, to pay such expenses."

To the same effect, see *Brawley v. Cope-lin*, *supra*.

The court committed no error in refusing instructions tendered by defendant, as those to which he was entitled were covered by the instructions the court gave. We find no error in the judgment of the trial

court and conclude the same should be affirmed; and it is so ordered.

OWEN, C. J., and SHARP, HARRISON, McNEILL, and HIGGINS, JJ., concur.

GRAY et al. v. McKNIGHT et al. (No. 8755.)

(Supreme Court of Oklahoma. June 24, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. INDIANS \S 18—DESCENT OF ALLOTMENT—ILLEGITIMATE CHILD—STATUTE.

Under Act Cong. Feb. 28, 1891, 26 Stat. 794, c. 383, § 5 (U. S. Comp. St. § 4222), providing that, for determination of descent of allotted lands, whenever a male and female Indian shall have cohabitated as husband and wife, their issue for such purpose shall be regarded as legitimate, and that every other Indian child, otherwise illegitimate, shall for that purpose be taken to be the legitimate issue of the father, the illegitimate child of an allottee by an Indian woman, whether born as the result of cohabitation in accordance with Indian customs or not, is entitled to inherit rights in his father's allotment as his heir.

2. INDIANS \S 18 — PATENT — RIGHTS OF HEIRS.

John Nestell, a white man, by the provisions of the Kiowa, Comanche, and Apache Agreement (31 Stat. 676, c. 813) was awarded all the benefits of land and money conferred by the agreement the same as members by blood of one of said tribes. Under the agreement, after an allotment was selected and approved by the Secretary of the Interior, the title thereto was to be held in trust for the allottee for a period of 25 years in the time and manner provided by Act Feb. 8, 1887, c. 119, 24 Stat. 388, and the act amendatory thereof approved February 28, 1891 (26 Stat. 794, c. 383), and at the expiration of said period the title was to be conveyed in fee simple to the allottee, or his heirs, free from all incumbrances. The said John Nestell died in August, 1902, prior to the issuance of final patent, but subsequent to the issuance of the trust patent. The Indian Appropriation Act approved March 3, 1903 (32 Stat. 1008, c. 994), authorized and directed the Secretary of the Interior to issue a patent in fee to several designated persons, including the said John Nestell, and further provided that "all restrictions as to the sale, incumbrance, or taxation of said lands are hereby removed." On June 17, 1903, the Secretary of the Interior issued a patent to the heirs of John Nestell without naming them. *Held*, that said heirs took the estate by inheritance, and not by direct grant from the United States.

3. INDIANS \S 28—COUNTY COURTS—PROBATE JURISDICTION — DETERMINATION OF HEIRSHIP.

County courts of this state, in the exercise of their probate jurisdiction, are authorized to

determine who, in fact, are the heirs of a deceased person for the purpose of distributing the estate of the decedent, except in those cases involving Indian allotments where Congress has not relinquished its supervisory control over the same or delegated such authority to said courts, and after the death of an allottee in the Kiowa, Comanche, and Apache reservation under a trust patent, and during the trust period, county courts are without jurisdiction to determine who in fact are the heirs of said decedent; but after the issuance of patent, and the removal of restrictions, and the withdrawal of federal supervision, and where the question of heirship has not been determined by the Secretary of the Interior during the trust period, the county court having jurisdiction of the administration of the estate of the deceased allottee is authorized to determine, under the state law, who in fact are the heirs of the decedent, and to distribute his estate accordingly.

4. EXECUTORS AND ADMINISTRATORS \S 315(6) — DECREE OF DISTRIBUTION — COLLATERAL ATTACK.

A decree of distribution of a county court cannot be successfully attacked in a collateral proceeding for mere irregularities in the proceedings in the county court.

5. DISTRIBUTION — RESIDUE OF ESTATE — JURISDICTION OF COUNTY COURT.

Under section 6463, Rev. Laws 1910, upon the final settlement of an account of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate of the decedent over which it is exercising jurisdiction.

6. JUDGMENT \S 509, 512—VALIDITY—FRAUD.

It is not every kind of fraud that will vitiate a judgment in an independent proceeding, for to investigate the character of the testimony upon which a judgment was obtained would be to retry the issues submitted in the trial at which the judgment was obtained, and the result would be that there would be no end to the litigation. The fraud which will vitiate a judgment in an independent proceeding must be extraneous to the issues and such as would deprive the party of a fair opportunity to present his case. *Brown et al. v. Trent et al.*, 86 Okl. 239, 128 Pac. 895.

7. APPEAL AND ERROR \S 1008(2)—TRIAL TO JURY—FINDINGS—WEIGHT.

In an action for the recovery of real property, tried to the court without a jury, the findings of the court upon disputed questions of fact will be given the same weight and effect as the verdict of a jury, and, where reasonably supported by the evidence, will not be disturbed on appeal.

Error from District Court, Caddo County; Will Linn, Judge.

Action by Sarah B. Gray, as administratrix of the estate of Mary B. Gray, deceased, and others, against L. E. McKnight and others.

Judgment for defendants, and plaintiffs bring error. Affirmed.

H. E. Asp, of Oklahoma City, C. H. Carswell, of Anadarko, and Blake & Boys, of Oklahoma City, for plaintiffs in error.

A. J. Morris, of Anadarko, for defendants in error McKnight and Haskett.

RAINEY, J. This case involves the title to an allotment of land made under the Kiowa, Comanche, and Apache Agreement (31 Stat. 676, c. 813). John Nestell was a white man, and under the said agreement he, with certain other named persons, were awarded all the benefits of land and money conferred by the agreement, the same as members by blood of one of said tribes. The agreement provided that, when allotments of land were selected and approved by the Secretary of the Interior, the title thereto should be held in trust for the respective allottees for a period of 25 years "in the time and manner and to the extent provided for in the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and territories over the Indians, and for other purposes,' approved February 8, 1887 [24 Stat. 388, c. 119], and an act amendatory thereof, approved February 28, 1891 [26 Stat. 794, c. 383]. And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances." The act of February 8, 1887, is commonly called the General Allotment Act. John Nestell died in August, 1902, prior to the issuance of final patent, but subsequent to the issuance of the trust patent. The Indian Appropriations Act, approved March 3, 1903 (32 Stat. 1008, c. 994), authorized and directed the Secretary of the Interior to issue a patent in fee to several designated persons, including the said John Nestell, and provided that "all restrictions as to the sale, incumbrance, or taxation of said lands are hereby removed." The Allotment Act of February 8, 1887, supra, contained the following provisions:

"Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of

the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act."

John Nestell, at the time of his death, was possessed of certain personal property, and he left a will devising his estate to Callie Ryan. An executor was appointed by the probate court of Caddo county. Prior to the issuance of patent the executor did not claim that he had the right, nor did he attempt, to take possession of the allotment in controversy, but subsequent to the issuance of patent did for several years collect the rents therefrom. On the 21st day of May, 1907, the executor filed his final account, and an order was entered directing him to pay certain allowed claims out of the funds of the estate, and, upon filing his receipts, that he be discharged. An appeal was taken from this order, which appeal was dismissed by the district court on the 19th day of June, 1909. The case was then neglected, and no order was made transmitting it back to the county court until April 23, 1910, when the order dismissing the appeal was filed in the county court. The appearance docket of the probate court shows that on May 5, 1910, another order was entered setting a day for settlement of account and issuing notice, etc. On August 19, 1910, an order of discharge, together with a decree of distribution, was entered, distributing the estate to L. E. McKnight and F. L. Haskett, as grantees of Albert Lamar, who was found to be the illegitimate son of John Nestell by an Indian woman, and as such to be his sole heir at law.

Subsequently this action was commenced by the grantees of the brothers and sisters and the descendants of several brothers and sisters of the said John Nestell against L. E. McKnight and F. H. Haskett for the possession of the allotment—it being the contention of the plaintiffs that Albert Lamar was not the child of John Nestell; that if he was found to be the illegitimate child of John Nestell, as contended, that he was not an heir to the allotment, of the deceased; that the decree of distribution entered by the county court of Caddo county was void, for the reason that the court was without jurisdiction to render said decree, and that the said decree of distribution was obtained by fraud.

[1] We will first consider the proposition advanced by plaintiffs in error that Albert

Lamar, even though he is an illegitimate child of John Nestell, as contended by defendants in error, is not an heir, and under the law is not entitled to the allotment, of the said John Nestell, deceased. The governing statute is the act amendatory of the act approved February 8, 1887 (26 Stat. 794), which act was approved February 28, 1891; section 5 (U. S. Comp. St. § 4222) thereof being as follows:

"For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child."

It is earnestly insisted that under the Oklahoma statute of descent an illegitimate child does not inherit from its father, unless the putative father acknowledges in writing, signing in the presence of competent witnesses, that he is the father of such child. According to the evidence, John Nestell never acknowledged in writing the said Albert Lamar as his child, and it is contended that the act above quoted does not apply to the case at bar, for the reason that John Nestell was a white man, and the act, by its terms, only applied to the heirs of deceased Indians. This identical question has received the consideration of the Supreme Court of Wisconsin in a case entitled *In re House's Heirs*, 132 Wis. 212, 112 N. W. 27, and also in the case of *Smith v. Smith*, 140 Wis. 599, 123 N. W. 146, wherein the court held that an illegitimate child of a white father was an heir within the meaning of said act. In the first-named case the court said:

"It is said that the trial court erred in construing that part of these statutes which was enacted for the purpose of determining the descent of these lands to the heirs of any deceased Indian. It was manifestly intended that the word 'heir,' as used in this part of the act, should include the children of Indians coming within the classes specified, namely, first, the children born to 'any male and female Indian [who] shall have cohabited together as husband and wife according to the custom and manner of Indian life.' This class of children are to be 'taken and deemed to be the legitimate issue of the Indians so living together.' The intent of this provision, for the purposes of this act, was evidently to make this class of children, who are legitimate under Indian custom and manner, legitimate within the state or territory where they reside, though the laws of such state or territory might not recognize them as legitimate, because their parents were not married according to the laws of such state or territory. The other class is comprehended in the phrase im-

mediately following the part last above quoted. It reads: 'And every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child.' It is urged that the trial court's construction, that they formed a class different from the first, which included all the illegitimate children of the father who were not the issue of him and a female cohabiting together as husband and wife according to the custom and manner of Indian life, rendered the previous class an unnecessary one, because this latter class would include all illegitimate children. It is evident that this class of children is constituted of those who are illegitimate according to Indian custom and manner, as well as by the law of the state or territory where they reside, and as such might accordingly not occupy the same status as to the right of inheritance that the first class do, whose legitimacy recognized according to Indian custom and manner is imported into the state or territory where they reside and given effect for the purpose of this act. Recognition of this difference in their status by Indian custom and manner and the law of the state or territory makes the act inclusive of all Indian children not born in lawful wedlock according to the law of the state or territory of their residence. It seems that Congress, in the evident purpose of caring for all Indians as its wards, whether legitimate or illegitimate, framed this statute so as to include all Indian children, legitimate or illegitimate, under the codes of the Indians or of the state or territory where they reside. There is no question under this interpretation of the statute but that all of the children of Thomas House, deceased, are his heirs for the purpose of inheriting the lands allotted to him under the act of Congress. This disposes of the question as to who were his heirs for this purpose, and results in Thomas House Ninham taking the share of his mother, who was one of the children of Thomas House, deceased."

We think the Supreme Court of Wisconsin correctly construed the statute. We have no doubt that, if the said Albert Lamar was the illegitimate son of John Nestell, he would be his sole heir at law.

[2, 3] But there is a serious question in this case. There was admitted in evidence, over the objection of plaintiff in error, the decree of the county court of Caddo county finding that the said Albert Lamar was the illegitimate son of John Nestell, and that as such he was his sole heir at law, and distributing the land and vesting the title thereto in the defendants in error McKnight and Haskett, as grantees of the said Albert Lamar. It is earnestly insisted that said court did not have jurisdiction to enter said decree. It will be borne in mind that the allotment of John Nestell was, during his lifetime, inalienable, and, although a trust patent had been issued to him, the legal title to the land was in the United States during the trust period, and the allottee had only the right of occupancy. At the end of the trust period, under the Allotment Act, it was to be conveyed to him, or in case of his death to his heirs, by the ulti-

mate or final patent from the United States. *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566; *Hallowell v. United States*, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750; *Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820; *Monson v. Simonson*, 231 U. S. 341, 34 Sup. Ct. 71, 58 L. Ed. 260; *Cæsar v. Krow*, 176 Pac. 927; *United States Fidelity & Guar. Co. v. Hansen*, 36 Okl. 459, 129 Pac. 60, Ann. Cas. 1915A, 402. State courts did not have jurisdiction to determine the heirship of the said John Nestell after his death and during the trust period. *Cæsar v. Krow*, supra, and cases therein cited.

Many cases are cited by counsel for plaintiff in error in support of their view that the title never vested in John Nestell, and that the heirs took by direct grant from the United States as objects of its bounty. Among these authorities are *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829; *McCune v. Essig* (C. C.) 118 Fed. 273; *Id.*, 122 Fed. 588, 59 C. C. A. 429; *Id.*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237; *Hershberger v. Blewett* (C. C.) 55 Fed. 170; *Rogers v. Clemmans*, 26 Kan. 523; *Coulson v. Wing*, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503; *Cooper v. Wilder*, 111 Cal. 195, 43 Pac. 591, 52 Am. St. Rep. 163; *Lamb v. Starr*, Fed. Cas. No. 8,022, Deady, 447; *Wittenbrook v. Wheadon*, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32; *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679; *Martyn v. Olson*, 28 N. D. 317, 148 N. W. 834, L. R. A. 1915B, 681; *Criner v. Farve*, 44 Okl. 618, 146 Pac. 10. These cases are materially different from the instant case in one important respect, since all are based upon the vital proposition that the original claimant was entitled to the allotment only on condition that he fulfilled certain requirements provided by the act under which he claimed the land. In *Hall v. Russell*, supra, a case arising in the state of Oregon under the act of Congress commonly called the "Donation Act," which provided that where a settler died prior to the expiration of the four years' residence that all of the rights of the deceased should descend to his heirs at law, including the widow, it was held that the heirs became qualified grantees upon his death and took title to the land direct from the United States. The reason upon which this decision was based was that the act required full four years' residence by the person claiming the grant, and that except for the above provision of the act all the rights of the settler would have been lost by his death, and he would have had nothing in the land to descend to his heirs. The case of *McCune v. Essig*, supra, arose under the Homestead Law, and the claimant died before he had performed all the conditions precedent entitling him to a patent, and it

was held that by the provision permitting his widow to complete what was necessary to be done in order to acquire the patent, and for the conveyance of the title to her in her own right, she took title, not by inheritance from the deceased, but by grant directly from the United States. The case of *Criner v. Farve*, supra, involved the allotment of one Joseph Baptiste, a Mississippi Choctaw Indian, under an act of Congress (Act July 1, 1902, c. 1362, 32 Stat. 651) which granted him the land on the condition that he reside in the Indian Territory for a number of years after making selection of the allotment. Section 5 of the act of April 26, 1906 (34 Stat. 138, c. 1876), conferred upon the decedent's heirs the right to make the necessary proof where the claimant died after selection and before performing the conditions, and it was held that the said Joseph Baptiste, at the time of his death, did not have any devisable interest in the land, and that, upon the making of the necessary proof by the heirs and the issuance of the patent, the title inured to and vested in his heirs.

It is unnecessary to specifically mention the other cases, as they all involved the same principle. But a very different situation is here presented. By the provisions of the act under which John Nestell took the allotment there was nothing further for him to do; his right to the allotment had become absolute, the preliminary patent had issued, and at the expiration of the trust period he was entitled to a patent in fee therefor, provided he lived, and, in the contingency of his death during the trust period, the same title that he had vested in his heirs, and they likewise became entitled to the patent in fee at the expiration of the trust period. The act specified that the patent should be issued to John Nestell, but in fact it was issued to his heirs after his death. This, however, is immaterial, for it had the same legal effect as if issued to him during his lifetime under section 5098, U. S. Comp. Stat. 1918 (section 2448, U. S. Rev. Stat.), which reads as follows:

"Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life."

The intent of Congress that the estate was a descendible one is evident from the above provision. A similar question was decided by the Circuit Court of Appeals in *Shulthis v. McDougal et al.*, 170 Fed. 529, 95 C. C. A. 615. The allotment in controversy in that case was that of one Andrew J. Berryhill, a member of the Creek Nation of In-

dians, who died before allotment, and who took by virtue of the following provision of Act June 30, 1902, c. 1323, 32 Stat. 501:

"And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them."

In holding that said allottee took said lands by descent, and not by purchase, the court called attention to section 5 of the Act of April 26, 1906, c. 1876, 34 Stat. 138, which reads as follows:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect."

It will be seen that the language just quoted bears a similar relation to the allotment of Andrew J. Berryhill as the language of section 2448 bears to that of John Nestell. Speaking to the question then under consideration, the Circuit Court of Appeals said:

"It was never the intent, however, either of the tribe or of the federal government to grant to parties having a kinsman who had died before the actual making of the allotment additional lands as a bounty. These kinsman got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seised of the property or not in his lifetime was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance."

And with direct reference to section 5 of the act of April 26, 1906, the court said:

"Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

A very similar question was before this court in *Moffett v. Conley*, 163 Pac. 118. In that case, subsequent to the death of one Moses Coney, a Creek Indian, an allotment was made in his name, and thereafter a pat-

ent was issued to his heirs. In deciding that the estate was one of inheritance, and went by operation of law, and not by purchase, to the heirs, this court, in an opinion by Mr. Justice Sharp, said:

"The allotment selected and made subsequent to his death was made in satisfaction of the right which he, as one of the enrolled citizens and allottable units of the tribe, had in his lifetime. The heirs took their title, therefore, not because of their enrollment as tribal citizens alone, but because they were his heirs—because they were related to him by consanguinity and succeeded to his rights at his death. That the children of Moses Coney did not take their title by purchase is, we think, settled by both the decisions of this court and the federal courts in cases arising in this state. * * * That the lands were not allotted in the lifetime of Moses Coney, but in his place and stead, and on account of his right, does not serve to change the character of the estate. The lands allotted on his account were not intended as a bounty or gratuity to the heirs by the tribe; they neither gave nor did anything in bringing about the title. The rights of Jennie Hickory's father attached during his lifetime, and it was in that right that the lands were subsequently set apart as an allotment. Jennie and her brother, standing in the ancestor's place and representing him under the statute, succeeded to the same rights that Moses had at the time of his death. This right constituted an estate of inheritance and went by operation of law to his heirs."

See, also, *United States v. Bessie Wildcat et al.*, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024; *Jesse et al. v. Chapman*, 173 Pac. 1044, and cases therein cited.

Although the facts in none of the cases alluded to are identical in all respects, they are controlled by the same principle. Whatever the character of the title John Nestell had during his lifetime and prior to the issuance of patent, it was at least as great, if not greater, than that possessed by Moses Coney to the allotment involved in the last-mentioned case. From a careful consideration of the above and many other authorities, we are of the opinion that the allotment of John Nestell vested in his heirs as an estate of inheritance by operation of law, and that they did not take their title as a direct grant from the United States.

As we have already seen, although the decedent's allotment descended to his heirs according to the Oklahoma laws of descent, during the trust period the state courts were without jurisdiction to determine who, in fact, were his heirs, and this condition existed at the time of the appointment of the executor for his estate. However, the probate court of Caddo county lacked jurisdiction to determine who in fact were his heirs only because the plenary authority to legislate for the Indians relative to their allotted lands rested solely with Congress, and not because the Oklahoma law did not make provisions therefor. The county courts of

this state, in the exercise of their probate jurisdiction, have jurisdiction to determine heirship in the distribution of the estate of a deceased person. It follows that when the Secretary of the Interior, pursuant to the aforementioned act of Congress, issued a patent to the heirs of John Nestell, which operated to remove all restrictions as to the sale, incumbrance, or taxation of the land therein conveyed, without having determined subsequent to his death who were in fact his heirs, all federal supervision over the allotment ceased, and the same became a part of the estate of the said decedent, and came within the jurisdiction of the probate court of Caddo county, and was subject to be distributed to his heirs the same as any other property of which he died seized, although it was not subject to the payment of his debts, or to be taken pursuant to any contract made prior to the removal of restrictions on the land. The probate court of Caddo county was, therefore, acting within its jurisdiction in determining who, in fact, were heirs of the decedent, and in ordering the estate distributed according to such findings.

[4, 5] The judgment of the probate court is attacked on several other grounds, all of which are collateral, and so long as the decree of distribution remains unreversed, unmodified, and unappealed from it must be given full force and effect, and therefore the contention that the court was without jurisdiction to render the decree on account of irregularity in the proceedings is not tenable. One of the alleged defects in the proceedings is that prior to the rendition of the decree the court had already rendered a final judgment in the cause, and that it was without jurisdiction to render another. The judgment previously rendered by the court only went to the extent of approving the account of the executor and ordering his discharge upon his compliance with the order, and it did not attempt to determine the heirship of the decedent or to distribute his real property. At the time of the entering of the decree of distribution the executor had not been discharged, since an appeal had been taken from the order settling his final account and ordering his discharge upon compliance with the order of the court, and, although the appeal had been dismissed, nothing further had been done. There is not any merit in the contention that the court could not enter a decree of distribution, except upon a final settlement, for authority is conferred upon the court to distribute the estate after settlement of the final account under

section 5413, Comp. Laws 1909 (section 6463, Rev. Laws 1910), which reads, in part, as follows:

"Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate. * * *

[6] A judgment may be assailed for fraud extraneous to the issues practiced on the court, or on the party against whom the judgment was rendered, which prevented him from having a fair opportunity to present his case, and it is immaterial, when a judgment is attacked on this ground, whether it is denominated direct or collateral. *Griffin v. Culp*, 174 Pac. 495. But the alleged fraud relied on to set aside the judgment of the county court is that the testimony upon which the decree of distribution was based was false, and such a claim cannot prevail in this action, for it is well settled that a judgment cannot be set aside in an independent proceeding, where the fraud alleged inheres in the verdict. *Brown et al. v. Trent et al.*, 36 Okl. 239, 128 Pac. 895; *Driskill v. Quinn et al.*, 170 Pac. 495; *Thigpen v. Deutsch et al.*, 166 Pac. 901. In *Brown v. Trent*, supra, this court said:

"Not every kind of fraud will vitiate a judgment. There are authorities holding that a judgment or verdict obtained on perjured testimony can be set aside in equity; but this is not believed to be the law. To investigate the character of testimony upon which a judgment was obtained would be to retry the issues submitted in the trial at which the judgment was obtained, and the result would be that there would be no end to the litigation. The fraud which will vitiate a judgment must be extraneous to the issues, and such as deprived the party of a fair opportunity to present his case."

[7] The court found for the defendants, which includes a finding that there was no fraud extraneous to the issues in procuring the decree of distribution in the county court, and in an action for the recovery of real estate, tried to the court without a jury, under the well-settled decisions of this court, the finding of the court upon disputed questions of fact will be given the same weight and effect as the verdict of the jury, and, where reasonably supported by the evidence, will not be disturbed on appeal.

Finding no reversible error in the record, the judgment is affirmed.

OWEN, C. J., and KANE, HARRISON, and JOHNSON, JJ., concur.

RASURE, County Superintendent of Public Instruction, v. SPARKS et al. (No. 10556.)

(Supreme Court of Oklahoma. July 22, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. MANDAMUS \S 79—DUTY OF COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION — DISSOLUTION OF SCHOOL DISTRICT — SUFFICIENCY OF PETITION.

Where, in a proceeding for the dissolution of a consolidated school district, authorized and provided for by chapter 202, Laws 1915, a petition is filed purporting to contain the signatures of one-half or more of the legal voters of the consolidated school district, asking that the county superintendent of public instruction call an election "for the purpose of voting on the question of whether such consolidated school district shall be dissolved," and which petition is accepted as sufficient by such school superintendent, and an election is duly called and held, at which 60 per cent. of the voters of the consolidated district, voting thereat, vote in favor of dissolution, and the proper officer of such special election makes report of the election and the result thereof to the county superintendent, who refuses to discharge the duties imposed in section 2 of the act, such superintendent will not be permitted, in a mandamus action to compel the performance of his statutory duties, to attack the sufficiency of the petition or the qualifications of the voters at the election; the proceedings had being regular on their face and constituting a prima facie compliance with the statute.

2. MANDAMUS \S 79—SCHOOLS AND SCHOOL DISTRICTS \S 36—MINISTERIAL ACT—STATUTORY DUTY OF COUNTY SUPERINTENDENT.

The duties imposed upon a county superintendent by section 2, c. 202, Laws 1915, in respect to declaring a consolidated school district dissolved, and the filling of vacancies in the "revived" school districts, involve the exercise of no discretion on the part of such superintendent, but are purely ministerial in their character, and their performance may be compelled by mandamus.

3. SCHOOLS AND SCHOOL DISTRICTS \S 44 — DISSOLUTION OF CONSOLIDATED SCHOOL DISTRICT—ELECTION—STATUTE.

Section 2, c. 202, Laws 1915, providing that "if sixty (60) per cent. of the voters of such district at the election held * * * shall vote to dissolve the consolidated district," etc., requires only that 60 per cent. of the votes cast at the election shall be in favor of dissolution, and not that 60 per cent. of all the voters of the district shall vote therefor.

4. ATTORNEY GENERAL \S 6—ADVICE AS TO DUTIES OF COUNTY SUPERINTENDENT.

It being the duty of the Attorney General, under section 8059, Rev. Laws, to give his opinion in writing, when requested, "upon all questions of law submitted to him by * * * any state official, commission or department," such advice, when obtained by the state superintendent

ent of public instruction for and at the instance of a county superintendent, respecting the discharge of the latter's official duties, should be followed.

Error from District Court, Caddo County; Will Linn, Judge.

Mandamus by R. D. Sparks and others against C. W. Rasure, County Superintendent of Public Instruction, Caddo County. From a judgment granting a peremptory writ of mandamus, defendant brings error. Affirmed.

Gasper Edwards, of Oklahoma City, for plaintiff in error.

Bond, Melton & Melton, of Chickasha, for defendants in error.

SHARP, J. On October 8, 1918, there was presented to C. W. Rasure, county superintendent of public instruction of Caddo county, addressed to him, a petition in due form, which on its face purported to bear the signatures of 177 legal voters of consolidated school district No. 22, Caddo county, asking that he call an election or meeting for the purpose of determining whether or not the consolidated district should be dissolved. Acting upon such petition, the county superintendent duly called an election, whereby there was submitted to the voters of the consolidated school district the question of the dissolution thereof. At the election so held 222 votes were cast, 140 in favor of, and 82 against, dissolution. On the same day the election officers of the consolidated district reported in writing to the county superintendent that the election had been held and the number of votes for and against the issue of dissolution. Notwithstanding the result of the election, and the due certification thereof, the county superintendent refused to declare the consolidated district dissolved, and to appoint school board officers in district No. 153, one of the school districts located within the consolidated district. Mandamus proceedings were thereupon begun by Sparks, Klumpp, and Kirk, resident taxpayers and patrons of school district No. 153, to compel the issuance of a proclamation declaring the consolidated district dissolved and to appoint a school board in school district No. 153. The petition in substance alleges the facts above set forth.

The answer does not put in issue, but in effect admits, the presentation of the petition purporting to bear the signatures of one-half of the legal voters of the district, pursuant to which a call for an election was made. But it was charged in effect that, after the election was called, four affidavits were filed in the office of the superintendent to the effect that the district contained in fact 385 legal voters, and that, in reliance

upon the proof submitted tending to show that the petition was insufficient, in that it did not bear the requisite number of signers, and that 60 per cent. of all of the legal voters of the consolidated district did not vote in favor of dissolution, and because "the day on which such purported election was held was a very rainy, stormy, and muddy day, and that the epidemic known as the 'Flu' was quite prevalent in said district, all of which prevented a full vote on the question of dissolution," respondent had refused to act. Notwithstanding the action was for mandamus to compel the defendant, as a public official, to discharge a purely ministerial duty, it seems that the trial court permitted him to introduce a great number of witnesses upon the question of whether certain of the petitioners were qualified voters, and upon the further question of the number of qualified voters in the consolidated district. The result of this indulgence was a judgment against the respondent; the court finding that the petition was signed by more than one-half of the legal voters of the consolidated district, and that at the election held more than three-fifths of the voters, voting at such election, voted in favor of dissolution.

[1] The statute, pursuant to which the proceedings for the dissolution of the consolidated district were held, is found in sections 1 and 2, chapter 202, Laws 1915, wherein it is provided that the county superintendent of public instruction may, upon petition of one-half of the legal voters of any consolidated school district, call an election at some convenient place in such consolidated school district, for the purpose of "voting on the question whether such consolidated school district shall be dissolved." Notice of the election is required to be given by written or printed notices posted in at least five public places in the consolidated district at least 10 days prior to the election. If 60 per cent. of the voters of such consolidated district at the election shall vote to dissolve the consolidated school district, the clerk of said special election shall report such fact to the county superintendent of public instruction, who shall thereupon declare such consolidated school district dissolved, and that the original school districts which had united in forming the consolidated district "will thereupon be revived, and it shall be the duty of said county superintendent to appoint persons to fill all vacancies in the school boards for each of the school districts, who shall serve for the respective terms as other like officers in other school districts." It will thus be seen that it is the duty of the county superintendent, when the issue submitted is carried by the requisite vote and report thereof is made, to declare the consolidated district dissolved, and to appoint members of the school board to fill vacancies in the respective school districts theretofore con-

tained within the consolidated district. This duty involves no exercise of discretion on the part of the county superintendent, but is purely ministerial. The duty is one enjoined by statute upon a public official to put into effect and consummate the wishes of the voters, as expressed by them at an election publicly held. The statute does not give to the county superintendent the right to nullify the result of such an election, on the ground that in the opinion of the county superintendent "it would be better to retain the district as consolidated." No such autocratic or arbitrary power is conferred upon the county superintendent by the governing statute. The duty enjoined is imperative, as was the case in *Jordan v. Davis*, 10 Okl. 329, 61 Pac. 1063, wherein Chief Justice Burford said, referring to section 5820, St. 1893:

"It was not intended by the Legislature to vest the officer with any arbitrary power of refusal, nor with a mere discretionary power to be exercised according to his whims or inclinations."

That mandamus is a proper remedy, and will lie in such cases, is well established in this jurisdiction. *Territory ex rel. Jones, County Attorney, v. Hopkins, Auditor*, 9 Okl. 133, 59 Pac. 976; *Davis, County Judge, v. Caruthers, District Judge*, 22 Okl. 323, 97 Pac. 581; *Smock v. Farmers' Union, State Bank*, 22 Okl. 825, 98 Pac. 945; *Threadgill v. Cross, Secretary of State*, 26 Okl. 403, 109 Pac. 558, 188 Am. St. Rep. 964; *Norris v. Cross, Secretary of State*, 25 Okl. 287, 105 Pac. 1000; *State ex rel. Freeling v. Lyon, Secretary of State*, 165 Pac. 419. The case is one coming clearly within section 4907, Revised Laws, providing that the writ of mandamus may be issued by the district court to any inferior tribunal, corporation, board, or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station. It is true that the writ will not issue in any case where there is a plain and adequate remedy in the ordinary course of the law (section 4908, Revised Laws); but in the instant case had the wronged school patrons a plain and adequate remedy in the ordinary course of the law? They had filed their petition in due form, purporting to be signed by 177 voters of the district, and which was accepted by the county superintendent as sufficient to authorize the call for an election. At the election more than 60 per cent. of the voters, voting thereat, registered in favor of the dissolution. Counsel say they should have appealed. We know of no statute authorizing an appeal in such cases. If there were those who believed the election was illegal, they might, if they had chosen so to do, have instituted proceedings to contest the election in some

form. This they did not do, but, as we are fairly warranted in saying, useu the office of the county superintendent to thwart the will of the majority of the electors. When the returns of the election were reported to the county superintendent, and disclosed that 60 per cent. of the voters of the district voting at the election were in favor of dissolution, a prima facie compliance with the statute was made out; that is to say, the issue of dissolution was decided favorably to those advocating dissolution, and thereupon it became the duty of the respondent to so declare, and make the necessary appointments to the school boards of the different districts.

The precise question has not heretofore been presented to this court, to our knowledge. There is a class of cases, however, which we think, by analogy, are applicable, holding that in an action in mandamus, where a relator shows a prima facie title to a public office, he is entitled to the aid of the writ to obtain possession of the books, records, insignia, paraphernalia, and official belongings of such office, and that in granting the writ the court will not go behind such showing and try the title thereto. *Ewing v. Turner*, 2 Okl. 94, 35 Pac. 951; *Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14; *Matney v. King*, 20 Okl. 22, 93 Pac. 737. As held in the latter case, mandamus is the proper remedy to compel recognition of the person holding the prima facie title to the office. In *Delgado v. Chavez*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. Ed. 578, it was said by Justice Brewer that the direct purpose and object of the writ of mandamus was to compel the defendant to discharge his duty, and to forbid him to assume to determine any contest between rival factions. The rule that mandamus will lie in favor of one having a prima facie title to office is very generally observed. *Ellis v. Armstrong*, 28 Okl. 311, 114 Pac. 327; *Mitchell v. Carter*, 31 Okl. 592, 122 Pac. 691; *Jewitt v. West*, 33 Okl. 703, 127 Pac. 476; *State ex rel. Love v. Smith*, 43 Okl. 231, 142 Pac. 408, L. R. A. 1915A, 832, and note; *Ross v. Hunter*, 53 Okl. 423, 157 Pac. 85. *Mitchell v. Carter*, *supra*, was a mandamus proceeding, brought by an officer elected in a municipal election to require the turning over to him of the belongings of such office by an officer claiming to hold by virtue of his election under an old charter; the relator in the mandamus proceeding holding a certificate of election by virtue of a municipal election held under the powers of such charter, and it was held that the respondent would not be permitted to contest the title or right of the relator to such office on the legal grounds of the invalidity of such municipal election, on account of the failure to hold a primary election pursuant to the primary election law passed by the Legislature to govern municipalities, or other irregularities in holding such election.

Threadgill v. Cross, Secretary of State, 26 Okl. 403, 109 Pac. 558, 138 Am. St. Rep. 964, and *State ex rel. Cruse, Governor, v. Cease*, 28 Okl. 271, 114 Pac. 251, Ann. Cas. 1912D, 151, while involving somewhat different questions may be looked to with profit by ministerial officers in determining their right to question the constitutionality or validity of acts of the Legislature. Thus it will be seen that the answer contained no sufficient defense, unless it be, for the reason contended for by respondent, that the statute, properly construed, requires 60 per cent. of all of the resident voters of the district, and not 60 per cent. of those voting at the election. This question will presently be considered. The defense set up by respondent, if authorized, would enable a public officer, charged with the performance of a plain ministerial duty, the enforcement of which was invoked by mandamus, to collaterally attack the sufficiency of the petition, which he had himself theretofore approved and acted upon, and put in issue the validity of the election, the returns of which, as certified to him, made a prima facie showing in favor of the issue submitted at the election.

[2] It is very generally held that certifying or declaring the result of an election is a ministerial duty, which may be compelled by mandamus (High's Extr. Legal Rem. §§ 55-60; *Spelling on Inj. and Extr. Rem.* § 62; 26 Cyc. 278; 18 R. C. L. 275); and this notwithstanding the refusal to act was on the ground of fraudulent voting (*People v. Bell*, 54 Hun, 567, 8 N. Y. Supp. 254, affirmed in 119 N. Y. 175, 23 N. E. 533; *Hudmon v. Slaughter*, 70 Ala. 546; *State v. County Judge*, 7 Iowa, 186; *State v. Monroe*, 46 La. Ann. 1276, 15 South. 625), as mandamus is not the proper remedy for determining the result of a disputed election (*Spelling on Inj. and Extr. Rem.* §§ 52-57; High's Extr. Legal Rem. § 56a). And so may be effectuated the statute prescribing that "It shall be the duty of the said county superintendent to appoint persons to fill all vacancies in the school board for each of the school districts" within the dissolved consolidated district. The appointment to fill such vacancies, which arise by operation of law, involves the exercise of a duty enjoined by statute upon the county superintendent, and requires, when necessary, the use of the writ of mandamus to compel him to respect and obey the law. The consequences of a different doctrine, under a polity such as ours, where the right to administer the duties of government is predicated upon the exercise of the elective franchise by its people, are too serious to permit any doubt to be raised as to the power of the courts to compel the performance of official duties on the part of an officer charged with a purely ministerial duty. The wisdom of the electorate in dissolving the consolidated district was not subject to

review, nor could it be annulled or made nugatory by the arbitrary acts of a ministerial officer, the servant, rather than the master, of the legal voters of the district.

[3] Does the statute under which the election was held require that 60 per cent. of the qualified voters of the consolidated district vote in favor of dissolution, or is it sufficient that 60 per cent. of the votes cast at the election be in favor of the dissolution of such district? The statute in this respect reads:

"If sixty (60) per cent. of the voters of such consolidated district at the election, held as provided by the first section of this act, shall vote to dissolve the consolidated school district, the clerk of said special election shall report such fact to the county superintendent of public instruction." Laws 1915, c. 202.

Clearly the statute means that but 60 per cent. of those voting at the election need cast their ballots in favor of dissolution, as the language employed refers, not alone to the voters of the consolidated district, but to the voters of such district voting "at the election." In other words, as none but resident voters of the consolidated district could vote at the election, the statute should be interpreted as if it read: "Sixty (60) per cent. of the voters at the election." Section 28, art. 10, Constitution, declares that no county, town, township, school district, or other political corporation or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any one year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election to be held for that purpose. This provision of the Constitution was under consideration in *Mason v. School District No. 72*, 168 Pac. 798, wherein the contention was made that at the election provided for three-fifths of all of the electors residing in the school district were necessary to carry such election. The contention was not sustained, the court holding that it was necessary only to obtain a majority of three-fifths of the legal voters voting at the election. See, also, *North v. McMahan*, 28 Okl. 502, 110 Pac. 1115; *Faulk v. Board of Commissioners*, 40 Okl. 705, 140 Pac. 777. The constitutional provision and the statute under consideration, from the standpoint of literary composition, bear a strong similitude; their legal requirements are identical.

[4] The county superintendent was advised

by the Attorney General of the state, through the office of the state superintendent of public instruction, prior to the institution of mandamus proceedings, that the statute required but 60 per cent. of those voting at the election, and not 60 per cent. of the entire voting population of the consolidated district, to effect its dissolution. Not only this, but upon receipt of such advice the superintendent promised to appoint the board members. This is shown by his letter to a citizen of Ft. Cobb, under date of November 6, 1918. It is the duty of public officers, such as county superintendents, when in doubt as to the construction of an act of the Legislature, to follow, and not disregard, the advice of the Attorney General, charged with the duty of giving "opinions in writing upon all questions of law submitted to him * * * by any state official, commission, or department." Rev. Laws, § 8059. This advice having been communicated to the state superintendent of public instruction by the Attorney General, and transmitted by him to the county superintendent, correctly informed the county superintendent as to the validity of the election. Had it been heeded, and had the county superintendent also sought advice as to his right to otherwise attack the validity of the dissolution proceedings, it is not likely that this regrettable instance of setting at defiance the will of the electorate, with all of its evil consequences, would have arisen.

The refusal to perform a plain statutory duty, particularly where the act is purely ministerial, and is intended to put into force and make effective the result of an election, is a very serious offense. As an evidence of the importance of this duty, and how the law regards its violation, section 4918, Revised Laws, provides that the court may impose a fine, not exceeding \$500, upon any public officer, body, or board, charged with the performance of any public duty specially enjoined by law, where such officers refuse or neglect, without just excuse, to perform such duty.

The first, second, third, and fourth assignments of error urged by plaintiff in error are deserving of no consideration, in view of the record of the proceedings had at the trial.

The judgment awarding a peremptory writ of mandamus is affirmed.

KANE, HARRISON, JOHNSON, and McNEILL, JJ., concur.

MOLINE PLOW CO. v. ADAIR. (No. 8925.)

(Supreme Court of Oklahoma. June 17, 1919.
Rehearing Denied Sept. 16, 1919.)

(Syllabus by the Court.)

1. COURTS \S 169(5)—JURISDICTION—COUNTY COURT—AMOUNT IN CONTROVERSY—SET-OFF.

Prior to the act approved March 9, 1917 (chapter 119, p. 184, S. L. 1917), county courts were without original jurisdiction in civil actions, where the amount involved, exclusive of interest, was less than \$200; but where an action was filed prior to the above act for \$89.90, interest, and attorney's fees, upon a promissory note, and the defendant filed a counterclaim for \$325, the plaintiff filed a reply, and trial was had, *held*, the court had jurisdiction to try the counterclaim.

2. SALES \S 285(2)—BREACH OF WARRANTY—"IMMEDIATE NOTICE."

A warranty providing, "If for any reason the machine should not appear to work properly on its first day's use by the purchaser, he must give immediate notice in writing to the dealer, stating in what respect he deems the machine to fail," *held*, that by the term "immediate notice" is ordinarily meant due diligence, in a reasonably prompt time, as the nature and the circumstances of the particular case demand.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Immediate Notice.]

3. SALES \S 426—BREACH OF WARRANTY—PROCEDURE.

Where parties to a contract of sale stipulate what course shall be pursued by the vendee in the event the warranty fails, such provision must be followed by the vendee in seeking to enforce the warranty.

Error from County Court, Carter County; Thos. W. Champlon, Judge.

Action by the Moline Plow Company against W. R. Adair, with cross-action or counterclaim by defendant. Verdict and judgment for defendant, motion for new trial overruled, and plaintiff brings error. Reversed and remanded.

A. Eddleman, of Ardmore, and J. W. Harreld and Stephen C. Treadwell, both of Oklahoma City, for plaintiff in error.

Thos. Norman and Jas. H. Mathers, both of Ardmore, for defendant in error.

PITCHFORD, J. The plaintiff instituted this action in the county court of Carter county to recover upon a note in the sum of \$89.90, with interest thereon and attorney's fees, and what is usually termed a title note. It was given as part of the purchase price of a binder. The plaintiff claimed a lien on the binder, and asked for a foreclosure of its lien and the sale of the property. The de-

fendant, W. R. Adair, filed an answer, in which he admitted the execution of the note, but defended on the ground that the binder did not come up to the warranty contained in the contract of sale, and as a cross-action or counterclaim he set up that he lost a crop of wheat and oats, because he was unable to harvest the same with the defective binder, and claimed damages for the loss of the crop in the sum of \$325. The plaintiff filed a reply to the counterclaim of the defendant. The defendant, having admitted the execution of the note, assumed the burden of proof. The case was tried to a jury on September 16, 1916, and a verdict returned in favor of the defendant in the sum of \$100. Judgment was entered thereon, and motion for a new trial filed and overruled. The case comes to this court on appeal.

[1] Plaintiff assigns as error the action of the court in overruling plaintiff's demurrer to the third paragraph of the defendant's answer, also to various instructions given and refused by the court, and also to the introduction of certain evidence. Suffice it to say we have examined the demurrer, together with the instructions and evidence complained of, and are unable to see wherein the substantial rights of the plaintiff have been affected thereby. The assignment as to the verdict of the jury being contrary to the evidence is a more serious proposition. At the threshold, however, we are confronted with this proposition; that is, whether or not the county court had jurisdiction to try the cause. At the time plaintiff filed its action herein, section 1816, R. L. 1910, was in force, which gave the county court jurisdiction with the district court in all civil cases in any amount over \$200, and not exceeding \$1,000, exclusive of interest. There are a number of decisions by this court holding that the county court had no jurisdiction where the amount involved was less than \$200. Section 1816, R. L. 1910, was amended by act of 1917 (S. L. p. 184), giving county courts concurrent jurisdiction with the district courts in civil cases in any amount not exceeding \$1,000, exclusive of interest. Section 2 of the 1917 act provides:

"All cases heretofore filed in the county courts for amounts of less than two hundred (\$200) dollars shall be deemed to have been validly filed on the day the petition and praecipe for summons were filed, and the action shall be deemed to have been legally commenced on said day, and all proceedings had in the county courts in cases brought for less than two hundred (\$200) dollars shall be deemed legal and valid, and any such case which has been dismissed on the ground of want of jurisdiction may be reinstated on motion, a copy of which motion shall be served by the applying party upon the opposite party or his attorney of record."

This act having been passed and approved subsequent to the trial of the cause in the lower court, we are not called upon to decide what effect the amendment would have upon matters passed upon prior thereto, or how matters pending in the county court would be affected. When the defendant filed his counterclaim for \$325, being an amount at that time within the jurisdiction of the county court, and the plaintiff filed the reply thereto, then the court was clothed with full jurisdiction to try the counterclaim and for all purposes connected therewith. Section 4714, R. L. 1910.

[2] The warranty given by the plaintiff at the time of the sale of the machine and execution of notes was as follows:

"Each machine is warranted to be well built, of good material, and capable of doing good work on proper management in operating it. If for any reason the machine should not appear to work properly on its first day's use by the purchaser, he must give immediate notice in writing to the dealer from whom the machine was purchased, stating in what respect he deems the machine to fail, and must allow a reasonable time for a competent person to be sent to remedy the alleged defects; the purchaser to render necessary and friendly aid for that purpose. If then it cannot be made to work well, the purchaser shall return it at once to the dealer from whom he purchased it, and another machine shall be given and taken in its place, and this shall be a complete settlement between the purchaser and ourselves. No provisions of this warranty can be waived, altered, or modified in any respect by any dealer. Continuous use of the machine, or at intervals through the harvest season, or failure to notify as above, or to return the machine, as above provided, shall be deemed positive acceptance of it by the purchaser."

The next matter to be considered is: Does the evidence in the case entitle the defendant to a judgment for damages? We have not only examined the evidence set out in the briefs, but, in order to sustain the judgment of the trial court, we have carefully gone over the entire evidence in the record, for we felt, if the defendant had been damaged and had lost his oat crop, as alleged, by purchasing a binder which completely failed to do the work guaranteed, having relied upon the warranty of the plaintiff, he (the defendant) would be entitled to recover all the damage he sustained resulting from the failure of the binder to do the work for which it was purchased, and which it was warranted to do.

We find two notes were executed by the defendant on the 8th day of June, 1915, the date upon which the binder was received. These notes were for \$85 each, payable, the first on the 1st day of September, 1915, and the second on the 1st day of September, 1916. The plaintiff at the same time executed the warranty above mentioned. After the defendant received the machine, to wit, the

8th day of June, 1915, he tried to operate the same, but without satisfactory results. On the Sunday following he made a further attempt, but did not succeed. Thereafter he used the machine in cutting grain for some of his neighbors, and found on every occasion it would not work as warranted; in fact, so far as we can gather from the evidence, it failed in all respects to be as warranted. It was the duty of the defendant, on the first day's use of the machine, if it failed to work properly, to give immediate notice in writing to the dealer. The dealer was entitled to have this notice given. He then would have had an opportunity to remedy the defect, but we find that no notice was given until the 26th day of June, 13 days thereafter, notwithstanding the defendant lived between four and five miles from the dealer from whom the machine had been purchased. It was the duty of the defendant to give the notice required, and as required, and, if he failed to do so, he could not claim the damages sought. By the term "immediate notice" is ordinarily meant due diligence in a reasonably prompt time as the nature and the circumstances of the particular case demand, and the question of what is reasonable time is usually for the jury to ascertain from all the evidence in the case and under proper instructions. *Horsfall v. Pac. Mutual Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846; 21 Cyc. 1724.

But under the evidence in the case we are unable to conceive how the court could allow this verdict to stand under the notice given, nor is there any evidence showing that the defendant suffered any injury to his crops after the notice of the 26th of June. We have examined the authorities cited by the defendant, wherein damages were allowed in cases in some respects similar to this; but we find in each of the cases cited there was a substantial compliance on the part of the purchaser with the terms of the warranty, in that immediate notice had been given. True, the notice therein given was not in writing, but no objection was made to the notice being oral, and the purchaser was promised in each instance the defect would be remedied, and, relying on the promise so made, suffered loss, and it was held that he was entitled to recover for the damages suffered.

In the case of *Bishop-Babcock-Becker Co. v. Estes Drug Co.*, 163 Pac. 276, Mr. Justice Kane, delivering the opinion of the court, said:

"A person damaged by the breach of the warranty of the fitness of an article of personal property for a particular purpose may recover anticipated profits, where the business of which the plaintiff was deprived was contemplated, or can reasonably be presumed to have been contemplated, by the parties when the contract was made, and it is reasonably certain that

gain or profit would have been derived therefrom, although the amount of such gain, to some extent, may be somewhat speculative and uncertain. It being apparent that some loss was suffered, it is then entirely proper to let the jury determine what the loss properly was, from the best evidence the nature of the case affords."

See Mackey v. Boswell, 162 Pac. 193; First State Bank of Mannsville v. Howell, 41 Okl. 216, 137 Pac. 657.

In Continental Gin Co. v. Sullivan, 48 Okl. 332, 150 Pac. 209, the court said:

"Where a party purchases a piece of machinery under a contract which provides for a specific notice to be given the seller in case the machine proves unsatisfactory, *held*, that such notice is for the sole benefit of the seller, and may be waived by him; and, if waived by him, he cannot complain because the contract notice was not given. * * * Where a party under a written contract and warranty purchases an attachment for a gin plant, and then enters into a subsequent oral contract with the seller to properly install this attachment for him, if the attachment does not come up to the written warranty, and is so improperly installed as to cause his gin to put out water-packed bales, and thereby damage the purchaser's business, he may rescind the contract of purchase, and recover the purchase price of the attachment, and in the same suit recover such damages for the breach of the contract to properly install the attachment as he is able by competent evidence to prove he has sustained."

[3] We cannot take judicial notice of the length of the harvest season in Carter county in 1915. We find the provision in the warranty that the continuous use of the machine, or at intervals through the harvest season, or failure to notify or return the machine, should be positive acceptance of it by the defendant. We find, however, that the defendant was cutting grain for his neighbors, and nothing to indicate that his grain was injured after the 26th of June, the date he claimed the dealer was notified of the defect in the machine. It is a well-settled principle of law that, where a written contract provides what the parties shall do, the provision must be complied with. The warranty in the case at bar was as much a part of the contract as the notes. Plaintiff and defendant stipulated the course to be pursued in the event the warranty failed. This point has been decided by this court in the case of Hope v. Peck, 132 Pac. 344. Mr. Justice Williams, delivering the opinion, said:

"Where parties to a contract of sale have stipulated what course shall be pursued by the vendee in the event the warranty fails, such provision must be followed by the vendee in seeking to enforce the guaranty."

To the same effect, see Scott v. Vulcan Iron Works Co., 31 Okl. 384, 122 Pac. 186; Nichols Shepard Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62.

We cannot subscribe to the view of the plaintiff to the effect that, if the contract was not rescinded, then there should be judgment rendered in this court for the amount of the note. Certainly the plaintiff could not seriously ask this court to render such a judgment for the reason that the machine, as shown by the evidence, was returned to the dealer and by him received and used continuously during the harvest season of 1916. It might be plaintiff has evidence not presented at the trial; otherwise, we are unable to understand how he could hope for or expect a verdict in his favor for the amount evidenced by the notes.

The judgment of the lower court is reversed and remanded.

OWEN, C. J., and McNEILL, HIGGINS, and SHARP, JJ., concur.

WINEMILLER v. PAGE et al. (No. 7953.)

(Supreme Court of Oklahoma. June 10, 1919.)

(Syllabus by the Court.)

1. EVIDENCE \S 457 — PAROL EVIDENCE — TECHNICAL EXPRESSIONS IN CONTRACT.

Where a written instrument contains words or expressions which are of a technical nature, being connected with some art, science, or occupation, and unintelligible to the common reader, yet susceptible of a definite interpretation by experts, parol evidence is admitted for the purpose of explaining the language used, and thus effectuating the intention of the parties through the medium of their own language.

2. CUSTOMS AND USAGES \S 18—EVIDENCE \S 457—PAROL EVIDENCE—TECHNICAL EXPRESSIONS IN CONTRACT.

The case at bar is governed by the rule of law relating to the meaning of technical terms or phrases used in a particular industry or business, and not by the rule invoked by counsel, which requires the custom of a particular place and local commercial usages to be pleaded before they can be proved.

3. APPEAL AND ERROR \S 1009(4) — EQUITY CASES—FINDINGS OF FACT—REVIEW.

The rule is well settled that in actions of purely equitable cognizance the Supreme Court will not disturb the findings of fact of the trial court, unless they are against the clear weight of the evidence.

4. JOINT ADVENTURES \S 5(2)—CONTRACT TO PROCURE LEASES—MEANING OF TERMS—EVIDENCE.

Record examined, and *held*, that the findings of the trial court as to the terms of the contract sued upon, and that the phrase "carried for an eighth" has a well-defined meaning in the oil business, and as to what this phrase means among persons familiar with the oil business,

are not against the clear weight of the evidence, and are not contrary to law.

Owen, C. J., and Sharp and Johnson, JJ., dissenting.

Error from District Court, Creek County; N. A. Gibson, Special Judge.

Suit by John H. Winemiller against Charles Page and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Phil D. Brewer, of Oklahoma City, and Charles B. Rogers and Fred A. Fulghum, both of Tulsa, for plaintiff in error.

Poe, Hindman & Lundy, of Tulsa, for defendants in error Page and Omega Oil Co.

Rice & Lyons, of Tulsa, for defendant in error March Oil Co.

KANE, J. This was a suit in equity, commenced by John H. Winemiller, plaintiff in error, plaintiff below, against Charles Page, the March Oil Company, and the Omega Oil Company, defendants in error, defendants below, for the purpose of enforcing certain equitable rights which it was claimed arose out of a certain oral contract pertaining to the procurement of several oil and gas leases, entered into by and between John H. Winemiller and one Nicholas Snyder. The cause was tried before Special Judge N. A. Gibson, who made special findings of fact and conclusions of law in favor of the defendants, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The plaintiff's action was based upon the theory that his contract with Snyder, for whom he agreed to procure certain oil and gas leases in the vicinity of Tulsa, was entered into in such circumstances as to create either (a) a joint adventure; (b) what is called in mining countries a grubstake contract; or (c) the relation of mining partners between himself and Snyder; or (d) a trust by operation of law—and that in either of these events the effect of the contract was to vest in the plaintiff an equitable interest in the leaseholds, although the leases were taken in the name of Snyder, which was enforceable against the defendants; they having purchased the leases from Snyder or his assigns with notice of the contract. After hearing the evidence the trial court found as a fact that the contract entered into between Winemiller and Snyder was as follows:

"That in the year 1906 the plaintiff, John H. Winemiller, by parol agreement made with Nicholas S. Snyder, agreed to procure for the said Snyder oil and gas leases upon lands in the vicinity of Tulsa; that as a consideration for the said services Snyder agreed to pay Winemiller's reasonable and necessary expenses and to carry said Winemiller for a one-eighth interest free in the first well to be drilled upon each

tract of land so leased, and to further carry the said Winemiller for a one-eighth interest in all subsequent wells drilled upon said lands; that the expenses of drilling all of said wells by the terms of said agreement were to be paid by the said Snyder if nonproducing or out of the production from said leases."

After finding that the plaintiff procured for Snyder certain oil and gas leases upon various tracts of land in accordance with the terms of this contract, which were subsequently assigned to the Omega Oil Company, who in turn assigned part of them to the March Oil Company, the court made the following conclusions of law:

"(1) That the plaintiff has no title or interest in and to the leasehold estates for oil and gas described in the plaintiff's petition.

"(2) That the contract by parol entered into by the plaintiff and Nicholas Snyder, in so far as it contemplated the assignment and conveyance to the plaintiff of any interest in said leasehold estates, or any other interest other than a share in the profits derived from the operation thereof, was not enforceable.

"(3) That the words 'carried for one-eighth,' or 'one-eighth carried,' have well-defined and well-established meanings among the oil men and in the oil country in Oklahoma, and were used by Snyder and the plaintiff in their ordinary meaning, and that as used by them they operated to confer upon the plaintiff no interest in the leasehold estates proposed to be taken and which were subsequently taken for Snyder by the plaintiff, but only passed from the sale or operation of the said leases, after the payment of the cost of procuring the same leases and the operation of the same.

"(4) That Snyder, as the holder of the said leases, had a full and complete right at all times to exercise his own judgment as to whether he would drill wells upon said leases, or would assign and transfer said leases, and he was vested with full and complete power to sell, transfer, and assign said leases without the consent of said plaintiff, and his assignment to the Omega Oil Company operated to confer upon that company a full and complete title to the said leases, free and clear of any claim and demand of the plaintiff."

In view of the conclusion we have reached as to the conclusiveness of this finding of fact and of these conclusions of law, it will not be necessary to notice any of the numerous assignments of error presented for review, except such as directly question their correctness.

Under the heading "Discussion of Specific Errors," counsel for Winemiller say in their brief:

"The eighth, ninth, and tenth assignments of error all raise practically the same question; i. e., the meaning of the words 'carried for one-eighth,' or 'one-eighth carried,' and as to whether or not these words had a settled meaning among the oil men in Oklahoma, and as to whether or not plaintiff, at the time of entering into the contract with Snyder, understood the meaning of the words as found by the court."

Under this heading counsel contends: (1) That, the defendants not having pleaded the usage and custom which the court found fixed the meaning of the words "carried for one-eighth" or "one-eighth carried," the evidence on that point was erroneously admitted; (2) that the findings of fact and conclusions of law of the trial court upon this point are against the clear weight of the evidence and are contrary to law. Whilst it is true, as a general rule, that the custom of a particular place and local commercial usage must be pleaded (12 Cyc. 1097), we are unable to sustain either of these contentions.

[1] The second amended petition filed by the plaintiff, the petition upon which the case was tried, contains no averments from which the defendants or their attorneys could anticipate what the precise terms of the oral contract sued upon would be shown to be, or that the plaintiff would assert that a joint adventure, or a grubstake contract, or a trust by operation of law, would arise out of a contract by the terms of which he was to be "carried for one-eighth." The testimony of Winemiller was that he was to be "carried one-eighth interest," and this phrase occurs again and again in the testimony of all of his witnesses, who testified as to the terms of the contract. If, as we believe, this phrase is unintelligible to persons not familiar with the oil business, and particularly that branch of it pertaining to procuring oil and gas leases, then the plaintiff himself presented a contract for construction which required the evidence of experts, to aid the courts in determining its meaning. It is the duty of the courts to construe contracts, whether oral or written, and where words or phrases of a technical nature connected with any art, science, or occupation are used, witnesses familiar with such art, science, or occupation may be called for the purpose of explaining such language. We think the applicable rule of law is well stated in 17 Cyc. 685, as follows:

"Where a written instrument contains words or expressions which are of a technical nature, being connected with some art, science, or occupation, and unintelligible to the common reader, yet susceptible of a definite interpretation by experts, parol evidence is admitted for the purpose of explaining the language used, and thus effectuating the intention of the parties through the medium of their own language."

The same authority (17 Cyc. 80) states the rule in other words as follows:

"Persons familiar with any art, calling, trade, etc., may state whether a word or phrase used in it has acquired a technical meaning, and, if so, what it is in any place where the significance is relevant."

Under the doctrine thus announced evidence has been admitted to explain the meaning of "accounts" (*Nat. Bank v. Puri-*

fer Co., 102 Mich. 462, 60 N. W. 981; *Waldhelm v. Miller*, 97 Wis. 300, 72 N. W. 869); "all accounts" (*Hawley v. Bader*, 15 Cal. 44); "current funds" (*Haddock v. Woods*, 46 Iowa, 433); "taking stock" (*Ginnuth v. Blankenship, etc., Co.* [Tex. Civ. App.] 28 S. W. 828); "proceeds of sales" (*Coles v. Saitta*, 119 N. Y. Supp. 253); "bonus" (*Smith v. Crockett Co.*, 85 Conn. 282, 82 Atl. 569, 39 L. R. A. [N. S.] 1148); and various other reported cases show that this doctrine has been applied to almost every term used in commercial transactions. In the case of *Mann v. Uguhart*, 89 Ark. 239, 116 S. W. 219, the court held that the ordinary meaning of the term "carry," when used in commercial transactions, was to advance the money to pay for whatever interest might be acquired, and held that the court did not err in giving that meaning to the word "carry" in the transaction under consideration.

[2] The case at bar, it seems to us, should be governed by the rule of law relating to the meaning of technical terms or phrases used in a particular industry or business, and not by the rule invoked by counsel, which requires the custom of a particular place and local commercial usages to be pleaded before it can be proved.

Upon their second contention, under this heading, counsel say that, inasmuch as the only testimony introduced on the trial tending to prove the contract was given by the plaintiff himself, therefore it follows that the trial court must have predicated his findings solely on the testimony of Winemiller, and the Supreme Court should also look only to the testimony of Winemiller in order to ascertain what kind of a contract or agreement was entered into. We are unable to entirely agree with this contention. It is true that Winemiller testified positively that, after it was discovered that all the leases taken covered restricted Indian lands, Snyder agreed that he would assign Winemiller his one-eighth interest in the leases after they were approved by the Secretary of the Interior. It must not be lost sight of that this purported conversation did not occur at the time the contract was entered into, and that it was offered, not for the purpose of proving the contract, but for the purpose of showing that Snyder understood the contract to mean that Winemiller was to have a one-eighth interest in the leases themselves. On the other hand, this conversation is denied by the testimony of Snyder, who testified that he merely hired Winemiller to procure the leases for him, for which service he agreed to pay a stipulated sum and expenses. The trial court made no specific finding on the issue of fact raised by this particular testimony, but it seems to us that the finding hereinbefore set out resolves the question in favor of the defendants. Winemiller himself constantly reiterated in his testi-

mony that he was "working for Snyder," and that he was to be "carried an eighth interest," and his statements to the effect that by his contract with Snyder he was to have an eighth interest in the leaseholds, seem to us to be more in the nature of conclusions as to what the contract meant than statements of fact. Two of the witnesses called by Winemiller, who were present when the contract was made, also testified that Winemiller was to be "carried for an eighth." Jack Wharton, one of these witnesses, testified in effect as follows:

I knew Mr. Snyder in the East. I met him here, and he wanted me to take some leases for him. I told him I was not in position to do anything, but that I knew Mr. Winemiller, who would be a pretty good man to get to take some leases for him, and told him I would see Winemiller and bring him around and introduce him, and Mr. Snyder said, "All right." I met Mr. Winemiller, took him to the Robinson Hotel, and made him acquainted with Mr. Snyder, and they talked about the country mostly in the vicinity of Glenn Pool. Snyder told Winemiller that he would like to get him to take up some stuff for him, and said he would pay him for this work. Winemiller told him that, if he did any work for him, he would rather have some interest in some stuff; that it would probably do him more good than the money he could get for the work; and Snyder told him he would do that with him, and told him that he had done some business of that kind with me, and that he would take Winemiller in on about the same terms that he had dealt with me in the East, and they agreed that that would be all right. Snyder told Winemiller that he would furnish him expense money to get around over the country and do this traveling, and that he would make arrangements with some liveryman, so that if he did any driving out of Tulsa he could get teams any time he wanted them, and this man was to make out a bill at the end of the month and send it to Snyder. Snyder told Winemiller that in the leases he was operating for me in the East that he carried me a one-eighth in these leases. There were some leases that he told him looked better than others, and he would carry me for more wells on some properties than he would on others. It would be according to the outlook. If the wells would make so much when brought in, he would carry me in the second well, etc. If the wells were as low as 50 barrels, I was supposed to carry my own part, and he would go ahead and operate it, and hold my part of the oil to pay these expenses for operating. The conversation that I have been stating, he was telling this to Winemiller, so that Winemiller would know about what kind of a deal that he had made with me, and that he was taking him in on the same line that he and I had worked together.

On cross-examination the witness was asked if at his first conversation Mr. Snyder did not say to himself, Winemiller, and McKeever "that anything all three of you boys bring in that is good, I will carry you for an interest in it, if it take it," to which he replied, "Well, I don't know, but he probably said that." The terms that Winemiller and Snyder talked about were

the same kind that Mr. Snyder had with me in the East. Mr. Snyder was to carry me a one-eighth interest as long as he could drill wells that would make better than 50 barrels, and when they came in at less than 50 barrels I was to pay my interest, but he was to go ahead and operate it and hold my part of the oil to pay my part of the expenses. Mr. Winemiller was to have one-eighth interest, but I would not say positively whether it was to be carried clear through, or whether it was just in one well.

Mr. McKeever testified in substance as follows:

I remember a conversation had between myself and Mr. Winemiller and Mr. Snyder along about December, 1906. There were four of us together. Mr. Snyder made the proposition that any leases we would bring to him that he would carry us one-eighth. Mr. Wharton, Mr. Winemiller, Mr. Snyder, and myself were present when this conversation was had some time in December, 1906. Mr. Snyder said "that anything you boys bring in I will carry you an eighth interest in it."

It seems to us that this testimony presents a clear case for the introduction of expert evidence by persons familiar with the oil business, for the purpose of explaining the meaning of the phrases "one-eighth carried," or "carried for an eighth."

[3, 4] The remaining question for consideration is: Was the finding of the trial court as to the meaning of the phrase, "carried for an eighth," against the clear weight of the evidence? For unless it is it is binding on this court on appeal. The rule is well settled that in actions of purely equitable cognizance the Supreme Court will not disturb the findings of fact of the trial court, unless they are against the clear weight of the evidence. As to the meaning of this phrase Mr. Crosbie and Mr. Watts and other experienced oil men all agreed with Mr. Crosbie who testified:

"That the phrase 'carried for an eighth' had a well-known meaning in the oil regions of Oklahoma and that a man that carries an eighth has no responsibility at all of any indebtedness or anything, and you just merely carry him an eighth, relieving him from the responsibility of any debts, and if there is any profits or the property is sold, he gets his part, but it gives you the opportunity to do as you want to with the property."

It is true that several witnesses testified to the contrary, but in our judgment the testimony pro and con on this point was so evenly balanced that it cannot be said with any degree of fairness that the findings of the trial court were against the clear weight of the evidence. As there is no contention that the plaintiff would be entitled to recover against the parties to this action, who were not parties to the contract, unless he succeeded in establishing his contract substantially as alleged in his petition, no useful

purpose would be subverted by carrying the inquiry further.

The trial court having found upon sufficient proof that by the terms of the contract Winemiller acquired no equitable interest in the leaseholds, the judgment in favor of the defendants must be upheld. All the Justices concur, except OWEN, C. J., and SHARP and JOHNSON, JJ., who dissent.

JACKSON v. LEVY. (No. 8208.)

(Supreme Court of Oklahoma. May 27, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. RECEIVER IN ACTION TO FORECLOSE MORTGAGE—STATUTE.

Under the second subdivision of section 4979, Rev. Laws of 1910, the district courts of this state are authorized to appoint a receiver in an action to foreclose a mortgage, where it is made to appear that the conditions of the mortgage have not been performed and that the property is probably insufficient to discharge the mortgage debt.

2. PLEADING —204(2)—PETITION—GENERAL DEMURRER.

Where a general demurrer is filed to the petition as a whole, if any paragraph of the petition is good and states a cause of action, the demurrer should be overruled.

3. APPEAL AND ERROR —1043(7)—PREJUDICIAL ERROR—GRANT OF CONTINUANCE.

Where, after the commencement of the trial, the court grants plaintiff's oral motion for a continuance, such action will not be held to be reversible error, where it does not appear that the granting of the continuance prejudiced the rights of the adverse party.

4. JURY —14(4)—FORECLOSURE OF MORTGAGE—TRIAL WITHOUT JURY.

In an action to foreclose a mortgage, where no personal judgment is sought and the defendant has filed an unverified answer, the action is properly triable to the court without a jury.

(Additional Syllabus by Editorial Staff.)

5. MORTGAGES —480—FORECLOSURE BY ASSIGNEE—BURDEN OF PROOF.

In an action by an assignee to foreclose a mortgage securing a note, involving issue whether assignment was made before or after maturity of note, plaintiff, introducing the assignment showing on its face that it was before maturity, was assuming the burden of proof, and defendant was not required to assume it, but only to rebut plaintiff's evidence.

6. APPEAL AND ERROR —1170(7)—TECHNICAL ERROR—STATUTE.

In such action, where the evidence showed that the assignment was made on the date shown on its face and before maturity of note,

any error in requiring defendant to show whether assignment was made before or after maturity could not be taken advantage of by defendant, in view of Rev. Laws 1910, § 6005.

7. APPEAL AND ERROR —757(3) — ASSIGNMENT OF ERROR—REVIEW.

An assignment of error in excluding evidence to prove the several defenses will not be considered, where counsel did not comply with Supreme Court rule 25, requiring the party complaining of exclusion of evidence to set out in the brief the full substance of the testimony and his specific objection thereto.

8. BILLS AND NOTES —485—PLEADING —291(4)—ACTION FOR FORECLOSURE—UNVERIFIED DENIAL—EFFECT.

In action for foreclosure of a mortgage securing a note, the defendant, by filing his unverified denial, admitted the execution of the note and mortgage.

9. APPEAL AND ERROR —1073(1)—REVERSIBLE ERROR—STATUTE.

In assignee's action to foreclose a mortgage against mortgagor's subsequent grantee, who had assumed mortgage, where written assignment was in evidence, the failure to introduce the note, which by inadvertence did not arrive in time, could not prejudice defendant's rights, where plaintiff testified that note was either in a bank or in the mail from such bank.

Error from District Court, Lincoln County; Chas B. Wilson, Jr., Judge.

Action by Abe Levy against W. K. Jackson and others. Judgment for plaintiff, and defendant Jackson brings error. Affirmed.

Erwin & Erwin, of Wellston, for plaintiff in error.

F. A. Rittenhouse, of Chandler, and G. A. Paul and Burford, Robertson & Hoffman, all of Oklahoma City, for defendant in error.

RAINEY, J. This was an action instituted by Abe Levy, as plaintiff, against W. K. Jackson and others, defendants, to foreclose a mortgage on a certain tract of land in Lincoln county, Okl. It appears, from the averments of the petition and from the evidence, that on the 8th day of July, 1912, C. S. O'Neal, for a valuable consideration, executed his note to one C. W. Williams in the sum of \$3,000, due and payable on or before two years after date; said note being secured by a mortgage executed by C. S. O'Neal and E. M. O'Neal on the land in controversy. On December 3, 1912, C. W. Williams assigned the note and mortgage, for a valuable consideration, to the plaintiff, Abe Levy. On November 18, 1912, title to the land was vested in C. S. O'Neal, and on the 4th day of December thereafter the said C. S. O'Neal conveyed the land to W. K. Jackson, who assumed and agreed to pay the mortgage as a part of the purchase price. Judg-

ment was for the plaintiff, from which the defendant W. K. Jackson has appealed to this court, assigning numerous errors.

[1] The parties will hereinafter be denominated plaintiff and defendant, respectively. Subsequent to the institution of the action, upon application of the plaintiff, the trial court appointed a receiver for the rents and profits arising from said land, and in defendant's first assignment of error he complains of this action. The court did not err in this respect, for the mortgage, by its terms, provided that if the taxes and assessments lawfully levied against said property, or any part thereof, should not be paid before they became delinquent, or if any part of the principal indebtedness or interest should not be paid when due, the holder of the note and mortgage should have the right to elect to declare the whole sum or sums payable at once and proceed to collect the debt, and "shall be entitled to possession of said premises." The petition alleged that the principal and interest was past due, remained unpaid, that the taxes and assessments against said land had not been paid, and that the premises were insufficient to discharge the mortgage debt. Under section 4979, Rev. Laws of 1910, plaintiff was entitled to have a receiver appointed; said section reading in part as follows:

"A receiver may be appointed by the Supreme Court, the district or superior court, or any judge of either, or, in the absence of said judges from the county, by the county judge:

* * * * *

"Second. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt."

[2] The second assignment of error is that the court erred in overruling the demurrer filed by defendant to plaintiff's amended petition. The objection to the petition is that the acknowledgment of the mortgage, attached thereto, was defective, and the mortgage was therefore not entitled to record, that the recording thereof did not constitute constructive notice, and that the petition did not allege that Jackson had actual knowledge of it. This objection is wholly without merit, because it was alleged in the petition that Jackson assumed the payment of said mortgage, which allegation, in our opinion, is equivalent to saying that he had actual notice of its execution. We cannot perceive how he could have assumed the payment of it without having had actual notice thereof. Moreover, the mortgage was admittedly properly acknowledged by E. M. O'Neal, the alleged defect being in the acknowledgment

of C. S. O'Neal, and the assignment was introduced in evidence without objection. The unverified answer admitted the execution of the note and mortgage.

In *Simpson et al. v. Hillis*, 30 Okl. 561, 120 Pac. 572, Ann. Cas. 1913C, 227, this court held:

"Under section 1195, Comp. Laws 1909, one purchasing property subject to a mortgage valid between the parties thereto, but defective in form and not recorded as required by statute, and who at the time of such purchase has actual knowledge of such mortgage, takes subject to such mortgage; the actual notice being equivalent to due acknowledgment and recording."

Defendant's demurrer was a general demurrer, and it has frequently been held by this court that a general demurrer will not be sustained, where any paragraph of the petition states a good cause of action.

[3] When the cause first came on for trial, and the plaintiff had introduced his evidence and rested, the defendant demurred thereto. While the record is not entirely clear, it seems that in the opinion of the court the plaintiff had not fully developed his case. At any rate, on plaintiff's oral motion the court granted a continuance of the cause, and this is assigned by the defendant as error; it being his contention that the court was only authorized to grant a continuance under section 5045 Rev. Laws of 1910, upon affidavit showing the matters required by said section. In support of this contention counsel cite the case of *Shy v. Brockhouse*, 7 Okl. 35, 54 Pac. 306. That and similar cases are not in point, for it obviously would not be error for the trial court to overrule a motion for continuance that was not sufficient under the statute, but it does not follow that it would be error to grant such a motion. In these matters the trial court is vested with a wide discretion, and where it does not appear that the granting of the continuance has prejudicially affected the rights of the adverse party, the court's ruling will not be disturbed on appeal.

[4] Counsel next contend that the court erred in refusing the defendant a jury trial. The petition, as originally drawn, asked for a money judgment against the defendant on his assumption contract; but prior to the trial the court permitted the plaintiff to amend his petition by eliminating the demand for personal judgment, and to ask only for the foreclosure of the mortgage. Since Jackson's unverified answer to the petition admitted the execution of the note and mortgage, under the amended pleadings the action was not one for the recovery of money, or of specific real or personal property, and the parties were not entitled to a jury trial, as a matter of right, under section 4993, Rev. Laws of 1910. *Childs et al. v.*

Cook, 174 Pac. 274; Maas et al. v. Dunmyer, 21 Okl. 484, 96 Pac. 591; Brewer et al. v. Martin, 40 Okl. 350, 138 Pac. 166.

[5, 6] It is next insisted that the court erred in requiring the defendant to assume the burden of proof. The execution of the note and mortgage being admitted by the pleadings, the only material question at issue was the date of the assignment, whether it was made before or after maturity. The plaintiff, in introducing the assignment, which was acknowledged and recorded, and which on its face bore the date of assignment, was assuming the burden of proof, and the defendant was not required to assume such burden, but only to rebut the evidence of the plaintiff. However, the practically undisputed evidence in the case shows that the assignment was made on the date shown on the face thereof, and if the court had erroneously placed the burden of proof on the defendant, he would not be in a position to take advantage of that fact here, for the reason that under section 6005, Rev. Laws of 1910, this court is not permitted to reverse any case on account of any irregularity in procedure, where such irregularity has not resulted in a miscarriage of justice, or does not constitute a substantial violation of a constitutional or a statutory right of the adverse party.

[7] The sixth assignment of error, that the court committed error in refusing to allow the defendant to introduce evidence to prove his several defenses, will not be considered, for the reason that counsel have not complied with rule 25 of this court (165 Pac. ix), which requires a party complaining of the admission or rejection of testimony to set out in his brief the full substance of the testimony, to the admission or rejection of which he complains, stating specifically his objection thereto.

[8, 9] The remaining assignment of error is that the court erred in rendering judgment without the note and mortgage having been introduced in evidence. The plaintiff testified without objection that he purchased the note on December 3, 1912, and took an assignment of the mortgage at the same time, and he further testified that he was the owner and in possession of the note and mortgage, and that the note was either in the American National Bank, at Oklahoma City, Okl., or in the mail from said bank to Chandler, Okl. If counsel for defendant was not satisfied with this proof, he did not so indicate at the trial, and we cannot see how he was prejudiced in any way. By filing his unverified denial, he admitted the execution of the note and mortgage, and, since the written assignment was introduced in evidence, the failure to introduce the note, which, by inadvertence, did not arrive

in time to be introduced at the trial, could not have injuriously affected his rights.

The judgment of the trial court is affirmed.

OWEN, C. J., and KANE, HARRISON, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

HUDSON v. HOPKINS, County Treasurer.
McGUIRE v. McCURDY, County
Treasurer.
(Nos. 9806, 9911.)

(Supreme Court of Oklahoma, June 17, 1919.
Rehearing Denied Sept. 9, 1919.)

(Syllabus by the Court.)

1. TAXATION \S 181—INDIANS—HOMESTEAD ALLOTMENT—EXEMPTION—STATUTE.

In construing the second proviso of section 7 of the Act of Congress of April 18, 1912, c. 83, 37 Stat. pt. 1, p. 86, the same must be construed tantamount to an independent enactment, and has the effect of removing the exemption from taxation on the homestead allotment of an Osage Indian, at the death of the allottee.

2. STATUTES \S 228—"PROVISO"—OFFICE.

The natural and appropriate office of a proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proviso.]

3. STATUTES \S 228 — PROVISO — CONSTRUCTION.

A proviso to a section of the statute should be construed with the section of which it forms a part, and, if the context requires it, may be considered tantamount to an independent enactment.

4. INDIANS \S 2—AGREEMENTS AND ACTS OF CONGRESS—CONSTRUCTION.

The acts of Congress and agreements between the various Indians have always been construed liberally in favor of the Indians.

5. CONSTITUTIONAL LAW \S 13 — STATUTES \S 181(1). 225 — CONSTRUCTION — INTENT — SUBSEQUENT ENACTMENT.

It is a cardinal rule in the construction of constitutions and statutes that the intention of the lawmakers, when ascertained, must govern, and that to ascertain the intent all the various portions of the legislative enactments upon the particular subject, including subsequent enactments, should be construed together and given effect as a whole.

6. TAXATION \S 181—INDIAN ALLOTMENTS—EXEMPTION—STATUTE.

But for the act of Congress of April 18, 1912, the plaintiffs in error could not have purchased the land in question. They took the land subject to the conditions of that act, which

provides, "Nothing herein shall be construed to exempt any of said property from taxation." Having purchased the land by virtue of said act containing said proviso, they cannot now claim the benefits of the exemption from taxation granted to the allottees in the Osage allotment act.

Appeal from District Court, Osage County; R. B. Boone, Judge.

Action between J. L. Hudson and O. L. Hopkins, as county treasurer of Osage county, consolidated with action between William E. McGuire, as guardian of Oscar Neal, a minor, and E. J. McCurdy, as county treasurer of Osage county. Judgment in each case for the county treasurer, and Hudson and McGuire, as guardian, each appeal. Affirmed.

Grinstead & Scott, of Pawhuska, for plaintiffs in error.

Corbett Cornett and A. R. Museller, both of Pawhuska, for defendants in error.

MCNEILL, J. These cases involve the question of whether, at the death of an Osage Indian, his homestead allotment becomes taxable; the plaintiff in error, J. L. Hudson, being the owner of three of said homestead allotments, having purchased the same as provided by the act of Congress of April 18, 1912. The plaintiff in error Oscar Neal inherited an undivided one-third interest in a homestead allotment of a deceased Osage, and purchased the other two-thirds of said homestead allotment from the other heirs, as provided by the act of Congress of April 18, 1912, he being a minor and not having a certificate of competency issued to him.

[1] The cases involve the construction of the Osage Allotment Act approved June 28, 1906, c. 3572 (34 Stat. 539), as supplemented and amended by the act of April 18, 1912, c. 83, 37 Stat. pt. 1, p. 86.

Subdivision 4 of section 2 of the Osage Allotment Act, approved June 28, 1906, contains the following provision:

"Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by act of Congress."

The lands in question were homestead allotments, and homestead deeds had been issued to the allottees, which deeds contained the provision: "Shall be inalienable and nontaxable until otherwise provided by act of Congress."

April 18, 1912, Congress, by a supplementary and amendatory act, passed an act dealing with inherited lands of deceased members of the Osage Tribe of Indians. Section 1 is as follows:

"That until the inherited lands of the deceased members of the Osage Tribe of Indians shall be partitioned or sold the Secretary of the Interior be, and he hereby is, authorized to pay the taxes on said land out of any money due and payable to the heirs from the segregated decedent's funds in the treasury of the United States."

Section 6 provides as follows:

"That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the state of Oklahoma: Provided, that no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees."

Section 7 contains the following provision:

"* * * That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: Provided, however, that inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid upon order of the county court of Osage county, state of Oklahoma: Provided, further, that nothing herein shall be construed so as to exempt any such property from liability for taxes."

It is the contention of the county treasurer that under and by virtue of the proviso contained in section 7 of the supplementary and amendatory act of April 18, 1912, which proviso is as follows, "Nothing herein shall be construed so as to exempt any of such property from liability for taxes," that said lands are taxable.

It is the contention of the plaintiff in error

ror that by virtue of the act of June 28, 1906, which provided that the homestead shall be nontaxable until otherwise provided by act of Congress, that this is a condition running with the land, and, although the same may be sold as provided by the act of April 18, 1912, still the same is nontaxable until otherwise provided by direct act of Congress. Counsel for plaintiff in error take the further position that should the exemption from taxation not be a condition running with the land, and the defendants' position be correct, still the land would be nontaxable until the decree of partition or deed had been approved by the Secretary of the Interior, and the restriction on alienation removed, and the same should not be placed upon the tax rolls until the alienation of the land was complete or the restriction on alienation removed. As to Oscar Neal, he inherited one-third interest in the homestead allotment, and that is not subject to taxation.

This identical question was before the federal court prior to the enactment of April 18, 1912, in the case of *United States v. Board of County Commissioners of Osage County* (C. C.) 193 Fed. 485. In that case there was involved the right to tax the homestead allotment where the allottee was deceased, and no certificate of competency was issued to him during his lifetime or to his heirs, and the court held that the homestead allotment was not subject to taxation after the death of the allottee. The court on page 488 of 193 Fed. stated as follows:

"This court has held that the restriction against alienation of the homesteads of these allottees to whom certificates were not issued is impersonal to the allottee and applicable to the lands, disabling the heirs also to convey, and that subdivision 7 does not relate to homesteads where the certificates are not issued. *United States v. Aaron* (C. C.) 183 Fed. 347. The exemption should be held, regardless of the death of the allottees, to coexist with the restriction against alienation, and to continue for the same time. They are mentioned in close relation, similar reasons justify their operation for a common term, and they should be held effective therefor, in the absence of any expression to the contrary; the rule being that when Indian lands, held in severalty, are not alienable, they are not subject to taxation. *Catholic Missions v. Missoula County*, 200 U. S. 118, 26 Sup. Ct. 197, 50 L. Ed. 398; *Goudy v. Meath*, 208 U. S. 148, 27 Sup. Ct. 48, 51 L. Ed. 130; 22 Cyc. 138. When no certificates of competency issue, the homesteads, whether held by the allottees or their heirs, remain an instrumentality employed by the national government, pursuant to the constitutional power it possesses to deal with the Indians for their protection and welfare, and are not subject to taxation. *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; *United States v. Thurston County* (C. C.) 140 Fed. 456. The question presented for decision in respect of the homesteads is wheth-

er, they are exempt where the allottees died without receiving certificates of competency. In the opinion of this court they are exempt, and will so remain until Congress shall remove the exemption."

This case was appealed to the Circuit Court of Appeals of the Eighth Circuit and was there affirmed. *United States v. Board of County Commissioners of Osage County*, 218 Fed. 883, 133 O. C. A. 87. The Circuit Court of Appeals in the opinion copied a letter from the Secretary of Interior, addressed to C. F. Larabee, Acting Secretary of Indian Affairs, requesting his view upon certain amendments which were pending in the Senate prior to the time of adopting the allotment act of 1906. One of the amendments proposed to strike out the word "nontaxable" in subdivision 4 of said act relating to surplus land. There was also an amendment which in the judgment of the commissioner would make the homestead taxable. Both of these amendments were pending, and in his letter the Secretary of Interior stated as follows:

"The office strongly opposes the first proposed amendment providing for the collection of taxes on the homesteads. This is in direct conflict with the provision in lines 8 and 9 on page 6, which declares that the homestead shall be inalienable and nontaxable until otherwise provided by act of Congress. Certainly the homesteads of the Indians should be free from taxation as long as they are held in trust for the benefit of the allottees. Such has been the invariable policy of the government from the time the Indian allotments were made, and it is thought that an exception should not be made in the case of the Osages. But I see no special objection to the alternative amendment, which provides merely for the payment of taxes on the surplus lands. It is believed that the Osage Indians should be required to pay taxes on their surplus lands, the same as citizens of Oklahoma territory. There occurs to me no valid reason why the Indians should not be required to bear their share of the burden of the state and county maintenance through taxation on their surplus lands."

If it was not for the act of April 18, 1912, there would be no question about the decision in the case at bar, but in order to ascertain the effect of the proviso contained in section 7 of the act of April 18, 1912, and it is upon the construction of this proviso in said section, that this question must be determined.

[2-5] This court in the case of *Searcy et al. v. State* (not yet officially reported) 167 Pac. 476, Chief Justice Sharp delivering the opinion, stated as follows:

"The natural and proper office of a proviso is to restrain or qualify some preceding matter, and will ordinarily be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. *Leader Printing Co. v. Territory*, 6 Okl. 302, 50 Pac. 1001; *Allen et al. v. Reed et al.*, 10 Okl. 105, 60 Pac. 782, 63 Pac. 867; *Brewer et al. v.*

Rust, 20 Okl. 776, 95 Pac. 233. But, as said in *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755, this rule is not without its exceptions, for 'where it is plainly intended that such proviso shall limit, qualify, or define other sections or provisions of the act than that of which it forms a part, the court should give it such meaning.' The proviso should be construed in connection with the section of which it forms a part, and, if the context requires, it may be considered tantamount to an independent enactment."

In the case of *United States v. Babbit*, 1 Black, 55, 17 L. Ed. 94, the court there stated as follows:

"The second proviso in the third section of the act of March 22, 1852, which declares 'that no register or receiver shall receive for his services, during any year, a greater compensation than the maximum now allowed by law,' is not limited in its effect to the section where it is found, but is an independent proposition, which applies alike to all officers of this class."

Section 7 of the act of April 18, 1912, the first portion of said section deals with all lands allotted to members of the Osage Tribe, to the effect that the same shall not be incumbered or alienated nor taken or sold to secure or satisfy any debt or obligation incurred prior to the issuance of said certificate of competency. The last portion of said act deals with inherited moneys and lands of Osage Indians. In dealing with inherited lands and moneys of Osage Indians, it provides that the same shall not be taken or sold to secure the payment of any indebtedness incurred prior to the time the lands and moneys are turned over to said heirs. Said section then contains the proviso that inherited money shall be liable for funeral expenses. It then contains the further proviso, that nothing therein shall be construed so as to exempt any of said property from liability for taxation. It is plain that both provisos refer to inherited property, and the latter portion of the section to which they are attached.

The question in the case at bar is, what does the proviso mean, "that nothing herein shall be construed so as to exempt any of said property from liability for taxes"? In construing the same we think it well to look to the way and manner that Congress dealt with the Osages, prior to the enactment of this legislation, in regard to taxation. In the first instance it was provided that each Osage at the time of the allotment should have at least three selections of land, one to be the homestead, this to be inalienable and nontaxable until otherwise provided by Congress.

Surplus allotments, Congress provided, should be inalienable, unless a certificate of competency was issued to the Indian, but taxable in all cases after three years, so at the time of adopting the Act of April 18, 1912, the surplus land of an Osage to whom

a certificate of competency had not issued was taxable, but inalienable. The homestead allotment was both nontaxable and inalienable. Prior to this act there was no way of selling or disposing of the homestead allotment irrespective of whether the allottee was living or deceased.

The Act of April 18, 1912, in so far as the alienation of property was concerned, dealt exclusively with inherited lands and money. It is, in our judgment, a significant fact that the act makes no distinction or difference between the right to alienate the inherited homestead allotment and the inherited surplus land, but both were made alienable in the same manner. It might be said that Congress was removing the restriction upon the inherited deceased Indian land, being both the homestead allotment and the surplus land. The restriction was not completely removed until the deed or the decree of partition was approved by the Secretary of Interior. The question then is, did Congress also intend to remove the exemption upon the inherited homestead allotment as to being taxable? If it did not, then this proviso is meaningless. It cannot be said that this proviso refers only to the surplus allotments, for the reason such lands were already subject to taxation.

In our judgment the only construction that could be given to this proviso would be that the same was intended as an independent provision and enactment, withdrawing the exemption that existed in favor of the homestead allotment of a deceased Indian, and making the same taxable, the same as surplus lands. The former act provides that the homestead should be exempt from taxation until otherwise provided by law; then Congress, in dealing with inherited lands, intended that, when the land passed out of the hands of the original allottee, the exemption from taxation was no longer necessary.

In this act Congress removed the restriction contained in homestead allotment deeds, in so far as alienation was concerned, subject, however, to be approved by the Secretary of Interior. It is not fair to presume that Congress also intended to remove the exemption as to taxation. We are not unmindful of the fact that in considering this subject the Congress of the United States has undertaken from the early history of the government to protect the Indian, as said in the case of *Schock v. Sweet*, 45 Okl. 51, 145 Pac. 388, the court stated as follows:

"The acts of Congress and agreements between the various Indian tribes have always been construed liberally in favor of the Indians."

In the case of *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, the court said:

"We must remember, in considering this subject, that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people, and to legislate concerning their property with a view to their protection as such. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25; *Elk v. Wilkins*, 112 U. S. 94, 99, 5 Sup. Ct. 41, 28 L. Ed. 643; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 19 Sup. Ct. 722, 43 L. Ed. 1041."

If we attempt to give this proviso a liberal construction, and construing it in favor of the Indian, it has no force and effect, and accomplishes no purpose whatever. If we construe with the view of ascertaining what Congress intended, and to give it the force and effect that Congress intended it to have, then it has but one construction and meaning. It certainly must have been the intent of Congress in adopting this proviso to have it accomplish some purpose, to either protect some right of the Indian, or to remove some restriction that it thought was no longer necessary. If they did not intend to remove the exemption that existed as to inherited homestead allotments, then this proviso was simply a surplus of words, and was adopted to accomplish no purpose whatever.

In construing statutes, this court has laid down the following rule: In the case of *De Hasque v. Atchison, T. & S. F. Ry. Co.*, 173 Pac. 73, L. R. A. 1918F, 259, Chief Justice Owen, speaking for the court, stated as follows:

"It is a cardinal rule in the construction of constitutions and statutes that the intention of the lawmakers, when ascertained, must govern, and that to ascertain the intent all the various portions of the legislative enactments upon the particular subject, including subsequent enactments, should be construed together and given effect as a whole."

The court in the opinion copied from the case of *State v. Clark*, 29 N. J. Law, 96, as follows:

"If a literal construction of the words of a statute make the act absurd, it must be so construed as to avoid the absurdity. The literal import of the terms and phrases employed will be controlled by the objects which the act was designed to reach."

In the case of *Board of County Commissioners v. Alexander*, 58 Okl. 128, 159 Pac. 311, the court, speaking through Justice Sharp, stated:

"When the language of the statute is dubious, the court, in construing it, will construe the reasons and intent of the law to discover its scope and true meaning."

In construing this proviso in accordance with the view expressed in the above decisions, and with the theory in mind that it was adopted to accomplish some purpose, then the only construction that can be placed

upon the same is that it stands as an independent enactment, removing the exemption on the homestead allotment at the death of the allottee.

At the time of the adoption of this act where the Osage Indian had not received a certificate of competency, his lands might be divided in three classes, to wit: First. His homestead allotment, which was inalienable and nontaxable.

Second. His surplus land, which was inalienable, but subject to be sold under certain rules and regulations adopted by the Department of Interior, as provided by the act of Congress of March 3, 1909, c. 256, 35 Stat. 778. This surplus land was taxable.

Third. His inherited land. Could it be said that Congress intended to extend to the Indian a greater protection to his inherited land than it did to his surplus land?

In dealing with the Osage Indians, Congress has only attempted to exempt the homestead allotment from taxation, and we know of no valid reason why the inherited land should receive any greater protection than his surplus allotment.

[8] There is another rule of law that must be considered, and that is the plaintiffs in error in this case are claiming the benefits of the act of April 18, 1912, which removed the restriction on alienation in so far as this land is concerned. Can they then ignore the proviso in the same act, which states that "said property shall not be exempt from taxation"?

The Supreme Court of the United States in the case of *Fink et al. v. Board of County Commissioners of Muskogee County*, decided January 13, 1919, reported in 248 U. S. 399, 39 Sup. Ct. 128, 63 L. Ed. 324, stated as follows:

"But for that act, they could not have purchased the lands in question. They took subject to all of the conditions of that act, and they cannot now claim the benefits of the exemption from taxation granted to the allottee by the Creek supplemental agreement."

This court in the case of *Schock v. Sweet*, supra, stated as follows:

"Hence it may well be said that it is by virtue of and through this act of Congress that plaintiffs obtained their title. There is no exemption from taxation contained in this law; neither is any contained in the conveyances made to plaintiffs. The law is well settled that, where land is granted by a particular act, a tax exemption asserted under a prior act will not be upheld. *Armstrong v. Treasurer of Athens County*, 16 Pet. 281, 10 L. Ed. 965; *Lord v. Town of Litchfield*, 36 Conn. 117, 4 Am. Rep. 41; *Southwestern R. R. Co. v. Wright*, 116 U. S. 281, 6 Sup. Ct. 375, 29 L. Ed. 626; *Wilmington & Weldon R. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590; *Platt v. Rice*, 10 Watts (Pa.) 352."

The plaintiffs in error in this case rely upon the act of 1912, which permitted them to purchase the homestead allotments. This act also provides that none of the property shall be exempt from taxation. Can they be heard to say that they will take the benefit of the law removing the restriction upon alienation, and which especially states that none of the property shall be exempt from taxation, and then be heard to say that we will accept the benefits of the act of April 18, 1912, in so far as it relates to alienation, and permits us to acquire the land under and by virtue of that act, but that we will ignore the proviso in said section which states, "Nothing shall be construed to exempt any of said property from taxation," and in so far as taxation claim the benefits of the exemption as it existed prior to the amendment? We do not think this can be done. The plaintiffs in error accepted the act which gives them the right to purchase this land, and under which they purchased it. They must also accept the proviso to the amendment which provided that this land shall not be exempt from taxation.

In construing the law prior to the act of 1912, Judge Cottrel used the following language:

"The exemption should be held, regardless of the death of the allottees, to coexist with the restriction against alienation, and to continue for the same time. They are mentioned in close relation, similar reasons justify their operation for a common term, and they should be held effective therefor, in the absence of any expression to the contrary; the rule being that when Indian lands, held in severalty, are not alienable, they are not subject to taxation." *United States v. Board of Com'rs of Osage County* (C. C.) 193 Fed. 485.

So, by applying the same reasoning to the case at bar, Congress removed the restrictions upon alienation upon all inherited Indian land, subject to the deed or decree of partition being approved by the Secretary of Interior. Then did Congress also remove the exemption from taxation that existed as to the homestead allotment at the death of the allottee? We think this is a fair interpretation to be given to said act.

The decisions of the courts in relation to taxation pertaining to the Five Civilized Tribes do not give us much assistance in the case at bar, for the reason they are all founded upon different acts of Congress and treaties. We must depend solely upon the wording and construction to be given this particular act. The first section of said act might aid in giving this section the proper construction, as Congress provided that the Secretary of Interior, prior to the time of approving the decree of partition or the deed to said land, might pay the taxes. Of course it might be argued that this only refers to

the surplus allotment; but it does not so provide in the act. But it would seem a proper construction that Congress removed the exemption on homestead allotment at the death of the allottee in so far as taxation was concerned, and provided that the Secretary of Interior might pay the taxes due upon any of said land, or to be assessed against any of said land, prior to the time the decree of partition or the deed was approved.

In dealing with this case we have considered the same in reference to Osage Indians to whom a certificate of competency had not issued neither to the allottee prior to his death, nor to his heirs thereafter; and the reference in the opinion, wherein it states it is necessary to have certain deeds or decrees of partition approved by the Secretary of Interior, refers to deeds or decrees of partition of inherited Indian land, where the Indian had not received a certificate of competency.

For the reasons stated, the judgment of the trial court is affirmed.

OWEN, C. J., and SHARP, PITCHFORD, and HIGGINS, JJ., concur.

WATT v. STATE. (No. A-2514.)

(Criminal Court of Appeals of Oklahoma, Sept. 2, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1099(7)—CASE-MADE—SIGNATURE AND CERTIFICATION.

A purported case-made, not signed and certified by the trial judge within the time limited by the statute for filing it in this court, is a nullity.

2. CRIMINAL LAW §1099(7) — CASE-MADE — ABSENCE OF TRIAL JUDGE.

Where a convicted defendant, without laches or fault on his part, loses the benefit of his exceptions as reserved in a case-made, on account of the absence of the trial judge from the state at the time the same should have been settled and signed, and until after the time limited by the statute for filing it in this court, a new trial will be granted.

3. CRIMINAL LAW §1099(7) — CASE-MADE — SIGNATURE—ABSENCE OF TRIAL JUDGE—NEW TRIAL.

It appears that orders granting extensions of time within which to prepare and serve case-made were duly entered as provided by law, which case-made was served within time, and notice given of the time for settling and signing the same; that the trial judge left the state before the day named in the notice, and remained absent until after the time limited by the statute for filing the same in this court; on

the last day within the time allowed by law an appeal was taken by filing in this court a petition in error, with a certified transcript of the record and an unsigned case-made attached. It appearing that the transcript of the evidence in the case would be essential to a consideration of the errors assigned, and that plaintiff in error has been prevented, without laches on his part, on account of the absence of the trial judge from the state, from having his case-made duly signed and settled, the judgment is reversed, and a new trial granted.

Appeal from District Court, Blaine County; Thomas A. Edwards, Judge.

C. F. Watt was convicted of assault with intent to do bodily harm, and he appeals. Reversed.

C. F. Dyer, of Enid, for plaintiff in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, C. F. Watt, was convicted in the district court of Blaine county of assault with a dangerous weapon, with intent to do bodily harm, and on January 29, 1915, was sentenced to be confined in the county jail for 120 days, and to pay the costs. To reverse the judgment an appeal was taken by filing in this court on July 29, 1915, a petition in error, with a duly certified transcript of the record, and a case-made, which had not been signed and settled by the trial judge.

In addition to the various errors assigned counsel for plaintiff in error asks that the judgment be reversed and a new trial granted, because "plaintiff in error has been deprived of his constitutional right to have his trial reviewed in this court upon a case-made by reason of the absence from the state of the trial judge, who remained absent from the state until the time expired within which plaintiff in error could have had said case-made duly settled, signed, and certified as provided by law; that plaintiff in error was ignorant of the intention of the trial judge to leave the state, and was in no way responsible therefor; that his inability to procure a proper certified case-made was not through his fault."

[1-3] It appears from the record that orders granting extensions of time within which to prepare and serve a case-made were duly entered as provided by law, the last order having been made on the 6th day of July, 1915, which extended the time until the 20th day of July; that said case-made was duly served and service acknowledged on the 19th day of July, and on the same day the county attorney was notified that said case-made would be presented to the trial judge on the 24th day of July for settlement, signing and certifying at the hour of 2 o'clock p. m. of said day at the chambers of said judge in the city of Cordell. On the 20th day of July the trial judge departed

from the state on his vacation, and did not return until after the 29th day of July, the last day on which the case-made could, within the limit of the statute, be signed and settled and filed in this court.

The Constitution recognizes the right of appeal from a conviction, but leaves it to the Legislature to regulate the manner of exercising that right. Under the provisions of the statute an appeal may be taken either by a duly certified transcript of the record proper, or by a case-made as by law provided. An appeal by transcript does not bring up the review of questions arising upon exceptions taken to rulings of the court upon the admission and exclusion of evidence. A purported case-made not certified by the trial judge cannot be considered by the appellate court. *Cohn v. State*, 4 Okl. Cr. 498, 113 Pac. 216.

And an original case-made settled and signed after the time limited by the statute for filing it in this court is a nullity. *State v. Coyle*, 11 Okl. Cr. 637, 150 Pac. 80.

That the case-made was not settled, signed, and certified is not the fault of plaintiff in error or his counsel. The trial judge left the state without notice to plaintiff in error or his counsel, and thereby plaintiff in error was deprived of the right to have his case reviewed on the errors assigned in this court.

In the case of *Bailey v. United States*, 3 Okl. Cr. 175, 104 Pac. 917, 25 L. R. A. (N. S.) 860, it is said:

"It seems to be well established, as a general rule, that where a defendant has done all that the law requires in perfecting his appeal, and where the record necessary for a review of the case is lost or destroyed while in the custody of an officer of the court, in order to prevent a possible miscarriage of justice by depriving the defendant of his legal right of appeal, a new trial will be granted."

And see *Tegler v. State*, 3 Okl. Cr. 595, 107 Pac. 949, 139 Am. St. Rep. 976.

By the weight of authority, where a convicted defendant has lost the benefit of regularly taken exceptions, through no fault or negligence of his own, the appellate court will not determine the cause, but will award a new trial. *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048, and note 1056.

The appeal here is taken by petition in error and a duly authenticated transcript of the record. Upon an examination of the record we have reached the conclusion that a transcript of the evidence in the case would be essential to a consideration of the errors assigned, and that plaintiff in error has been prevented, without fault or negligence on his part, but on account of the absence of the trial judge from the state, from having his case-made duly signed and settled. Upon that ground, and for the reasons stated, we are of opinion that the motion to re-

verse the judgment and award a new trial should be sustained.

The judgment of the trial court will therefore be reversed, and a new trial awarded.

ARMSTRONG and MATSON, JJ., concur.

BORNHEIM v. STATE. (No. A-3031.)

(Criminal Court of Appeals of Oklahoma. Aug. 30, 1919.)

(Syllabus by Editorial Staff.)

1. DISORDERLY HOUSE §17—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction of keeping a house of ill fame.

2. CRIMINAL LAW §598(2)—CONTINUANCE—ABSENT WITNESS—DILIGENCE.

In prosecution for keeping a house of ill fame, a motion for a continuance for absence of a material witness, an inmate at time of a raid, December 16, 1916, and an intimate friend of a codefendant, was properly denied, where no effort was made to obtain her attendance until April 2d, one day before trial, though it could probably have been obtained within three or four days.

3. CRIMINAL LAW §829(18)—REQUESTED INSTRUCTION—GIVEN INSTRUCTION.

Refusal of defendant's requested instruction that jury could not convict if there was a reasonable doubt as to whether any one of the elements of the offense had been proven was not error, where the subject was substantially covered by the general charge.

Appeal from County Court, Pittsburg County; S. F. Brown, Judge.

Frank Bornhelm was convicted of keeping a house of ill fame, and sentenced to pay a fine of \$500, and he appeals. Judgment affirmed.

Andrews & Anderson, of McAlester, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMullan, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Pittsburg county, where in the defendant, Frank Bornhelm, was convicted of keeping a house of ill fame, and sentenced to pay a fine of \$500.

He was jointly informed against for the offense with one Mabel Reed, his married daughter, who was an inmate of the house at the time of the alleged commission of the offense. Upon a joint trial, Mabel Reed was acquitted, and properly so, because there was no evidence that she had any control whatever over the premises, being merely an in-

mate of the house and not the keeper thereof.

[1] It is strenuously contended that the evidence is insufficient to sustain this conviction. The court cannot agree with this contention. The evidence is amply sufficient to sustain the conviction as to Frank Bornhelm, as the proof is conclusive that a house of ill fame was in operation on his premises on the 16th day of December, 1916, as charged in the information; that he had been in possession and control of said premises for a number of years, had admitted men and women there at late hours of the night, and had assigned a room to a man and woman in his home at the late hour of 1 a. m.; that said house had for a long period of time the reputation of being a house of ill fame; that men were frequently seen to enter said house at late hours of the night; that women were roomers in said house; that the house was furnished with a dance hall and slot piano, and numerous bedrooms on either side of a long hall; that on the night of December 16th, two women and about 12 men were found in said house at 11 o'clock at night dancing; that one of the women was seen to sit upon the lap of one of the men present, and embrace him; that when the officers entered said house, the women were dressed in kimonos, were scantily clad, and indulged in lewd conduct and used lascivious language; that two men were found in one of the beds in one of the bedrooms, and that the men attempted to make their escape when the raid was made; and other circumstances which tended conclusively to show that the premises had been conducted as a house of ill fame for some length of time, and that the defendant had occupied said premises for numerous years and must have been acquainted with the carryings-on therein. The evidence was sufficient, as the defendant, Frank Bornhelm, interposed no defense thereto.

[2] Among other assignments of error is that the court erred in overruling a motion for a continuance based upon the absence of one Mabel Morris, who was alleged to be a material witness for the defendant, and whom the evidence discloses was one of the inmates of the house at the time of the raid on December 16, 1916. The application was properly denied, as there is absolutely no showing of diligence on the part of defendant in attempting to procure the attendance of this witness. The witness was shown to be an intimate friend of Mabel Reed, one of the defendants. The defendants were arrested on December 18, 1916, and on the 14th of March, 1917, the case was set for trial for April 3d following. The application for continuance was filed on April 2d. No effort had been made to obtain the attendance of the said witness Mabel Morris between

(183 P.)

the 14th of March and the 2d of April, and the application shows that the absent witness was living in Okfuskee county at the time said application was made, and her attendance could probably have been obtained within three or four days at the farthest. There was no request to continue the case for a short period of time, but the application was for a continuance for the entire term of court. The court did not abuse its discretion in refusing to continue this case for the term, in view of the lack of diligence shown by the defendant to discover the whereabouts of this witness, or to keep in touch with such witness between the 18th day of December, 1918 (the date of the arrest of defendant) and the 2d day of April, 1917 (the date the case was called for trial).

[3] A certain instruction given and a certain instruction refused, both over the objection and exception of the defendant, are assigned as errors. We have carefully examined the instructions. The court gave three of the defendant's requested instructions, and refused the fourth. The requested instruction refused was to the effect that the jury could not convict if there was a reasonable doubt as to whether or not any one of the elements of the offense had been proven. The law covered by this instruction was substantially covered in the general charge of the court, and when the instructions are considered as a whole the law of the case is fully covered in a fair and impartial manner.

A reading of this record convinces the court that the conviction of this defendant is just and merited under the law and the evidence; that the alleged errors relied upon are more technical than substantial; that the defendant was accorded a fair and impartial trial; and, for the reasons stated, the judgment is affirmed.

SMITH v. STATE. (No. A-3288.)

(Criminal Court of Appeals of Oklahoma. Aug. 19, 1919.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW §1144(17)—FAILURE TO GIVE SUPERSEDEAS BOND—EXECUTION OF JUDGMENT—PRESUMPTION.

Where an appeal is taken to the Criminal Court of Appeals, and record fails to show that judgment was superseded by required supersedeas bond in court below, the presumption obtains that judgment was immediately carried into effect by incarceration in the penitentiary, where such imprisonment was provided in the judgment.

2. CRIMINAL LAW §1134(3), 1182 — MOOT QUESTION—DISMISSAL OF APPEAL—AFFIRMANCE.

Where it appears that if a judgment of conviction was executed the term of imprisonment would have been served, and where no appearance was made either to orally argue case on appeal or by filing a brief for plaintiff in error, the criminal court of appeals, in its discretion, will either dismiss because questions involved are moot, or affirm under its rule 9 (165 Pac. x).

3. CRIMINAL LAW §1184—JOURNAL ENTRY OF JUDGMENT—CLERICAL ERROR—MODIFICATION.

Where information charged embezzlement, and court charged thereon, and the verdict was "Guilty as charged," imposing two years in penitentiary, a journal entry showing a judgment as of conviction for "robbery," with sentence for two years, though minimum punishment for robbery is five years, would be modified by substituting "embezzlement" for "robbery."

Appeal from District Court, McCurtain County; C. E. Dudley, Judge.

Wilson Smith was convicted of the crime of embezzlement, and sentenced to serve a term of two years' imprisonment in the state penitentiary, and he appeals. Modified and affirmed.

Jeff McLendon, of Idabel, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. Wilson Smith was convicted in the district court of McCurtain county of embezzlement, and his punishment fixed as above stated.

This appeal has been pending in this court since the 13th day of March, 1918, the cause having been submitted June 5, 1919, at which time no appearance was made by any counsel representing plaintiff in error, nor has any brief been filed in his behalf. Rule 9 (165 Pac. x) of this court provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence, and, if no prejudicial error appears, will affirm the judgment."

It is to be noted also that the case-made contains no copy of any supersedeas bond given by the defendant. The judgment was rendered on the 22d day of September, 1917, with directions to the sheriff of McCurtain county to immediately transport the defendant to the state penitentiary at McAlester. Presuming that the judgment was carried into effect according to its terms, the defendant has already served, allowing time for good behavior, the two-year term of imprisonment imposed against him, and the ques-

tions involved in this appeal would for that reason be moot.

[1, 2] Where an appeal is taken to this court from a judgment of conviction, and the record fails to show that the judgment was superseded by the giving of the required supersedeas bond in the court below, the presumption obtains in this court that said judgment was immediately carried into effect according to its terms by the incarceration of the prisoner in the penitentiary, where such imprisonment is provided in the judgment. And where it is apparent that, had said judgment been carried into effect, the term of imprisonment would have been served, and no appearance is made in this court by counsel representing the defendant, either to orally argue the case or by filing a brief in behalf of his client, this court will, in its discretion, either dismiss the appeal because the questions involved are moot, or else affirm the judgment under the provisions of rule 9, *supra*.

[3] This appeal has evidently been abandoned. An examination of the pleadings, instructions, judgment, and sentence discloses no prejudicial error. However, the journal entry of judgment shows that the court pronounced judgment as of a conviction for the crime of "robbery," sentencing the defendant to imprisonment for a term of two years. The minimum punishment provided for robbery, under the statutes of this state, is five years' imprisonment. The information charges the crime of embezzlement, the court charged on that crime, and the jury returned a verdict of "guilty as charged in the information," imposing a punishment of two years' imprisonment in the penitentiary.

The incorporation of the word "robbery" in the journal entry of judgment is clearly a clerical error. The judgment is modified by substituting the word "embezzlement" for the word "robbery" in each instance where the latter word appears in the journal entry of judgment, and, as so modified, the judgment is affirmed under rule 9, *supra*.

STURGES v. STATE. (No. A-3236.)

(Criminal Court of Appeals of Oklahoma.
Aug. 12, 1919.)

Appeal from District Court, Pittsburg County; R. P. De Graffenreid, Special Judge.

J. B. Sturges was convicted of the crime of adultery, and sentenced to serve a term of four years in the penitentiary, and appeals. Judgment affirmed.

T. D. Taylor, of McAlester, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. J. B. Sturges was convicted in the district court of Pittsburg county of the crime of adultery, and his punishment fixed as above stated.

This appeal has been pending in this court since the 7th day of January, 1918, the cause having been submitted on June 3, 1919, at which time no appearance was made by any counsel representing plaintiff in error, nor has any brief been filed in his behalf. Rule 9 of this court (165 Pac. x) provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence, and if no prejudicial error appears, will affirm the judgment."

This appeal has evidently been abandoned. An examination of the pleadings, instructions, judgment, and sentence discloses no prejudicial error, and in accordance with rule 9, *supra*, the judgment is affirmed.

RIDLEY v. STATE. (No. A-3636.)

(Criminal Court of Appeals of Oklahoma.
Nov. 1, 1919.)

Appeal from District Court, Stephens County; Cham Jones, Judge.

Willis Ridley was convicted of burglary, and he appeals. Appeal dismissed, and cause remanded, with direction to cause judgment and sentence to be executed.

Bond & Kolb, of Duncan, for plaintiff in error.

PER CURIAM. Plaintiff in error, Willis Ridley, was convicted in the district court of Stephens county of burglary in the second degree, and in accordance with the verdict of the jury he was on the 15th day of April, 1919, sentenced to imprisonment in the penitentiary at Granite for the term of two years. From the judgment an appeal was perfected by filing in this court on October 2, 1919, a petition in error, with case-made.

On October 31, 1919, plaintiff in error filed a motion to dismiss the appeal, which motion is signed by himself and subscribed and sworn to before G. A. Witt, court clerk. The motion to dismiss the appeal is granted, and the appeal dismissed, and the cause remanded to the trial court, with direction to cause its judgment and sentence to be carried into execution.

In re SMITH'S ESTATE. ARMSTRONG et al. v. STATE TAX COMMISSIONER.
(No. 15303.)

(Supreme Court of Washington. June 18, 1919.)

Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceeding to determine an inheritance tax in the matter of the estate of Charles Benjamin Smith, deceased. From a judgment upholding the tax, James Armstrong and others appeal. Reversed and remanded.

Kerr & McCord and Stephen V. Carey, all of Seattle, for appellants.

C. R. Jackson and Geo. G. Hannan, both of Olympia, for respondent.

PER CURIAM. The questions involved here are identical with those decided in the case of In re Corbin's Estate, 181 Pac. 910. The trial court in this case, however, held against the contentions of the executors, and entered a judgment upholding the computation of the inheritance tax as made by the state tax commissioner.

For the reasons stated in the Corbin Case, the judgment here appealed from is reversed, and the cause remanded, with directions to compute the tax upon the amount going to each devisee or legatee as a separate entity.

VALLEJO v. BURROWS et al. (S. F. No. 8860.)

(Supreme Court of California. June 26, 1919.)

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Hazel Vallejo against John W. Burrows, special administrator, etc., and others. Judgment for defendants, and plaintiff appeals. Reversed, and remittitur directed to issue.

Cullinan & Hickey, Theo. A. Bell, and Hugh K. McKevitt, all of San Francisco, for appellants.

A. G. Kazebeer and J. E. Pemberton, both of San Francisco, for respondents.

PER CURIAM. In the above-entitled cause, in view of the application and stipulation of the parties, and in view of the order of the judge of the superior court having jurisdiction of the matter of the estate of Paul Seller, deceased, authorizing such action as one of the steps in a compromise of the litigation involving the estate, a certified copy of which order is annexed hereto, it is ordered that the judgment appealed from be and the same is hereby reversed, without costs to any party, and that remittitur issue forthwith.

ANGELLOTTI, C. J., and SHAW, WILBUR, and OLNEY, JJ., being all present, concur.

BERRY et al. v. EUREKA CONST. CO.
(No. 9005.)

(Supreme Court of Oklahoma. July 8, 1919.)

Appeal from District Court, Tulsa County.

Action by the Eureka Construction Company against J. H. Berry and others. Judgment for plaintiff, and defendant appeals. Affirmed on rehearing.

J. J. Henderson, of Tulsa, for plaintiff in error.

Jno. R. Ramsey, of Tulsa, for defendant in error.

PER CURIAM. It is ordered and adjudged:

First. That the petition for rehearing herein be granted.

Second. That the opinion of Mr. Commissioner Davis, filed November 12, 1918, reversing and remanding the cause, be withdrawn.

Third. The questions involved in this action are identical with the questions involved in the case of Nitsche v. State Security Bank of Zanesville, Ohio, et al., 170 Pac. 234, and that the opinion of this court in that case is controlling in the instant case.

It is therefore ordered and adjudged that the judgment in the instant case be affirmed, under the authority of the Nitsche Case and the authorities cited in the opinion of this court in that case.

JONES et ux. v. STATE. (No. A-3317.)

(Criminal Court of Appeals of Oklahoma.
Sept. 10, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1159(4)—CONVICTION—EVIDENCE—AFFIRMANCE.

The credibility of the witnesses and the weight of their testimony being a question solely for the jury, the Criminal Court of Appeals, if, after a careful examination of the evidence, it is not prepared to say that the jury were not warranted in convicting, will affirm.

Appeal from County Court, Oklahoma County; Wm. H. Zwick, Judge.

C. H. Jones and Mrs. C. H. Jones were convicted of a violation of the prohibitory liquor law, and they appeal. Affirmed.

O. A. Cargill, of Oklahoma City, for plaintiffs in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiffs in error, C. H. Jones and Mrs. C. H. Jones, were tried and convicted on an information charging that on the 12th day of September, 1917, they did keep and maintain a place at 106½ East Third street, Oklahoma City, where intoxicating liquor was kept and stored for the purpose of selling, bartering, giving away, and otherwise furnishing the same to others. In accordance with the verdicts, C. H. Jones was sentenced to be confined in the county jail for a period of 6 months and to pay a fine of \$500, and Mrs. C. H. Jones was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. From the judgments an appeal was perfected by filing in this court on April 11, 1918, a petition in error with case-made.

The proof on the part of the state is that W. B. Nichols, chief of police, and Dell Bruce and John Heep, policemen, accompanied by Chas. B. Selby, county attorney, went to the defendants' place, and on the back porch found a sack containing 13 half pints of whisky; that the general reputation of the Jones' place was that of being a place where

whisky was kept for sale, and where people congregated for the purpose of drinking the same. There was also proof of sales. Mrs. Jones testified that she did not know who put the whisky there. The defendant C. H. Jones did not testify.

The only question presented by this appeal is the sufficiency of the evidence to support the verdicts. The credibility of the witnesses and the weight and value to be given their testimony is a question solely for the jury's determination. After a careful examination of the evidence, we are not prepared to say that the jury was not warranted in finding the defendants guilty.

The judgments appealed from are therefore affirmed. Mandate forthwith.

JONES v. STATE. (No. A-3318.)

(Criminal Court of Appeals of Oklahoma.
Sept. 10, 1919.)

Appeal from County Court, Oklahoma County; Wm. H. Zwick, Judge.

C. H. Jones was convicted of a violation of the prohibitory liquor law, and he appeals. Affirmed.

O. A. Cargill, of Oklahoma City, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, C. H. Jones, was convicted on a charge that he did have unlawfully in his possession five quarts of whisky with the unlawful intent to sell the same, and in accordance with the verdict was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. From the judgment rendered February 11, 1918, he appealed by filing in this court on April 11, 1918, a petition in error with case-made.

The proof on the part of the state sustains the allegations of the information and is undisputed. The only question presented by this appeal is the sufficiency of the evidence to sustain the verdict. After an examination of the record, our conclusion is that the appeal is wholly destitute of merit. The judgment appealed from is therefore affirmed.

Mandate forthwith.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

JONES v. STATE. (No. A-3319.)

(Criminal Court of Appeals of Oklahoma.
Sept. 10, 1919.)

(Syllabus by Editorial Staff.)

INTOXICATING LIQUORS \S 236(1) — UNLAW-
FUL TRANSPORTATION—SUFFICIENCY OF EVI-
DENCE.

Testimony of a police captain that on certain date he met defendant near corner of Third and Santa Fé streets, and said to him "Charley, I want that whisky," and searched defendant, and found a quart and two half pints of whisky on him, supported a conviction for unlawful conveyance of whisky to corner of Third and Santa Fé streets.

Appeal from County Court, Oklahoma County; Wm. H. Zwick, Judge.

C. H. Jones was convicted of a violation of the prohibitory liquor law, and he appeals. Affirmed.

O. A. Cargill, of Oklahoma City, for plaintiff in error.

The Attorney General and W. O. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted on an information charging the unlawful conveyance of one quart and one half pint of whisky from a point unknown in Oklahoma county to the corner of Third and Santa Fé streets, in Oklahoma City, and in pursuance of the verdict was sentenced to be confined in the county jail for 90 days and to pay a fine of \$200 and the costs.

The only testimony is that introduced by the state: W. W. Slayton testified that on the 12th day of September, 1917, he was captain of police, and on said date saw the defendant, Jones, going west on Third street, and met him near the corner of Third and Santa Fé streets, shook hands with him, and said to him, "Charley, I want that whisky;" and thereupon Jones said, "I am blowed up;" that he searched Jones and found a quart and two half pints of whisky on him.

The only question presented is the sufficiency of the evidence to support the verdict. An examination of the record discloses no merit in this appeal. The judgment herein is therefore affirmed.

Mandate forthwith.

\Leftarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SHADRICK v. STATE. (No. A-3266.)

(Criminal Court of Appeals of Oklahoma.
Sept. 2, 1919.)

Appeal from County Court, Oklahoma County; Wm. H. Zwick, Judge.

Bert Shadrick was convicted of a violation of the prohibitory liquor law, and he appeals. Affirmed.

Prulett, Sniggs & Patterson, of Oklahoma City, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Bert Shadrick, and Charles H. Holden, were jointly charged, tried, and convicted on an information charging the unlawful transporting of 60 half pints of whisky in an Overland automobile from one point to another certain point in Oklahoma City. The jury fixed the punishment of each at confinement for three months in the county jail and a fine of \$250. From the judgments rendered in pursuance of the verdict an appeal was perfected by filing in this court on February 26, 1918, petition in error, with case-made.

The appeal of the defendant Holden was dismissed on account of his leaving the state without leave of the court. 14 Okl. Cr. 463, 172 Pac. 977. An examination of the record discloses that the testimony on the part of the state to prove the allegations of the information is undisputed, and that the errors assigned are destitute of merit.

The judgment against the plaintiff in error, Bert Shadrick, is therefore affirmed. Mandate forthwith.

RANKIN v. STATE. (No. A-3130.)

(Criminal Court of Appeals of Oklahoma.
July 25, 1919.)

Appeal from District Court, Choctaw County; C. E. Dudley, Judge.

Charlie Rankin was convicted of the crime of conjoint robbery, and he appeals. Appeal dismissed on appellant's motion.

John Cocke, of Hugo, and Utterback & MacDonald, of Durant, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the district court of Choctaw county, wherein the defendant, Charlie Rankin, was convicted of the crime of conjoint robbery, and on the 16th day of May, 1917, was sentenced in said court to serve a term of 10 years' imprisonment in the state penitentiary at McAlester, and on failure to give a supersedeas bond the said Rankin has been confined in said penitentiary pending the determination

of this appeal. The defendant, Rankin, was convicted of having robbed, on the 22d day of November, 1916, one W. W. Jeter and one W. W. Moran, officers of a bank located in Boswell, Choctaw county, Okl., of the sum of \$11,362.32.

Since this cause was submitted, the defendant, Charlie Rankin, has filed a verified motion to dismiss his appeal as follows:

"Charlie Rankin, Appellant, v. State of Oklahoma, Appellee. No. A-3130.

"Petition to Dismiss Appeal.

"Comes now the appellant, Charlie Rankin, and moves that the honorable Criminal Court of Appeals of the state of Oklahoma shall dismiss from the records his appeal in said case, and that the action of the said appellant in appealing said case from the district court of Choctaw county, state of Oklahoma, shall and is hereby held for naught.

"[Signed] Charlie Rankin, Appellant.

"State of Oklahoma, Pittsburg County—ss.:

"Personally appeared before me J. G. Duncan, a notary public in and for the aforementioned county and state, Charlie Rankin, who being first duly sworn according to law, and being personally known to me, deposes and says that he is the appellant in the above-entitled case, and that he is the party signing the foregoing petition, and that the fact therein contained is true and correct.

"[Signed] J. G. Duncan, Notary Public. [Seal.]

"My commission expires 11-3-1920."

The motion of the appellant to dismiss the appeal is sustained, and it is therefore ordered that the appeal be dismissed. Mandate forthwith.

MOGG v. STATE. (No. A-3355.)

(Criminal Court of Appeals of Oklahoma.
Oct. 15, 1919.)

Appeal from District Court, Canadian County; Geo. W. Clark, Judge.

Richard Mogg was convicted of grand larceny, and he appeals. Appeal dismissed, and cause remanded, with direction.

Chas. H. Carswell, of Anadarko, and J. N. Roberson, of El Reno, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Richard Mogg, was tried and convicted in the district court of Canadian county on an information charging the theft of one Ford automobile, the personal property of one J. C. Shriver, and in accordance with the verdict of the jury he was on the 28th day of December, 1917, sentenced to serve a term of one year in the penitentiary at McAlester. From the judgment an appeal was perfected by filing in this court on May 10, 1918, a petition in error, with case-made.

On July 5, 1919, plaintiff in error filed a

motion to dismiss his appeal. The appeal herein is therefore dismissed, and the cause remanded to the trial court, with direction to cause its judgment to be carried into execution. Mandate forthwith.

PHILLIPS v. STATE. (No. A-3325.)

(Criminal Court of Appeals of Oklahoma.
Sept. 13, 1919.)

(Syllabus by the Court.)

INTOXICATING LIQUORS \S 233(2)—UNLAWFUL POSSESSION—EVIDENCE.

In a prosecution for the unlawful possession of intoxicating liquor, it was error to permit the prosecution to prove that three or four weeks after the filing of the information the officers found intoxicating liquors at the same place.

Appeal from County Court, Stephens County; J. W. Marshall, Judge.

W. C. Phillips was convicted of a violation of the prohibitory liquor law, and he appeals. Reversed.

J. B. Wilkinson, of Duncan, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Phillips, was convicted on an information charging that in Stephens county, on or about the 17th day of July, 1917, he did have in his possession one pint of whisky with the intent to sell the same, and his punishment was fixed at confinement in the county jail for 30 days and a fine of \$50. He has appealed from the judgment rendered upon such conviction.

There is but a single question presented by the record in this case for our determination. It appears that Bush Rayburn testified that on the 17th day of July, 1917, he was deputy United States marshal, and about said date he went to a place about seven or eight miles east of Duncan with some parties with a search warrant and searched the defendant's premises, finding a pint bottle of whisky with about a drink taken out. After other witnesses had testified, the witness Rayburn was recalled by the state, and over the defendant's objection was permitted to testify that three or four weeks later, and after the information was filed in this case, he with other parties searched the same place and found 84 quarts of whisky in the loft of the residence. The testimony was objected to on the part of the defendant as irrelevant, incompetent, and prejudicial, because the transaction testified to occurred after the of-

fense is alleged to have occurred in this case, which objection was overruled. Thereupon counsel for the defendant moved the court to exclude this testimony from the jury, for the reasons stated. The motion was denied, and exception allowed.

This testimony was wholly incompetent, and the only effect of it must have been to prejudice the jury against the defendant in the case upon trial, and for this reason it was error to overrule defendant's motion to strike. It follows that the judgment of conviction must be reversed.

ARMSTRONG and MATSON, JJ., concur.

ASHBURN v. STATE. (No. A-3267.)

(Criminal Court of Appeals of Oklahoma. Sept. 20, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1036(1), 1054(1)—APPEAL—ADMISSION OF EVIDENCE—OBJECTION AND EXCEPTION.

Admission of alleged incompetent evidence cannot be reviewed, where no objection was made or exception reserved.

2. LARCENY \S 85—GRAND LARCENY—SUFFICIENCY OF EVIDENCE.

In a prosecution for grand larceny, the evidence considered, and conviction affirmed.

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW \S 596(1)—CONTINUANCE—DISCRETION OF COURT—CUMULATIVE EVIDENCE.

In a prosecution for grand larceny, where the record showed that the testimony of an alleged absent witness would have been cumulative, it could not be said that trial court abused its discretion in overruling defendant's motion for a continuance for absence of such witness.

Appeal from District Court, Carter County; F. M. Freeman, Judge.

H. A. Ashburn was convicted of grand larceny, and he appeals. Affirmed.

Pardue & Hamilton, of New Wilson, for plaintiff in error.

W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, H. A. Ashburn, was charged jointly with B. M. Whitamore, E. S. Starkey, and J. E. Hocker, with the larceny of 600 feet of 2½ New Bedford cable, of the value of \$300. 1,000 feet of 2¼ New Bedford cable, of the value of

\$400, and 250 feet of two-inch Trojan cable, of the value of \$150, all of the aggregate value of \$850, the property of S. M. Gordon. A severance was granted, and upon his separate trial plaintiff in error was convicted, and his punishment assessed at three years' imprisonment in the penitentiary. He has appealed from the judgment rendered upon such conviction.

The errors assigned are: (1) The court erred in overruling plaintiff's in error motion for a continuance; (2) the court erred in admitting certain testimony on the part of the state over the objections of the plaintiff in error; (3) the court erred in overruling the motion to instruct the jury to return a verdict of acquittal.

[2] The evidence for the state shows that S. M. Gordon, an oil and gas well contractor, was drilling a well in the Healdton field in Carter county; that the cable described was coiled on the ground near the well the evening before he missed the same; the next morning he found the tracks of two wagons near the well, one drawn by a span of mules and the other by a team of ponies; one was a narrow-wheel wagon, and the other one was wide; he followed the tracks towards Ardmore; there he found the defendants, who had been arrested. He then went out near Lone Grove, and found the cable on two wagons. The officers testified they met the defendants near Wolf Creek. Ashburn was driving one of the wagons and said he had bought the cable from a fellow that he had met on the other side of Dundee the day before. Another witness testified that he was driller for S. M. Gordon, and was familiar with the cable used on the well; that he helped splice the cable, and identified the cable found in the defendant's wagon as S. M. Gordon's property.

Codefendant J. E. Hocker, as a witness for the state, testified that he, with the other defendants, left Ardmore and went to the defendant Ashburn's place; that they left there and went towards Ragtown; that he was with Ashburn, who was driving one team, and the defendant Starkey was driving the mules, and B. M. Whittamore was with him; that about midnight they stopped the wagons near an oil derrick and Ashburn

said, "We can get this rope here;" that Ashburn had a double edge ax and chopped the rope with it, and they loaded it on the wagons and started for Ardmore, and that morning he threw the ax out near the Hewitt graveyard; that daylight came when they were near Wilson; about that time the narrow tread wagon broke down, and they borrowed another wagon; that between Bayou and Wolf Creek the sheriff and his deputy arrested them.

Ethel Earl, as a witness for the defendant, testified she was peddling milk in Ragtown, and on her way home met Hardy Ashburn and Barney Whittamore about a mile and a half north of Ragtown, and was talking to them when a man came along, and Hardy and Barney bought this rope from him and paid him \$17.50 for it; that this was the day before they were arrested. H. A. Ashburn, as a witness in his own behalf, testified that he bought the rope a mile and a half north of Ragtown from a fellow, and paid him \$17.50 for it; that he did not know who the fellow was.

[3] The motion for continuance was filed on the day that the case was called for trial, September 10, 1917. It was stated in the motion that Otto McCarty, if present, would testify that he was present when Hardy Ashburn purchased the rope in question; that on the 4th day of September, 1917, he caused a subpoena to be issued for Otto McCarty, and that such subpoena has not been served; that said defendant cannot safely go to trial without said testimony. The record shows that the testimony of McCarty would have been cumulative, and we cannot say that the court abused its discretion in overruling the motion for continuance.

[1] As to the second assignment of error, counsel have not pointed out, and we have failed to find, any exceptions reserved to rulings of the court on the admission of evidence.

The third assignment of error is not well taken. The evidence is ample to support the verdict and judgment of conviction.

The judgment is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

CASSINELLI v. HUMPHREY SUPPLY CO.
(No. 2339.)

(Supreme Court of Nevada. Sept. 5, 1919.)

1. APPEAL AND ERROR \S 1511(1)—FINDINGS—CONCLUSIVENESS.

A finding of fact based on a substantial conflict in material evidence is conclusive upon appeal.

2. APPEAL AND ERROR \S 1008(1, 3)—FINDINGS—CONCLUSIVENESS.

A finding based upon undisputed facts or the construction of a written instrument is not binding upon appeal.

3. SALES \S 90—ACTION FOR PURCHASE PRICE—ADMISSIBILITY OF EVIDENCE.

In action for purchase price of hay destroyed by fire, evidence that a stick was placed in the hay to indicate amount covered by the sales agreement *held* immaterial on question whether hay subject to agreement was ascertained so as to pass title, where a subsequent written agreement fixed exact amount of hay sold.

4. SALES \S 209—PASSING OF TITLE—"SPECIFIC OR ASCERTAINED GOODS."

Where all the hay in certain stacks was sold except 30 tons retained by the seller, the hay sold was "specific or ascertained goods" within Uniform Sales Act, \S 18, providing that the property in such goods is transferred at time the parties intend.

5. SALES \S 199—UNIFORM SALES ACT—CONSTRUCTION.

Uniform Sales Act, \S 19, prescribing several rules for ascertaining the intent of the parties as to when title passes, merely creates presumptions which give way if a contrary intent appears.

6. SALES \S 201(5)—PASSING OF TITLE—UNIFORM SALES ACT.

Uniform Sales Act, \S 19, rule 5, creating a presumption that title does not pass until the goods have been delivered, *held* inapplicable to an agreement under which certain hay was to be constructively delivered immediately after it had been measured.

7. SALES \S 209—PASSING OF TITLE—UNIFORM SALES ACT.

Uniform Sales Act, \S 19, rule 1, creating a presumption that title is intended to pass where there is an unconditional contract to sell certain specific goods in a deliverable state, etc., *held* inapplicable to an agreement to sell all the hay in certain stacks except 30 tons to be retained by the seller.

8. SALES \S 200(2)—PASSING OF TITLE—CONSTRUCTION OF CONTRACT.

A contract under which all hay in certain stacks was sold, excepting 30 tons to be retained by the seller, etc., *held* to make measurement

of the hay a condition precedent to the passing of title despite the use of the words "bought" and "sold" in the contract.

9. SALES \S 199—DESTRUCTION OF GOODS—SELLER'S LIABILITY.

Under the direct provisions of Uniform Sales Act, \S 8, 22, the seller must bear the loss of hay covered by a sales agreement, but to which title had not passed, when it burned without the fault of either party.

10. SALES \S 218½—EVIDENCE—ADMISSIBILITY.

In seller's action to recover purchase price of hay which defendant claimed had not been measured so as to pass title before it was accidentally burned, evidence that plaintiff's sons measured the hay after sales contract was executed, but before date agreed upon for measurement, *held* inadmissible to show compliance with contract.

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

Action by Pietro Cassinelli against the Humphrey Supply Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Mack & Green and A. F. Lasher, all of Reno, for appellant.

Cheney, Downer, Price & Hawkins, of Reno, for respondent.

DUCKER, J. Appellant, who was plaintiff in the court below, brought his action against the Humphrey Supply Company to recover the unpaid purchase price of 296 $\frac{5}{8}$ tons of hay. The complaint alleges that at the time of the sale the hay was in a deliverable condition, and was agreed to be delivered and was delivered in the stack at and where the same was then stacked, and nothing remained to be done with reference thereto to pass the title to defendant, and it was the intention of plaintiff and defendant to pass the title to the hay by agreement, and that the title did thereby pass from plaintiff to defendant. It is also alleged that no part of the purchase price of said hay has been paid except the sum of \$500, and that the remainder of the purchase price of the hay, the sum of \$2,468.33, is due, owing, and unpaid. All of these allegations are denied in the answer except the payment of the sum of \$500, and in the counterclaim the return of this sum is demanded.

The answer also alleged the following agreement in writing:

"No. 964.

"Humphrey Supply Company.

"Dec. 1st. 1916.

"Bought of Peter Cassinelli the following. I have sold all of my hay to Humphrey Supply Co., except about thirty tons at Ten Dollars per ton to be measured by same rule as

sold to Nevada Packing one year ago, to be fed by P. Cassinelli free or we can feed ourselves, Cassinelli to furnish team and wagons.

"The above hay to be delivered at once when measured and I hereby acknowledge receipt of \$500.00.

"His mark X Peter Cassinelli,
"Seller.
"H. L. Nichols,
"Buyer.
"W. E. Fuhrman."

On the issues thus made the trial court found that on December 2, 1916, all the hay referred to in this action was consumed by fire and destroyed; that at the time the hay was so burned and destroyed all of said hay was owned and in the possession of the plaintiff herein; that the hay in the stacks was not in a deliverable condition at the time it was burned, and had not been delivered to, or accepted by, the defendant; that the terms of said written agreement had not been complied with at the time the hay was burned; that the title to the hay or any of the hay referred to did not pass from the plaintiff to the defendant.

From the judgment rendered in favor of defendant and an order denying a motion for a new trial this appeal is taken.

A number of errors are assigned by appellant, and the principal one is that the court erred in finding that the hay in the stacks was not in a deliverable condition at the time it was sold, and had not been accepted by the defendant, and that the title had not passed from the plaintiff to defendant. It is insisted that such finding is not sustained by the evidence. On the other hand, respondent contends that the facts found are not reviewable here because they were found on a conflict of the evidence; and the only question we can consider in reference thereto is whether the conclusion that the title to the hay did not pass is a correct conclusion of law to be drawn from the facts found by the trial court.

[1, 2] If there is a substantial conflict of the material evidence upon which the finding rests, this contention may be admitted. The question of whether the title passed depends entirely upon the intention of the parties, if the goods were specific and ascertained goods.

"If the intention is to be determined mainly from a construction of written instruments, the legal effect of which is for the court, and uncontradicted evidence, it is one for the courts." 24 R. C. L. § 275.

"The question is essentially one of fact; and though if the whole contract of the parties is reduced to writing this question is determined by the court, as also if the facts are so clear as to justify but one conclusion." Williston on Sales, § 262.

If the question is one for the court, either by reason of the construction of a written instrument or undisputed facts, this court is

not bound by the findings or conclusions of the lower court, but may draw its own conclusion as to the legal effect of the written instrument or other evidence. 3 Cyc. p. 347.

The inquiry arises, therefore, as to how far the finding of the court is based upon conflicting evidence, and necessitates a brief summary thereof.

On November 30, 1916, appellant was the owner of and in possession of two stacks of hay, situated upon his ranch near Reno, and on that day Mr. Small, representing the Humphrey Supply Company, went to appellant's ranch and entered into negotiations with him for the purchase of the hay for the company. The next day, Friday, December 1st, appellant went to the office of respondent in Reno, and the agreement set out in the answer was executed by appellant and respondent. At the time of the execution of the agreement respondent gave appellant its check for \$500. Mr. Small was present, and it was agreed between appellant and Mr. Small that they would measure the hay on the following Monday. At some time between the day the agreement was executed and the Monday following all the hay was burned through no fault of either party. This summary comprises all of the uncontradicted evidence that has any bearing upon the intention of the parties. There is also in the record the undisputed testimony of the appellant's two sons that on December 1st, at their father's instance, they measured the hay claimed to have been sold to respondent; but this evidence was retained in the record, by the ruling of the court, only for the purpose of showing the quantity of the hay, in case the court found that there had been a completed sale. The only evidence in which there is a conflict of a substantial nature is as to whether Mr. Small and appellant, when negotiating at the latter's ranch on November 30th, segregated or identified the hay which respondent desired to purchase from the 30 tons which the appellant wished to retain. Appellant testified that on this occasion Small drove a stick in the stack on the east side to indicate the amount of hay he desired and the quantity reserved by appellant. Mr. Small testified that he did not put any stick in the stack and did nothing to designate the portion of the hay appellant was to keep for himself.

[3] From the aforesaid ruling of the court on the evidence of appellant's sons, and its judgment in favor of respondent, it is apparent that the court did not consider their testimony that they found a stick in the stack and measured from it when they measured the hay on December 1st.

There is no intimation of a finding on this conflicting evidence in the findings of the trial court, nor is it mentioned in the brief oral opinion of the court incorporated in the record. Even if the stick was placed in the stack by respondents' agent, the act

was, at the most, a mere estimation of the amount of hay desired, and was superseded by the written agreement which fixed the amount of hay to be taken by respondent and the amount to be retained by appellant to a definite number of tons, to be ascertained by actual measurement. The testimony of appellant and Mr. Small on this question was therefore immaterial, and a finding upon it, if made, would have been ineffective.

A consideration of the provisions of the Sales Act (Laws 1915, c. 159) is necessary to a determination of the principal question involved.

We are admonished by the statute to so interpret and construe its provisions as to effectuate its general purpose to make uniform the laws of those states which enact it. Section 74, Uniform Sales Act. Consequently a large number of the authorities cited by appellant, having no reference to the Uniform Sales Act, will not be considered as aids to our construction.

"It is apparent that, if these Uniform Acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws." *Commercial Bank v. Canal Bank*, 239 U. S. 520, 38 Sup. Ct. 194, 60 L. Ed. 417, Ann. Cas. 1917E, 25.

Section 76 of the act defines "goods" to "include all chattels personal other than things in action and money." By sections 17 and 18 of the act, goods are divided into two classes—"unascertained goods" and "specific or ascertained goods."

"Sec. 17. Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

"Sec. 18. (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."

It thus becomes important to ascertain which one of the classifications of the statute embraces the subject-matter of the controversy, for clearly, by the express prohibition of section 17, no property in the hay which was burned could have passed unless the property which respondent desired to purchase had been previously ascertained. If the hay was specific or ascertained goods, the property could pass only at the time the parties intended it to be transferred, as provided in section 18.

[4] Counsel for respondent contend that the hay was not "specific or ascertained goods," but we are of the opinion that it was. It was in a specified mass of two stacks of hay which had been examined by Mr. Small on November 30th, and it does not appear from the agreement or circumstances attending it that any selection as to quality or other character was to be made. From the written agreement it appears that all of the hay was included in the arrangement, except about 30 tons reserved by appellant, and its terms exclude any legitimate inference that it was the intention of the parties that either allotment was to come from any portion or section of the stacks. We need not determine whether the hay in the stacks was fungible goods or not, within the meaning of that section of the act which defines fungible goods to be "goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit." It is sufficient that the parties in their agreement treated the hay as fungible goods by making no reservation for selection from any part of the mass. Conceding for the purposes of this decision that the hay was fungible goods, it was still specific and ascertained goods, for it was all in a specified mass, and considered the same in quality and value. If appellant had sold an undivided share of it to respondent, segregation would be necessary to give each his property in severalty; but before such severance the property of each in a proportionate share of the entire mass would be no less definite and ascertained. *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Kingman v. Holmquist*, 36 Kan. 735, 14 Pac. 168, 59 Am. Rep. 604.

Section 6 of the Uniform Sales Act provides for the transfer of fungible goods, and as we conclude that the subject-matter of the agreement comprehends specific or ascertained goods, as designated by section 18, we must look to the intention of the parties for the residence of title when the hay was burned.

[5, 6] The Uniform Sales Act, in section 19, prescribes several rules for ascertaining the intention of parties, and counsel for respondent contend that if the goods were specific rule 5 applies.

Of course these rules are mere rules of presumption, and by the terms of the act must give way if a contrary intention appears. Rule 5 reads:

"If the contract * * * requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

This rule is declaratory of the common law. It is based upon a theory analogous to that supporting rule 2 of section 19—something

further remains to be done, not, indeed, to put the goods in a deliverable state, but in order to carry out the bargain. Williston on Sales, par. 280.

Counsel base their contention in this respect upon the theory that the agreement obligates the appellant to deliver the goods as a condition precedent to the transfer of the property, and there was no delivery.

But it is not clear that the agreement effects such an obligation. The agreement contemplates delivery after measurement. This is plain from the language, "The above hay to be delivered at once when measured." And it is likewise clear that the delivery was intended to be made at the stack grounds, for it is apparent from the language used in the agreement, "to be fed by P. Cassinelli free or we can feed ourselves, Cassinelli to furnish teams and wagons," that the respondent intended to feed the hay to stock directly from the stack grounds. The weakness, therefore, of respondent's contention that rule 5 applies lies in the fact that the agreement for delivery in no way changes the rule of law that in the absence of a contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and, if not, his residence. Section 43, Uniform Sales Act. In the case before us the agreement merely provides for delivery at once after measurement at the stack grounds, which, under the facts of this case, constituted the appellant's place of business. The effect of the agreement in this regard is the same as if delivery had not been mentioned, but left to the implication of the law. To construe a contract of sale as vesting title to specific and identified property only on delivery to the buyer, or to a particular place, its terms evidencing such intention must be clear and explicit. "Slight evidence is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery." Benjamin on Sales, § 325.

The cases cited by counsel for respondent (*Hauptman v. Miller et al.*, 94 Misc. Rep. 266, 157 N. Y. Supp. 1104, and *Conroy v. Barrett*, 95 Misc. Rep. 247, 158 N. Y. Supp. 549), wherein rule 5 is construed, and the contract involved held to be within the terms of that rule, and which they contend support their theory that the parties intended the transfer of the property to be dependent upon delivery, do not, in our opinion, sustain it. In the former case there was no contention that the rule did not apply. This was conceded by the plaintiff, who sought to show compliance with the contract by delivery to the defendant at their place of business, and the court held on appeal that he had failed to prove such delivery. In the latter case, of the facts and the law the court said:

"The contract not only required the sellers to deliver the goods to the buyer, but it also re-

quired the sellers to deliver the articles at a particular place. The sellers having agreed to make the delivery, they were bound to see that delivery was properly made, and the title to the article remained in them until the agreement of sale and delivery had been completed."

In the instant case it is apparent that only a constructive delivery was contemplated. No physical act on the part of appellant was necessary to accomplish delivery. The hay was to be fed from the stacks to respondent's stock. Delivery under these circumstances would necessarily have been incidental to and effectuated by the measurement made by the parties. An act so inconsequential would hardly justify the inference that it was intended as the event that was to transfer the property. We think the intention of the parties as to delivery was merely to postpone it until immediately after measurement, and therefore that rule 5 has no application.

[7] Counsel for appellant insist that the true rule for ascertaining the intention in this case is formulated by rule 1, which provides:

"Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

This rule is also declaratory of a common-law rule, that if the buyer or seller makes a proposition of purchase or sale, and either accepts, and the goods are in possession of the seller, and nothing remains to be done to identify them, or in any way prepare them for delivery, the sale is completed, and the property in the goods passes at once. Time of payment or delivery is immaterial. This rule establishes a presumption that the title passes when the contract is made if the goods are identified, and nothing remains to be done other than delivery of the goods and payment of the price. Williston on Sales, § 264.

We think that this rule is also inapplicable.

[8] The pivotal matter in the transaction is the condition as to measurement, and, on the whole, it is fairly collectible that the parties intended this requirement as essential to consummate the sale.

In the written contract it is stipulated that the hay should be measured prior to delivery and by an agreed standard of measurement, "by same rule as sold to Nevada Packing one year ago."

The written contract is silent as to the time and by whom the measurement was to be made, but these factors are supplied by the understanding between Mr. Small and appellant at the time of the execution of the contract. Mr. Small testified, and it was contradicted by appellant, and corroborated

by Mr. Nichols, that at that time appellant agreed that the hay should be measured the following Monday. It appears that Mr. Small and appellant were to participate in the measurement. Neither of the parties had waived the stipulations concerning measurement when the hay was burned. Both had the right to participate in the measurement of the hay. Delivery had been postponed by the express terms of the contract until after measurement. There was something more to be accomplished by the measurement than the mere ascertainment of the price to be paid for the hay.

It was a necessary act under the contract to separate appellant's 30 tons from the larger mass which respondent proposed to purchase, so that the latter could be fed from the stacks to its stock without incurring the danger of feeding any portion of the hay reserved by appellant.

If respondent had contracted for all of appellant's hay in the two stacks, then it would be certain that measurement could serve no purpose except to ascertain the price to be paid.

If such was the case here, then the rule contended for by appellant, and to sustain which he has cited numerous authorities, that property in goods will pass to the buyer though the goods sold are afterwards to be weighed, measured, or counted, might apply. This rule, however, has its most frequent application when there has been a delivery, and the quantity of goods sold is yet to be ascertained to fix the price. Benjamin on Sales, §§ 418-423. In this case, however, delivery having been specially postponed until after measurement, and the former being necessary, not only to ascertain the price, but to distinguish into severalty the subject-matter of the contract so that the acts of possession and ownership mentioned in the contract might be properly exercised over it, the circumstances strongly indicate that the parties regarded measurement as essential to complete the sale. The effect of the agreement and understanding concerning measurement was to make it impossible for the buyer to take possession of the property until that had been done. The measurement was "something further to be done," as stated in Williston on Sales, supra, "not, indeed, to put the goods in a deliverable state, but in order to carry out the bargain," and to put the buyer in possession of the property.

Considerable stress is laid by counsel for appellant upon the words "bought" and "sold," used in the contract, as indicating a present sale. These terms are frequently used in executory contracts, consequently their literal meaning is not necessarily evidence of a present sale.

In Elgee Cotton Cases, 22 (Wall.) U. S. 180, 22 L. Ed. 863, the contract of sale contained

this expression: "We have, this 31st of July, 1863, sold unto Mr. C. S. Lobdell our crops of cotton," etc. The contract was held executory only:

"Not too much stress must be laid upon the use of the words 'sell' or 'buy' by the parties. These words are constantly used as meaning or including contract to sell or contract to buy." Williston on Sales, § 262.

We see no reason for attributing any particular significance to the buying and selling clauses of the contract.

The case of Welch v. Spies, 103 Iowa, 389, 72 N. W. 548, illustrates the distinction which may be drawn as to intention between the sale of an entire mass and a part of a larger mass from which reservations are made by the vendor. Plaintiff sold defendant not less than 1,600 nor more than 2,300 bushels of corn at so much a bushel, and received \$50 of the purchase money. The corn was in two cribs, one containing 1,600 bushels intact, and the other, which had been opened, about 700 bushels. Plaintiff reserved a right to retain 200 or 300 bushels, if he needed them, and a third party was entitled to 50 bushels. The jury by its verdict found that the agreement was effectual to transfer the title to the 1,600 bushels only of corn in the crib which had not been opened. The court said the evidence to sustain the finding was ample.

In Kimberly v. Patchin, supra, 19 N. Y. 338, 75 Am. Dec. 334, the leading American case holding that, upon a sale of a specified quantity of grain, its separation from a mass indistinguishable in quality or value, in which it is included, is not necessary to pass title when the intention to do so is otherwise clearly manifested, the court recognized that in such a case it was quite possible and competent for parties to intend measurement as a condition to be performed before title vests in the purchaser. Upon this point the court said:

"Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale."

We hold that, under the particular facts of this case, measurement was a condition precedent in the contract to the transfer of property in the hay, and that the title had not passed to the buyer when the hay was burned.

[9] When the hay was burned the risk of

the loss was with the seller, for there is nothing in the agreement to place the risk on the buyer. This proposition is made a positive rule of law by the terms of the Uniform Sales Act.

With certain exceptions not presented by the facts of this case, section 22 of the act provides:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not."

In the absence of agreement to the contrary, the risk is with the seller, though the goods are identified, till the moment when the property is transferred. If the goods are destroyed or injured before that time, the buyer cannot be compelled to pay the price, and, if he has paid the price in advance, it may be recovered. Williston on Sales, § 301.

The risk not having passed to the buyer when the hay was burned without the fault of either party, the contract was avoided. This is the effect of section 8 of the Uniform Sales Act:

"When there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, * * * the goods wholly perish, the contract is thereby avoided."

[10] We find no error in the rulings of the court excluding and striking out certain testimony. The principal objection in this regard is to the ruling of the court in striking out the testimony of plaintiff's sons respecting measurements which they made of the hay after the contract was executed and before the date agreed for measurement. This testimony was immaterial as tending to show compliance with the contract. It was pertinent only for the purpose of tending to establish the quantity of hay in the stacks in case the court found that there was a completed sale, and it appears that the court by its ruling retained the testimony in the record for this purpose.

In view of our opinion on the merits of the case, we have deemed it unnecessary to consider respondent's motion to dismiss the appeal.

The judgment of the district court is affirmed.

SANDERS, J., concurs. COLEMAN, C. J., concurs in the order.

BRAUTIGAM v. BRAUTIGAM.
(L. A. 5233.)

(Supreme Court of California. Aug. 27, 1919.)

DIVORCE §127(4) — **CRUELTY** — **CORROBORATION.**

Corroboration, in action for divorce for cruelty, may be sufficient, though weak; the nature of the cruelty being of a character making corroboration difficult.

Department 1.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Anna M. Brautigam against Sigel F. Brautigam. Judgment for defendant, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Preisker, Preisker & Goble, of Santa Maria, for appellant.

SHAW, J. The plaintiff appeals from a judgment against her in an action for divorce, in which the defendant had defaulted and the case was submitted to the court upon the evidence produced by the plaintiff. The complaint as causes of divorce, alleged cruelty and desertion. It is unnecessary to set forth particularly the allegations or the evidence produced. A reading of the evidence satisfies us that it was sufficient to establish the cruelty alleged in the complaint. It fails to establish the allegation of desertion solely because of the fact that, after the cruelty had continued until it became impossible for the wife to continue living with her husband, as such, without destroying her health, the parties for that reason agreed to a separation. The only doubt in the case arises from the weakness of the corroboration. The nature of the cruelty was of a character which made corroboration difficult, but we think it was sufficient to meet the requirements of the law in that particular.

The judgment is reversed, and the court below is directed to enter judgment in favor of the plaintiff in accordance with this opinion.

We concur: **LAWLOR, J.; OLNEY, J.**

BENJAMIN v. WALTON. (L. A. 5215.)

(Supreme Court of California. Aug. 25, 1919.)

1. ASSAULT AND BATTERY §40 — **DAMAGES** — **EXCESSIVENESS.**

\$1,000 held not excessive damages for injuries which evidence tended to show caused permanent impairment to one eye, internal adhesions in the abdomen, severe pains, loss of sleep,

and impaired earning capacity, resulting from an assault.

2. ASSAULT AND BATTERY §34 — **CIVIL LIABILITY** — **ADMISSIBILITY OF EVIDENCE** — **MITIGATION.**

Where question of punitive damages had been withdrawn from jury in an assault case, provoking circumstances cannot be considered in mitigation of the actual damages suffered by plaintiff.

3. TRIAL §244(1) — **INSTRUCTIONS** — **UNDUE PROMINENCE.**

Where defendant's counsel in an assault case improperly argued to the jury that plaintiff's provoking words mitigated the damages, after question of punitive damages had been withdrawn from jury, the court might properly emphasize that portion of his instruction which showed the fallacy and impropriety of counsel's argument.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by W. L. Benjamin against R. A. Walton. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Evans and W. E. Evans, all of Los Angeles, for appellant.

Oliver O. Clark, George M. Pierson, Claud B. Andrews, and E. B. Drake, all of Los Angeles, for respondent.

WILBUR, J. Plaintiff sued to recover compensatory and punitive damages for an assault. Defendant answered, admitting the assault, and alleging circumstances of provocation in mitigation of punitive damages. Upon the trial plaintiff waived punitive damages.

[1] The only question remaining for consideration was the amount of compensatory damages to which the plaintiff was entitled. The jury returned a verdict for \$1,000. As usual, the evidence concerning the nature and extent of the plaintiff's injuries is conflicting. According to the testimony offered on behalf of plaintiff the sight of one eye has been permanently impaired, internal adhesions were caused by a blow on the abdomen, plaintiff has suffered severe pain and loss of sleep and impaired earning capacity, so that for a period of 10 months after the assault he had only earned \$176. Without further statement of the testimony, it is evident that the damages were not excessive.

[2, 3] Plaintiff objects to the substance and the manner in which the following instruction was given to the jury:

"And, gentlemen, it is for you to determine whether any words were spoken by the plaintiff after he was first accosted by the defendant; but, if you find there were, they are not the slightest excuse or justification for the defendant. The jury have no right to consider them as any justification whatever, or in any

way as affecting or reducing the damages. A man has no right to take the law in his own hands under any circumstances, and the jury should not consider that at all. They should find what the damages were, without reference to any words that they may find were spoken."

With reference to the substance of the instruction appellant admits that no form of words would have justified an assault, but maintains:

"That there is a rule of law which permits the jury to consider any words immediately preceding an affront which would tend to provoke an assault, in mitigation of any damages resulting."

It is sufficient in this regard to say that, the question of punitive damages having been expressly withdrawn from the jury, no circumstances of provocation, whether occurring before or at the time of the assault, could in any way be considered in mitigation of the actual damages suffered by plaintiff by reason of the assault. *Marriott v. Williams*, 152 Cal. 705, 93 Pac. 875, 125 Am. St. Rep. 87.

With reference to the manner of the court in giving this part of the instruction, an affidavit was filed by the appellant's attorney, in which it is stated:

"His honor turned in his seat toward and faced the jury, leaned forward and with his left hand raised, and left fist clenched, and with strong and repeated gestures, with his said left hand and arm raised and extended, he gave said quoted instructions in a voice so loud that it could have been easily heard outside of the large courtroom, and in the corridors of the building."

The judge, in a reply affidavit, stated that, in giving this portion of the instruction he did face the jury and lean forward, but that he did not clench his fist, although he may have used gestures, and did give the instruction with great emphasis; that all the instructions were given in a loud tone of voice, and that this instruction was not given in a louder tone of voice than the rest. It was, however, given with greater emphasis than the rest, for the reason that the attorney for the defendant had argued to the jury that they should take into consideration in mitigation of damages the words that were claimed to have been spoken by the plaintiff just before the assault was committed. The affidavit proceeds as follows:

"Before the introduction of any evidence by the defendant the plaintiff waived all claim for punitive damages, and the court then stated that, the assault being admitted in the answer, the defendant could not introduce any testimony looking to mitigation of damages, and that the recovery could be only for compensatory damages. The testimony of what was claimed to have been said at the time of the assault was admitted in evidence, however, as part of the occurrence at that time; the testimony of the defendant being substantially as follows: That he got out of the machine and approached the plaintiff as he was on his way to his gate, and asked him why he had been talking about the company as he had, and that the plaintiff replied, 'To hell with you and your company,' and that then the defendant struck the plaintiff with his fist. Notwithstanding the prior instructions of the court, however, counsel for defendant in his argument to the jury stated that this was like a boy's quarrel, and that the defendant should be excused and the damages should be mitigated on account of what was said, and I deemed it proper under those circumstances to give the instruction which I did give, and I was especially anxious that the jury should understand that, if the words referred to were spoken, they were not the slightest excuse or justification for the defendant's assault, and that they should not be considered as affecting or reducing the damages; and I emphasized the statement that no man had a right to take the law into his own hands, and that whatever damages the jury should find without reference to any words that they might find were spoken. I felt no prejudice against the defendant, and did not intend to indicate that I was prejudiced against him; but I did intend that the jury should understand that a man had no right to take the law into his own hands, and that they should disregard the argument of the attorney for the defendant that what was said by the plaintiff, if it was said, should be taken into consideration by the jury in fixing the damages."

Under the circumstances stated in the affidavit of the judge, it was proper for the court to point out the impropriety of counsel's argument. Instead of doing this directly in an instruction, as might well have been done, the judge specially emphasized that portion of the instruction which showed the fallacy and impropriety of counsel's argument.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

NICHOLS v. MOORE et al. (L. A. 5235.)

(Supreme Court of California. Aug. 25, 1919.)

1. LIMITATION OF ACTIONS ⇐177(3) —
FRAUD—PLEADING.

A complaint based upon a fraud, outlawed by statute of limitations, except for fact that plaintiff had only recently discovered it, must plead facts excusing failure to make an earlier discovery.

2. EVIDENCE ⇐10(1) — JUDICIAL NOTICE —
TIMBER LAND.

Judicial notice will be taken that there are vast areas of timber lands in the state of Washington.

3. LIMITATION OF ACTIONS ⇐179(2) —
FRAUD—COMPLAINT—SUFFICIENCY.

A complaint based upon defendant's misrepresentations that land conveyed to plaintiff 12 years previously was timbered, and showing that plaintiff knew there was timber in the vicinity, but had not learned that this particular tract was burned over land until recently, etc., held to state facts excusing failure to earlier discover fraud sufficiently to avoid statute of limitations.

Department 2.

Appeal from Superior Court, Riverside County; H. H. Craig, Judge.

Action by Emma L. Nichols against Thomas Moore and E. E. Moore, his wife, and R. S. Brinkerhoff. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Evans, Abbott & Pearce and Albert D. Pearce, all of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, for respondents.

WILBUR, J. [1-3] This is an action to recover damages for fraud. Demurrer was sustained to the complaint on the ground that the claim was barred by the statute of limitations. The transaction complained of occurred in October, 1904. Plaintiff alleges that the fraud was first discovered by her in October, 1916, a few months before the bringing of the action. As stated in *Bradbury v. Higginson*, 187 Cal. 553, 558, 140 Pac. 254, and cases therein cited, it is necessary for the party seeking to avoid the bar to affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon—citing *Dennis v. Bint*, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; *Harrington v. Paterson*, 124 Cal. 542, 57 Pac. 476; *Lady Washington Co. v. Wood*, 113 Cal. 482, 45 Pac. 809. As was there said:

"But a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute. *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Burling v. Newlands*, 112

Cal. 476, 44 Pac. 810; *Lady Washington Co. v. Wood*, 113 Cal. 482, 45 Pac. 809; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117."

In *Phelps v. Grady*, 168 Cal. 75, 77, 141 Pac. 926, 928, the rule stated in *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, concerning pleadings in such cases, is cited and approved as the rule "consistently adopted and adhered to in this state"—citing *Robertson v. Burrell*, 110 Cal. 578, 42 Pac. 1086; *Lady Washington Co. v. Wood*, 113 Cal. 485, 45 Pac. 809; *Simpson v. Dalziel*, 135 Cal. 603, 67 Pac. 1080; *People v. San Joaquin, etc., Association*, 151 Cal. 797, 91 Pac. 740. In order to determine the question whether or not the plaintiff has shown reasonable diligence to acquaint herself with the facts constituting the fraud, and therefore whether her claim is barred by the statute of limitations, it will be necessary to state some of the facts and circumstances concerning the fraud alleged and the discovery thereof.

The complaint is based upon defendants' fraud in securing a contract by which plaintiff transferred an orange grove in Riverside, Cal., worth \$10,000 and returning an income of \$1,000 a year, for defendants' land in the state of Washington, which is absolutely valueless. At the time of the transaction plaintiff was living in Ohio and the defendants were living in Riverside. The negotiations were conducted by correspondence. The false representations which induced the plaintiff to transfer her land were numerous—among others that the land was worth \$25,000, and that the land was covered with timber, having at least 5,200,000 feet of timber of first-class quality, and, in addition thereto, other growing timber, that it was accessible to water transportation, and that when cleared the land was valuable for agriculture. The lands were more or less inaccessible, and known as wild lands. At the time of the representations and transfer there was no timber on the land. Whatever timber there had been thereon had been burned off. The land was valueless for agriculture. The allegations by which plaintiff justifies her failure to discover the fraud from the date of the transaction to October, 1916, and the circumstances concerning the discovery, are to the effect that during the negotiations leading up to the transfer the defendants sent a letter to her from one J. A. Wittrow, who signed himself as a "crulser," written upon the letter head of the Bank of Clallam County, Port Angeles, Wash., whose president subsequently acknowledged the signature to the deed which was delivered to plaintiff at the time of the transfer of the land to her; that by this representation so conveyed to her she was lulled into a false sense of security; that she was unacquainted with the basis upon which

assessments were made for taxes in that neighborhood, and that therefore the tax bills did not advise her of the fraud; that she was acquainted with the lands in the vicinity of the lands in question and knew that they were timber lands containing valuable timber; that she had bought the property as an investment for herself and children, and that the defendants knew that it was her desire to purchase the property for such purpose; and that she held the same as investment until 1916, when she had her brother investigate the property. She alleges that from the time of the transaction till that date she was at all times in the state of Ohio, and never in the state of Washington, although she had been in the state of Washington before or at the time of the transaction in question.

Without considering other items of fraud alleged, regarding the vicinity of the land to navigable water and its availability for agricultural purposes after it had been cleared, the question resolves itself into this: Was there anything in the situation that put the plaintiff on inquiry or required her to investigate the question as to whether or not the land had been denuded of its timber by fire before she acquired it? If the plaintiff had no knowledge whatever regarding the property, it might be said that the failure to investigate for 12 years and her reliance during all that period upon the assertions of strangers was inexcusable, and at least came within the principles enunciated in *Phelps v. Grady*, 168 Cal. 75, 141 Pac. 926. But the very fact that the plaintiff did know something of the surrounding lands, and did know that there were valuable timber lands, and that the land in question was located in such a district, coupled with the fact that such land does not change its character, and that under ordinary conditions the only result of a failure to examine the property for 12 years would be that the timber would have had that much more additional growth and be that much more valuable, tended to prevent any inquiry even by a careful person, where it involved a long and expensive trip to a more or less inaccessible land. It is a matter of common knowledge, of which the court will take judicial notice, that there are vast areas of timber land in the state of Washington. It is also claimed that the plaintiff did not sufficiently allege the facts concerning the discovery.

The real question, however, is whether or not plaintiff was justified in refraining from making any investigation until she sent her brother in 1916 to examine the property with a view to a sale of the timber thereon. If she was in fact ignorant of the fraud at that time, as she alleges, and as the demurrer admits, the allegation that she discovered the fraud through the investigation made by her brother at that time is a sufficient statement

concerning the discovery. As was said in *Phelps v. Grady*, 168 Cal. 75, 141 Pac. 926, every case of this sort must turn upon its particular facts, and where the alleged fraud of the defendants consisted, among other things, of concealing from the plaintiff the fact that the timber had been entirely burned off the land in question, the plaintiff has sufficiently disclosed by the facts alleged in her complaint that she was not in any way put upon inquiry, and that there was nothing to cause her in the exercise of ordinary diligence to examine the land in question, for the mere purpose of determining whether or not the timber that the defendant had represented was on the ground, and which she believed to be there, was in fact there.

The judgment is reversed.

We concur: LENNON, J.; MELVIN, J.

GARBARINO v. NOCH et al. (No. 2767.)

(Supreme Court of California. Aug. 25, 1919.)

1. WATERS AND WATER COURSES §152(5)—WATER RIGHTS—PLEADING—SUFFICIENCY.

Allegations that defendant owned a third interest in a ditch and water right may be supported by proof of ownership acquired by deed, prescription, or other lawful manner.

2. EVIDENCE §353(3) — ADMISSIBILITY — RECITALS IN ANCIENT DEEDS.

Recitals in a 50 year old deed relating to the property conveyed are competent evidence of the facts recited, even as against strangers to the title.

3. EVIDENCE §353(3) — ADMISSIBILITY — RECITALS IN DEEDS.

A 50 year old deed held admissible to show a declaration by the grantor while in possession that he then claimed full ownership of a ditch and water right.

4. WATERS AND WATER COURSES §152(8)—OWNERSHIP OF DITCH — SUFFICIENCY OF EVIDENCE.

Plaintiff's testimony that defendants used water from a ditch by his permission and deeds indicating that ditch had been considered appurtenant to plaintiff's and not defendant's property, etc., held to sustain a finding that ditch and water right belonged solely to plaintiff, although the parties had alternated in using the water for many years.

5. WATERS AND WATER COURSES §151 — PRESCRIPTIVE RIGHTS — EXTINGUISHMENT — DISUSE.

Under Civ. Code, § 811, subd. 4, relating to extinguishment of servitudes, a prescriptive right to the use of a ditch and water right is lost by failure to exercise the right for five years.

In Bank.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Angelo Garbarino against Philip Noce and Mrs. G. Cammissiona. Judgment for plaintiff, and defendants appeal. Affirmed.

J. B. Curtin, of Sonora, for appellants.

John A. Wall and R. B. Stolder, both of Mariposa, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff. The case involves the respective rights of the three parties in the waters of a stream known as Maxwell creek and in a certain ditch by which water is diverted therefrom. Each party owns a small parcel of land abutting upon the creek in the outlying limits of Coulterville. Noce's land is the upper parcel, Cammissiona's is the next, and that of Garbarino is the lowest upon the stream. The part of Noce's land for which the water is claimed lies on the northerly side of the creek. The lands of Cammissiona and Garbarino are on the southerly side. The ditch in question is a foot wide at the bottom, 18 inches wide at the top, and a foot deep. It diverts water from the stream at a dam situated about three-fourths of a mile above the land of Garbarino and about a quarter of a mile above the parcel of Noce. It is wholly on the southerly side of the stream and passes through the parcel of Cammissiona to that of Garbarino. In order to take water therefrom to the Noce land, a cut is made in the ditch, so as to let the water run into the bed of the creek, from whence it is taken into another ditch, on the northerly side of the creek, to the Noce land. Concerning these facts there is no dispute.

The plaintiff alleged that he is the owner of the entire interest in the ditch and in all the water it carries, that in July, 1916, defendant Noce wrongfully diverted water from the ditch and appropriated the same to his own use, and that he threatens to continue to do so. He prays that he be declared to be the owner of the entire interest in the water right and in the ditch, and that Noce be restrained from interfering therewith. Mrs. Cammissiona was brought in as a party defendant after the action was begun. The complaint contains no allegation as to her. The question as to her rights is raised by her answer. The claim of Noce and Mrs. Cammissiona is that the three parties to the suit are equal owners of the ditch and of the right to the water carried therein, as tenants in common, for a certain period of each year. More particularly, their claim is that the right to the common use of the ditch and to the water carried therein begins as soon each year as the water naturally running in the creek ceases to flow down its bed as far as their lands. In explanation it should be said

that, as the land of each party is riparian to the stream, each has the right to use thereon a reasonable proportion of its water, and that in the early part of the season of each year there is enough water in the creek to enable Noce and Cammissiona to divert it directly from the stream to their respective tracts without making use of Garbarino's ditch, and that they have been accustomed to do so. This usually continues until June or the early part of July. It is only thereafter, when the water gets too low to allow this, that they resort to the ditch or claim the right to use it. After this occurs, so they each claim and allege, each party, including Garbarino, has the right to use the ditch and all the water it carries, exclusive of the others, one day in three in successive turns, for the remainder of the season, to carry water to their respective parcels of land. At that time the ditch takes all the water of the creek flowing at its head. The court found that Garbarino was the sole owner of the entire interest in the ditch and in the water it takes from the creek, and gave judgment as prayed for in the complaint, but without damages. It is the contention of the defendants that this finding is contrary to the evidence. This is practically the only question in the case.

[1] Upon a review of the evidence we are of the opinion that it is sufficient to sustain the finding. The plaintiff discusses at some length his claim that the defendants cannot prove title by adverse possession under the issues made by the pleadings. The complaint alleges that Garbarino is the owner of the ditch and of the water taken from the creek and flowing therein. The answer of each defendant alleges in general terms the ownership by such defendant of a one-third interest in said ditch and water right, consisting of the right to use the same one day in each three days during the irrigating season, as above stated. The rule is that such a general allegation may be supported by proof of ownership acquired by deed, by prescription, or in any other lawful manner. *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318; *Cooper v. Blair*, 50 Or. 394, 92 Pac. 1074; *Gray v. Walker*, 157 Cal. 381, 108 Pac. 278.

[2-4] There was testimony that the ditch was in existence as early as the year 1860, and that from that time until Garbarino acquired his land in the year 1871 the ditch and the water therein was used each year on the land of each of the parties to this action one day in each three during the period of the year above mentioned, and that this was done without asking permission of the owner of the Garbarino lot and without interference by him. There was no testimony with respect to this period that the owner of the Garbarino lot had made any statement regarding the title or right of the other parties to the ditch or water or whether or not it was

done by his permission. It appears that during the years 1872 to 1875, inclusive, the Oak Flat Company turned water from Boneyard creek into Maxwell creek, increasing its flow in the dry season, so that the persons occupying the lands in question were able to take water from the enlarged stream directly to their lands, and that during that period they did not use the Garbarino ditch. They paid for this water directly to the Oak Flat Company. After the year 1875, and until July, 1916, the water was used on the land owned by Noce every year during the time above mentioned, and was carried thereto through the said ditch one day in three, and so on in succession, during each season. Garbarino himself testified to this continuous use of the water in the manner stated. His testimony also shows a similar use by Mrs. Cammisiona on her lot, at one time for a period exceeding five years continuously.

From this evidence of long-continued use without interference, if unexplained, the court could have inferred that the use of each party was rightful and adverse, and therefrom might have concluded that each had thereby acquired title by prescription to a one-third interest in the water and ditch, as claimed by defendants. But there was other evidence to the contrary. Garbarino also testified that each year during this time the other parties, before beginning to use water from the ditch, asked his permission to do so, and that when so asked he gave such permission to each of them to use the ditch and water one day out of each period of three days; that he did this out of friendship, and for no other consideration; and that he refused permission in the year 1916, because at that time he needed all the water on his own land. The appellant contends that this testimony is incredible; that the statement that one would continuously, for so many years, give away a valuable right, especially in view of his own testimony that it was necessary for his own land, and that the loss of the use of part of the water during that period of the season was injurious to him, surpasses belief. We cannot take this view of the testimony. The court below saw and heard the witness, and is the better judge as to whether he was sincere in his statement. In the words of Mr. Justice Burnett, in deciding the case in the District Court of Appeal:

"We cannot say that, even in this period of thrift and fierce competition, the claim of such generosity is so extraordinary as to cause us to reject it as inherently improbable."

There was also other evidence of admissions by the other owners tending to prove that they acknowledged the title and ownership of Garbarino in the ditch and the water and that they had the use of it only by his permission. If this were true, it would disprove the theory of a tenancy in common acquired by continuous adverse use and would

be sufficient to support the finding in question.

Other evidence tends to confirm this view. Neither of the defendants introduced any evidence tending to show the acquisition of the right they claim in any other manner than by continuous adverse use under claim of right. There was no direct evidence of the original construction of the ditch, but there was evidence justifying an inference regarding the same. A deed executed on October 6, 1862, for the Garbarino lot by one Comisione to the predecessors in interest of Garbarino, under whom he claims title, purports to convey the lot in question and the "garden thereon," and it describes the appurtenances thereto as follows:

"Two water ditches connected with the garden taken out of Maxwell's creek, one opposite of Chinatown and the other below the same, both on the same side of the creek of the garden, made and purchased to supply the garden with water."

It is admitted that the ditch coming out opposite Chinatown is the one now in controversy, although some changes in the place of diversion at the head thereof have been made since that time. A later deed in the chain of title of Garbarino also specifically describes the said ditch as an appurtenance to the lot. None of the deeds in the chain of title of the other lots to the defendants mentions this ditch in any manner. The deed to Noce from Cassacia not only fails to mention the Garbarino ditch as an appurtenance, but it does mention another ditch, known as the Cassacia ditch, leading from the creek on the opposite side from the Garbarino ditch to the Noce land. The deed of October 6, 1862, aforesaid, purported to convey the full title to the property described, including the ditch. Having been executed more than 50 years before the present controversy arose, it comes within the rules of evidence applicable to ancient deeds, and hence the recitals therein relating to the property conveyed are competent evidence of the facts recited, even against strangers to the title. *Randall v. Chase*, 133 Mass. 210; *Drury v. Midland Railroad Co.*, 127 Mass. 581; *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430; *Den ex dem. Saxton v. Fuller*, 20 N. J. Law, 65; *Morris v. Callanan*, 105 Mass. 132; *Ryle v. Davidson* (Tex. Civ. App.) 116 S. W. 828. It is also competent as a declaration of the grantor while in possession, as evidence that he then claimed full ownership of the ditch and water right. *Cannon v. Stockmon*, 36 Cal. 541, 95 Am. Dec. 205; *Stockton Savings Bank v. Staples*, 98 Cal. 193, 82 Pac. 936. The recitals quoted tend to show that the ditch was originally constructed by the owner of the Garbarino lot for the purpose of conveying water from the creek to that lot. The fact that the title deeds of the Garbarino lot show this particular ditch as an appurtenance,

while the title deeds of the other lots make no mention thereof, is some evidence, at least, that the right thereto was not claimed by the owner of the other lots at the time of making the conveyances thereof. All this evidence, we think, sufficiently supports the finding of the court that the defendants had not acquired title to any interest in the ditch or the water it carried.

[5] With respect to the Commission lot, it further appears from the evidence that water from the ditch was not used on that lot for the period of 10 years preceding the beginning of the action. If we assume that by her previous use of the ditch and water under claim of right for a period of more than 5 years prior to that time she had acquired the right she claims thereto, the evidence just referred to would show that she subsequently had lost it by disuse. An easement acquired by enjoyment is lost by a disuse thereof for the period of 5 years. Civ. Code, § 811, subd. 4; *Drake v. Russian River Land Co.*, 10 Cal. App. 668, 103 Pac. 167.

There are no other points made in support of the appeal. It may be added that the evidence was very conflicting in many matters of detail. The conflict, however, was substantial, and the court cannot interfere on appeal.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

GAUME v. SHEETS et al. (L. A. 5206.)

(Supreme Court of California. Aug. 25, 1919.)

1. VENDOR AND PURCHASER § 85—RESCISSION BY AGREEMENT.

A vendor's notice, declaring contract void for nonpayment of a purchase price installment and that he would commence an action to quiet title within 60 days, unless vendees surrendered possession, held a repudiation of the contract, which justified vendees in surrendering property and treating contract as rescinded.

2. VENDOR AND PURCHASER § 334(8)—RESCISSION—RECOVERY OF MONEY PAID.

Where a land sale contract is mutually rescinded, the vendees may recover purchase price installments paid by them.

3. TRUSTS § 79—RESULTING TRUST—CONTRIBUTING TO PURCHASE PRICE OF REAL ESTATE.

Persons contributing toward the purchase price of real estate held entitled to a resulting trust in property in proportion that their contribution bore to total purchase price.

4. VENDOR AND PURCHASER § 49—CONSTRUCTION OF CONTRACT—ATTORNEY'S FEES.

Vendees' agreement to pay expenses incurred by the vendor in clearing title to property refers only to expenses in perfecting title to be tendered vendees, and does not include attorney's fees incurred in an action to quiet title by vendor against vendees.

Department 2.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action to quiet title by Joseph Gaume against William P. Sheets and others. Judgment for plaintiff, and defendants appeal. Reversed, with instructions.

Hales & Cunningham, of Redlands, for appellants.

Earl D. Finch, of Redlands, for respondent.

WILBUR, J. [1-3] This is an action by a vendor to quiet title against his vendees. The defendants, in their answer and cross-complaint, set out certain arrangements and contracts entered into by the defendant and one Wells at the time of the execution of the contract of sale and as a part of the transaction. Portions of the answer were stricken out, and evidence in support of defendants' claims was objected to by plaintiff, and objection sustained. For the purpose of this decision we will assume the facts to be as stated by the defendants in those portions of the answer stricken out. Upon such assumption it appears that one K. C. Wells was the owner of the property in question, and that plaintiff held a mortgage thereon which was overdue, and upon which he was threatening a foreclosure. An agreement was entered into on August 7, 1915, between plaintiff and defendants and Wells, by which the defendants conveyed to Wells some real property owned by them, valued at \$3,000, and in consideration thereof, and of the agreement of plaintiff to cancel the mortgage thereon, amounting to \$5,600, Wells conveyed the property to the plaintiff, and plaintiff entered into an agreement with defendants by which plaintiff agreed to sell and defendants to purchase the land in question for the sum of \$5,600, which amount was to be paid in monthly installments of \$50, payable on the 10th of each month, and, in addition thereto, the entire proceeds of the crops grown on the property in question, until the amount of such proceeds, together with the \$50 payable each month, equaled the sum of \$1,200 per year, and if such proceeds, together with the payments so made, did not equal said amount, to add thereto sufficient to make the total payment for the year \$1,200. In addition thereto, the vendees agreed to take possession of the property and care for it in a good and husbandlike manner, keep the

property in good condition of repair, pay all taxes levied and assessed thereon, and to assume and pay the taxes for 1915-1916, then a lien on the premises. The vendees entered into possession of the property and cared for the same, but whether they did so in a good and husbandlike manner was one of the facts in dispute. Defendants defaulted in the payment due April 10, 1916. Time was expressly made the essence of the contract. The agreement in that regard is as follows:

"It is understood and agreed that time is the essence of this contract, and should the parties of the second part fail to comply with the terms hereof, then, upon sixty days' notice in writing, the party of the first part shall be released from all obligations in law and equity to convey said property, and the parties of the second part shall forfeit all rights thereto and to all money paid under this contract. And the parties of the second part agree to reimburse said party of the first part for any and all expenditures of whatsoever nature which may be incurred by said first party in clearing the title to the property herein agreed to be conveyed, and for the payment of all sums expended by said first party for taxes, assessments, incumbrances, adverse claims, insurance, repair, cultivation, irrigation, fertilization and protection."

Thereafter, on April 28, 1916, the vendor served notice upon the vendees, stating that they had defaulted in the payments to be made under the contract; that—

"by reason of said default the said Joseph Gaume has elected and does hereby elect to declare said agreement null and void and all right which you have acquired thereunder forfeited. You are notified that unless you surrender possession of said premises to said Joseph Gaume or his attorney on or before sixty days from the date hereof; that he will commence an action against you to quiet title to said above described premises, and will ask for a decree against you requiring you to pay all delinquent taxes and assessments, together with reasonable attorney's fees to be determined by the court for the quieting of the title to said premises."

Upon the receipt of said notice the vendees surrendered the possession of said property to the vendor. Defendants allege in their answer and cross-complaint "that because of the acts of the plaintiff, as above specified, the defendants elected to treat the contract set out in paragraph I of plaintiff's complaint as rescinded by the plaintiff," and seek by such answer and cross-complaint to recover the sum of \$850 which they had paid in monthly installments on account of the purchase price, and have it declared that the conduct of the plaintiff amounted to a rescission of the contract, and pray for a judgment that they own fifteen forty-thirds of the property, upon the theory that on the cancellation of the contract of sale between the vendor and vendees by mutual consent the vendees are en-

titled to recover the moneys paid and in addition thereto be relegated to the position they occupied at the time the contract between the vendor and vendees was entered into, namely, that, having paid Wells fifteen forty-thirds of the purchase price of the land, they are therefore the beneficiaries of a resulting trust in the property pro tanto. The vendees seek to excuse the nonpayment of the \$50 installment due April 10th by claiming that they were prevented from making such payment by reason of the fact that the vendor served a notice upon a packing house to which the vendees had delivered a part of the crop, directing the owner of such packing house not to pay to the vendees the proceeds, amounting to \$52, derived from the sale of oranges raised upon the place, but to pay the same to the vendor. This claim, however, is not sustainable, for the reason that the vendor was entitled to the amount as a part of the proceeds of the crop in any event, and for the further reason that the state and county taxes for 1915-1916 were then due, and by the terms of the contract were payable by the vendee, and the further fact that the vendee had assigned the claim due from the packing house to Wells in payment of a note executed by the vendees to Wells at the time of the original transaction for the repayment to Wells of the state and county taxes of 1914-1915 then paid by Wells. In other words, on April 10, 1916, there was due from the vendees not only the \$50 installment, but also the taxes for 1915-1916, and such portion of the proceeds derived from the sale of oranges grown upon the place as were then available. Consequently any interference by the vendor with the collection of the \$52 cannot be considered as excusing the default of the vendees in making the payment referred to. Under the ordinary provision that time was of the essence of the contract, the effect of this failure of the vendees to make the payments due was, at the option of the vendor, to terminate the rights of the vendees. The contract, however, contained the unusual proviso for a 60 days' notice in writing; that after such 60 days the parties of the first part shall be released from all obligation in law and equity to convey said property. The evident purpose of such provision of the contract was to give 60 days' grace, after notice to the vendees, in which to comply with the contract. The notice given, however, declares that "the vendor has elected and does hereby elect to declare said contract null and void and all rights which you have acquired thereunder forfeited." This construction of the notice as declaring an immediate forfeiture is in accord with the allegations of plaintiff's complaint as to the nature and effect of such notice, as follows, to wit:

"That on or about the 28th day of April, 1916, plaintiff served upon the defendants a notice in writing that he had declared the said contract null and void, and would recognize no further interest of the defendants, or any of them, in the premises hereinbefore described."

The notice also demands that the vendees surrender possession "on or before sixty days from the date hereof," in default of which "an action will be commenced to quiet title." There is no suggestion in the notice that the vendees, by paying the installments of the purchase price then due within a period of 60 days, could retain their rights in the property and in the contract. This notification that the contract was already null and void, and that the possession should be surrendered within 60 days, was in effect a repudiation of the contract by the vendor, and justified a rescission by the vendees. They alleged, in their pleadings, that they elected to treat the contract as rescinded by the plaintiffs, and that they surrendered possession of the property to the vendor, and that the vendor immediately took possession thereof. It is true that, subsequent to the taking of possession by the vendor, one of the vendees, according to the testimony of the vendor, stated that they were unable to make further payment thereon. The case then comes within the principle stated in *Glock v. Howard*, 123 Cal. 1, 13, 55 Pac. 713, 717 (43 L. R. A. 199, 69 Am. St. Rep. 17), where it is said:

"It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money."

See, also, *Phelps v. Vrown*, 95 Cal. 574, 30 Pac. 774; *Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622; *Lemle v. Barry*, 183 Pac. 148.

The taking of the possession of the property by the vendor, on his demand, was particularly significant under the circumstances as indicating a mutual abandonment of the contract. In *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004, a vendor of personal property under a conditional contract of sale wrongfully retook possession of the property before the vendee was in default, and it was held that the vendee, without any formal

rescission of the contract, could treat the contract as abandoned and annulled by the vendor, and maintain an action against him for money had and received, and recover the portion of the purchase price theretofore paid. The contract in this case having been mutually rescinded or abandoned, the vendees were entitled to a return of the money paid by them and such rights as grow out of the fact that the contract has been rescinded. In that event the vendees, having, according to their allegations, paid \$3,000 to Wells on account of the purchase price thereof, are entitled to have a resulting trust declared in said property for the proportion thereof which the amount paid by them to Wells bears to the amount of the purchase price paid by plaintiff to Wells, if the court should find upon a new trial any amount was so paid.

The order striking out those portions of the defendants' answer alleging the terms of the agreement whereby defendants transferred property worth \$3,000 in connection with the transfer of the property from Wells to plaintiff was erroneous. Leave should be given to the defendants to amend their answer and cross-complaint, if they so desire.

[4] In view of the necessity of a new trial in this action, it is necessary to pass upon another point raised by appellants with reference to the payment of attorney's fees, as this question will arise upon a subsequent trial in the event that the plaintiff is again successful. The trial court allowed attorney's fees to the vendor for the prosecution of this action to quiet title against the vendees, under the above-quoted provision of the contract requiring the payment by the vendees of "all expenditures of whatsoever nature which may be incurred by the first party in clearing the title to the property herein agreed to be conveyed." In that regard it may be said that, in our opinion, such provision of the contract did not contemplate the payment of attorney's fees in this action, but the expenditures of perfecting the title to be tendered to the vendees upon the fulfillment of their contract.

The judgment is reversed, and the trial court instructed to grant defendants leave to amend their pleadings, if they so desire.

We concur: LENNON, J.; MELVIN, J.

BANK OF LOS BANOS et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (Sac. 2926.)

(Supreme Court of California. Aug. 26, 1919.)

1. MASTER AND SERVANT — 383 — WORKMEN'S COMPENSATION ACT — SELF-INSURANCE — DEPOSIT OF SECURITIES — DISCRETION OF COMMISSION.

Under Workmen's Compensation Act, § 29, requiring an employer to secure payment of compensation in one of specified ways, discretion of commission, when giving consent to self-insure, to require deposit of bond or securities, is not limited to a case where there is reasonable doubt at the time of the employer's ability; a purpose of the act being to secure prompt payment, and such ability being subject to change.

2. MASTER AND SERVANT — 383 — WORKMEN'S COMPENSATION ACT — SELF-INSURANCE — DEPOSIT OF SECURITIES — DISCRETION OF COMMISSION.

For Industrial Accident Commission, on granting employer certificate of consent to self-insure, under Workmen's Compensation Act, § 29, to require it to deposit \$20,000 in bonds held, in view of magnitude of its business and probability of frequent injuries to its employes, not an abuse of discretion.

In Bank.

Application by the Bank of Los Banos and others for certiorari to review action of the Industrial Accident Commission of California. Order to show cause discharged.

Edward F. Treadwell, of San Francisco, for petitioners.

Christopher M. Bradley and A. E. Graupner, both of San Francisco (W. H. Pillsbury, of San Francisco, of counsel), for respondent.

MELVIN, J. Application was made for certiorari to review the action of the Industrial Accident Commission in requiring of Miller & Lux, Incorporated (a corporation), the filing of a bond in the sum of \$20,000, or the depositing of securities of that value, as a prerequisite to the carrying of its own compensation insurance by the corporation. The other petitioners are corporations, and are companies subsidiary to Miller & Lux, Incorporated. Upon filing of the petition an order to show cause was made.

All of the petitioners asked permission to demonstrate their ability to self-insure. Their applications were heard, and the counsel for the Industrial Accident Commission wrote to counsel for petitioners a letter containing, among other things, the following language:

"The commission notes that Miller & Lux, Incorporated, has listed among its assets 'Unit-

ed States Liberty Bonds' (first and second issues), \$28,000. If you will deposit \$20,000 of the 'Liberty Bonds' listed by you in the manner and form prescribed by the commission, certificate of consent to self-insure will be issued to Miller & Lux, Incorporated, and that company will be acceptable to the Industrial Accident Commission as the surety for the San Joaquin & Kings River Canal & Irrigation Company, West San Joaquin Valley Water Company, Bank of Gustine, and Bank of Los Banos."

The showing made by Miller & Lux, Incorporated, before the Industrial Accident Commission, indicates that it has many millions of dollars surplus and that it is amply able to self-insure. The petitioners contend that solvent employers, having assets commensurate with the hazard, should be permitted to self-insure without the deposit of security or the giving of a surety bond, and that the exacting of such security or bond as prerequisite to permission for petitioners to self-insure amounts to an abuse of discretion on the part of respondent.

Petitioners first attack the action of respondent on the ground that it is based upon an arbitrary rule applied to all corporations or others seeking self-insurance, and not upon any real investigation of the merits of these particular requests. The letter of the counsel for the Industrial Accident Commission indicates, however, that there was some consideration of the facts, both of solvency and of corporate association, because, instead of demanding a bond or a deposit from each petitioning corporation, the commission was willing to allow Miller & Lux, Incorporated, to carry the insurance for itself and its subsidiary corporations.

[1] We must decide, therefore, whether or not any bond or deposit may be required, and if that question be answered in the affirmative, whether or not the amount (\$20,000) is reasonable, under all the circumstances.

By the Workmen's Compensation Act of 1917 (Stats. 1917, p. 831), it is provided (page 857) that—

"Every employer as defined in section seven hereof, except the state and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:

"1. By insuring and keeping insured against liability to pay compensation in one or more insurance carriers duly authorized to write compensation insurance in this state.

"2. By securing from the commission a certificate of consent to self-insure, which may be given upon his furnishing proof satisfactory to the commission of ability to carry his own insurance and pay any compensation that may become due to his employes. The commission may, in its discretion, require such employer to deposit with the state treasurer a bond or securities approved by the commission, in an amount to be determined by the commission.

Such certificate may be revoked at any time for good cause shown."

Petitioners insist that the commission may require the bond or securities specified in the statute when there is any reasonable doubt of the employer's ability to carry his own insurance, but that where no such doubt exists the commission must grant the certificate of consent without the giving by the applicant of any security. There might be some force in this position if solvency of the petitioning employer were the only matter involved, but the highest purpose of the workmen's compensation statutes is not merely to obtain payment of just claims, but to have such demands promptly adjudicated and paid in such way as to be available to the injured employes when most needed. Any corporation, no matter how rich, may be subject to lawsuits, and it is easily conceivable that all the funds of a given corporation might be held by injunction, or other order of court, in such manner as not to be immediately available for settlement of awards of compensation found by the Industrial Accident Commission. It is therefore highly desirable that a proper fund or bond be provided and that such security be under the control of the Industrial Accident Commission. The requirement of security is also justified by the fact that payments of compensation sometimes extend over long periods of time. A corporation solvent at the time it may secure permission to carry its own compensation insurance may have many changes in its financial status during the years of its obligation to pay persons who may be injured while in its service. The fund, or bond, authorized by the statute not only keeps safe the installments of indemnity due from time to time to the injured employes, but it makes unnecessary the otherwise constant watchfulness of the Industrial Accident Commission over the possibly diminishing resources of the self-insurer.

Upon this phase of the discussion we are constrained to quote some of the language of Mr. Justice Pitney, who delivered the opinion of the Supreme Court of the United States in the case of *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. To be sure, the exact question here under discussion was not there involved. Nevertheless, the observations of the learned justice, made while expressing the court's opinion, are quite pertinent. At page 208 of the report in 243 U. S., at page 255 of 37 Sup. Ct. (61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629), we find the following language:

"We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and

are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By section 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of \$300,000, under section 50, and \$30,000 in cash as a deposit to secure prompt and convenient payment, under section 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

"The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of section 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employes, and the amount of its pay roll (about \$50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested."

Section 50 of the New York act of 1914 (chapter 41, Laws of 1914) is substantially the same as our own statute with reference to self-insurance.

[2] Undoubtedly, following the suggestion set forth above, this court would not so construe the statute as to give "unbridled discretion to the commission." We cannot say, however, from the record before us, that the Industrial Accident Commission abused its discretion when acting upon the applications of these petitioners. This record discloses the fact that petitioners are engaged in very extensive business operations of many sorts. These activities are only made possible by the employment of many persons. It is not improbable that casualties may occur within the near future and we cannot justly say that the security demanded is disproportionate to the reasonable probability that such unfortunate happenings may be more than a few. Payments of compensation usually extend over a considerable period of time, being frequently made weekly for 240 weeks. The liability of the employer is therefore cumulative, and may increase from year to year. As counsel for respondent well say:

"If an employer had one maximum liability a year for five years, he would, during the fifth year, be paying upon all five injuries, and his

total liability to all claimants during that year would be in the neighborhood of \$20,000, without allowance for any further injuries occurring in that year."

In view of the magnitude of the business of petitioners, and the probability of frequent injuries to their employes, we cannot say that this record reveals an abuse of discretion on the part of the Industrial Accident Commission.

The order to show cause is discharged.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; OLNEY, J.; WILBUR, J.; LENNON, J.

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 9017.)

(Supreme Court of California. Aug. 26, 1919.)

1. MASTER AND SERVANT §405(4) — WORKMEN'S COMPENSATION ACT — DECISION BY COMMISSION — OPINION EVIDENCE.

The Industrial Accident Commission is not bound to decide in accordance with opinion evidence as to the speed at which an employe was driving an auto by the overturning of which he was killed; but it is its duty to pass on the evidence, and decide the fact.

2. MASTER AND SERVANT §405(4) — WORKMEN'S COMPENSATION ACT — AWARD BY COMMISSION — REVIEW — SUFFICIENCY OF EVIDENCE.

Circumstantial evidence that an employe when killed by overturning of auto was exceeding the speed limit held insufficient, particularly in view of the presumption against commission of crime, to justify annulling of award of Industrial Accident Board as unsupported by evidence.

In Bank.

Proceeding under the Workmen's Compensation Act for death of Joe Marrazzo, employe of Bisceglia Bros. Canning Company. Award was made to heirs by the Industrial Accident Board, and the United States Fidelity & Guaranty Company, insurer, petitions for review. Award affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondent.

WILBUR, J. [1, 2] Respondent commission made an award in favor of the heirs of Joe Marrazzo, an employe of Bisceglia Bros. Canning Company. Marrazzo was killed while driving an automobile on his return from San Felipe Rancho to San Jose. The only point made by the petitioner is based upon the claim that at the time of the accident the

deceased was driving more than 30 miles an hour, in violation of the motor vehicle act, and that, therefore, he was not engaged in the course of his employment. The commission found that the deceased was engaged in the course of his employment at the time of his death, and if we assume, as contended by the petitioner, that the fact that the deceased was violating the motor vehicle act by exceeding the speed limit took him out of the course of his employment, then the finding is, in effect, a finding that the deceased was not exceeding the speed limit. The petitioner applied for a rehearing before the commission, averring "that all the evidence supports but one inevitable finding, that said automobile was being operated at a rate of speed in excess of 30 miles per hour; * * * that the death of the deceased was caused by an accident which was due to driving said automobile at a speed in excess of 30 miles per hour." In the order denying the rehearing the commission found "that the allegation that the said injury was caused by driving in excess of 30 miles per hour, in violation of the statute and orders of the employer was not substantiated by the evidence." The commission having found, in effect, that the deceased was not violating the law with reference to speed, the question for our consideration is whether there was substantial evidence to support the finding. It is true that there was evidence offered tending to show that the speed exceeded 30 miles an hour. This evidence was wholly circumstantial, and consisted in showing the power and the condition of the capsize automobile, and of marks upon the highway, showing that the automobile had swerved from the paved portion thereof, first to the right and then to the left, and had skidded about 90 feet before overturning. Witnesses testified that the automobile—a heavy two-ton Hudson Super-six—in their opinion must have been going at a rate of speed in excess of 30 miles an hour. It was conceded by these witnesses, however, that such marks as were found upon the highway might have been made by such an automobile going 30 miles an hour or less. The commission was not bound to decide in accordance with the opinion evidence. It was its duty to pass upon the evidence and decide the fact, and we cannot say that the circumstantial evidence of excessive speed is sufficiently compelling to justify us in annulling the award as unsupported by the evidence, particularly in view of the presumption of law that the deceased was not committing a crime, viz. violating the motor vehicle act.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

SHAW, J. (concurring). I concur in the judgment, but for reasons different from

those stated by Mr. Justice WILBUR. In my opinion the evidence showed conclusively that the automobile was going at a rate exceeding the lawful limit of 30 miles an hour at the time it overturned. The marks upon the highway were of a character that could not have been made unless the speed was in excess of that limit. There is no direct evidence, however, tending to prove that Marrazzo was knowingly driving in excess of the speed limit. The accident occurred about 11 o'clock at night. He may not have been able to see the speed gauge of the automobile, assuming that there was one, owing to the darkness. The difference between a speed in excess of 30 miles an hour and a speed under that rate, especially at night, is often imperceptible to those in the vehicle. The fact that the accident which caused the injury was the result of wilful negligence of the injured employé is not a defense to an application for an award under the Workmen's Compensation Act of 1917 (St. 1917, p. '831) when the injury causes his death. The act does not provide that the employer shall not be liable where the act of the employé which causes death is a violation of law. The theory that such fact is a defense can only be sustained upon the general principle that no one can be allowed to receive the benefit of the workmen's compensation law for an injury resulting from a violation of some other law by the injured party. I do not say that such principle should be laid down as a matter of public policy in such cases as the one at bar. The act does not so declare, and it would seem to be a matter of policy properly within the control of the Legislature. But if such principle should prevail, I think that, as applied to this law, it should be limited to cases where the act of the employé was either morally vicious in itself, as well as a violation of express law, or a conscious violation of a law that is merely prohibitory in character. Nothing of the kind appears, and therefore the evidence sustains the award.

I concur: OLNEY, J.

BERGER v. BRIGHT et al. (L. A. 5248.)
(Supreme Court of California. Aug. 26, 1919.)

1. TRIAL ⇐395(1)—FINDINGS—SUFFICIENCY.

A finding that defendants executed and agreed to all terms of a written contract held a sufficient finding on defendant's allegations that contract did not express real intent of parties.

2. APPEAL AND ERROR ⇐1011(1)—FINDINGS—CONCLUSIVENESS.

A finding based upon a substantial conflict in the evidence will not be disturbed upon appeal.

Department 2.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by W. E. Berger against M. R. Bright, J. Brombacher, and H. F. Wagner. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank C. Hill, George S. Hupp, and G. E. Delavan, Jr., all of Los Angeles, for appellants.

Seaver & Seaver, Frank R. Seaver, Byron D. Seaver, and Harold E. Thomas, all of Los Angeles, for respondent.

LENNON, J. Defendants appeal from a judgment for plaintiff in an action to recover the sum of \$750 alleged to have been received by defendants for the plaintiff's use.

Gilbreth & Co., entered into a contract with the Los Angeles school district whereby the company agreed to erect a school building to be known as the "Amella Street School." In consideration of defendants' promise to become sureties on its bond, the company assigned to defendants, as trustees, the right to receive all moneys due from the school district and to disburse all moneys owing laborers and materialmen. The company at the time owed plaintiff the sum of \$1,000. Plaintiff's attorney having threatened to put the company into bankruptcy, defendants, after figuring that there would be a profit of at least \$2,000 on the erection of the school building, promised to pay plaintiff out of the payments received from the school district. After some preliminary discussion, defendants signed an agreement by which they promised to pay to plaintiff the sum of \$250 on the date of the agreement, and, in addition, "such sum of money as shall amount to 8 per cent. of all future payments made by the owner of said Amella Street School for the construction thereof, until said indebtedness is satisfied in full." Although about \$10,000 was received under the contract for the construction of the school building, defendants have made no payment to plaintiff, other than the initial payment of \$250. The work, on its completion, showing a deficit of \$4,000, defendants refused to make any further payment to plaintiff, who thereupon brought this action.

In their answer, and in a cross-complaint praying a reformation of the written agreement, defendants admitted the signing and execution of the agreement, but alleged that it did not express the real intent of the parties, which was that plaintiff should be paid only out of the profits, if any, realized on the work.

[1] One of the main contentions of defendants on this appeal is that the trial court failed to find upon the issues presented by this allegation in the answer and cross-

complaint. The court, however, found that defendants signed and executed and agreed to all of the terms and provisions of the written agreement. This was a sufficient finding adverse to the defendants on the issues tendered in the answer and cross-complaint.

[2] Defendants also present an analysis of the evidence offered in support of their defense and prayer for reformation, which was intended to and does in a measure tend to show that defendants did not agree to the terms and provisions of the written agreement. The transcript, however, reveals a substantial conflict in the evidence presented upon this phase of the case, and it is therefore impossible for this court to undertake to disturb the finding.

There is obviously no merit in the contention of defendants that the judgment should have been so framed as to make subject to execution only such property as they might hold under the trust agreement with Gilbreth & Co.

The judgment appealed from is affirmed.

We concur: MELVIN, J.; WILBUR, J.

PRATT v. ROSENTHAL et al., Civil Service Com'rs. (S. F. 7938.)

(Supreme Court of California. Aug. 28, 1919.)

1. MUNICIPAL CORPORATIONS §216(1) — CHARTER—BOARD OF HEALTH—CIVIL SERVICE COMMISSION.

Under the San Francisco City Charter, the board of health and the Civil Service Commission are independent of each other, and the board has no authority to prescribe qualifications for civil service eligibles.

2. MUNICIPAL CORPORATIONS §133—CIVIL SERVICE COMMISSION — DISCRETIONARY POWER.

Under the San Francisco City Charter, the Civil Service Commission has a wide discretion regarding the manner in which it performs its duties and exercises its powers.

3. INJUNCTION §126—PRESUMPTIONS—CIVIL SERVICE EXAMINATIONS.

In an action to enjoin civil service examinations, the court cannot assume that the proposed method of examination is impractical.

4. MUNICIPAL CORPORATIONS §216(2)—CIVIL SERVICE COMMISSION—ABUSE OF DISCRETION.

The fact that the Civil Service Commission of a city placed veterinarians on the same basis as persons experienced in handling meat, fish, and fowl in examinations for market inspectors does not show an abuse of discretion.

5. MUNICIPAL CORPORATIONS §217(3)—CIVIL SERVICE EXAMINATIONS—VALIDITY.

A civil service examination notice which stated that copies of certain regulations would be distributed as long as the supply held out does not indicate a violation of San Francisco City Charter, prohibiting special information being furnished any applicant, since it will be presumed that any applicant failing to secure a copy would be allowed to inspect the original records.

6. INJUNCTION §11—CIVIL SERVICE COMMISSION—THREATENED ABUSE OF POWER.

A civil service examination notice, stating that certain deductions would be made if an applicant's experience was not considered satisfactory, does not authorize an injunction without a showing that the commission is threatening to abuse its discretionary power.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Augustus David Pratt against B. B. Rosenthal, Earl A. Walcott, and John J. O'Toole, as Civil Service Commissioners of San Francisco. Judgment granting an injunction was affirmed in the District Court of Appeals, and defendants appeal. Reversed.

Percy V. Long, George Lull, Joseph T. Curley, and Maurice T. Dooling, Jr., all of San Francisco, for appellants.

Edward F. Moran, of San Francisco, for respondent.

SHAW, J. The case is stated in the following part of the opinion rendered therein by the District Court of Appeal of the First District:

"Plaintiff brought an action, as taxpayer, against the Civil Service Commissioners of the city and county of San Francisco, alleging in his complaint that prior to the bringing of the action the Civil Service Commissioners classified for purposes of examination certain places of employment in the department of public health, which places were designated as market inspectors. The complaint further alleged that prior to the institution of the action the board of health adopted the following regulations governing the inspection of meat-food products:

"Section 1. All employees of the Department of Health engaged in the work of meat inspection shall be appointed from eligibles certified by the Civil Service Commission, and such employees include veterinary inspectors, market inspectors, inspectors' assistants, patrolmen and skilled laborers.

"Sec. 2. *Veterinary Inspectors.* All applicants examined for these positions must be graduates of recognized veterinary colleges having a course of not less than three years leading to the degree. All final ante mortem and post mortem examinations are conducted by veterinarians. At establishments where slaughtering is

conducted only veterinary inspectors shall be placed in charge.

"Sec. 3. *Market Inspectors.* These employes are laymen experienced in the curing, canning, packing, or otherwise preparing of meat; they shall supervise the work and the use of permitted preservatives, specially set forth in regulation No. 21 of these regulations."

"The complaint further alleged that the Civil Service Commission gave notice that on Saturday, January 15, 1918, said commission would hold an examination of applicants for positions as market inspectors on the subjects, General Knowledge of Duties, Writing of Report and Experience. The said notice was as follows:

"*'General Knowledge of Duties'* will cover the laws and ordinances pertaining to abattoirs, packing houses, meat markets, sausage factories, etc., the inspection of meats, fish and fowl, and general duties of a market inspector. (The commission has a limited supply of the regulations of the board of health governing meat inspection and while the supply lasts a copy of the regulations will be given to each person filing an application. A copy of the questions asked in the last examination held for this class also will be given to each applicant.)

"*'Writing of Report'* will be a test of the applicant's ability to write a correct report upon a subject to be named by the Civil Service Commission.

"The subject *'Experience'* will be rated as follows: 5 years' first-class experience had within the last 8 years as a veterinarian or in the handling of meats, fish and fowl, 100 credits; 4½ years, 95 credits; 4 years, 90 credits; 3½ years, 85 credits; 3 years, 80 credits; less than 3 years and intermediate periods will not be rated. Deductions will be made when the experience is not considered first-class. Experience had prior to January 15, 1908, will not be rated. Proof of graduation as a veterinarian will be considered equal to 3 years' first-class experience."

"It was alleged in the complaint that the holding of said examination by defendants would be in excess of their powers and jurisdiction as civil service commissioners, and contrary to the procedure and limitations prescribed for the conduct of civil service examinations in the San Francisco charter; and that in conducting said examination certain indebtedness would be incurred against the city by reason of the employment of help to assist the commission in the examination. The defendants interposed a general demurrer to the complaint, which the court overruled, and upon the defendants' refusing to answer further to the complaint, the court ordered judgment for the plaintiff, restraining the defendants, as civil service commissioners, from holding an examination for market inspectors pursuant to the provisions of the charter of the city and county of San Francisco."

The charter of San Francisco provides that the civil service commissioners "shall classify, in accordance with duties attached thereto, all places of employment in or under the offices and departments of the city and county" (section 2, art. 13, Stats. 1913, p. 1611), and that the examinations to be conducted by said commission "shall be public, competitive and free. Such examinations shall be

practical in their character, and shall relate to those matters only which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include, when appropriate, tests of physical qualifications, health, and of manual or professional skill." Section 4, art. 13, Stats. 1899, p. 350. With respect to the board of health, the charter provides for the appointment of a board of seven members, and declares that "the board may appoint such officers, agents, and employes as may be necessary for the proper and efficient carrying out and enforcement of the purposes and duties of the board, and may fix their salaries and prescribe their duties." Section 5, art. 10, Stats. 1899, p. 343. The duties of the board of health, generally stated, are to manage and control all matters pertaining to the preservation, promotion, and protection of the lives and health of the inhabitants of the city and county, provide for the abatement of nuisances, supervise the sanitary condition of municipal institutions and buildings, the disposition of the dead, the disposition of garbage, offal, and other offensive substances, and to enforce all ordinances, rules and regulations of the board of supervisors for said purposes. It also provides that the board of health shall, from time to time, submit to the board of supervisors a draft of such ordinances, rules, and regulations as it deems necessary to promote the objects for which the health board is established. Sections 3, 4, art. 10, Stats. 1899, p. 343. The regulations of the board of health above quoted were adopted under the authority of these provisions of the charter. The Civil Service Commission is further empowered to make rules for the examination of persons to be employed in the service of the city (section 3, art. 13), to control all examinations (section 5, art. 13), and to give, in a prescribed manner, "notice of the time, place and general scope of every examination." Section 6, art. 13. The aforesaid notice of examination was given in pursuance of these powers.

It is contended by the plaintiff that in providing that a given number of years of experience as a veterinarian should be equal, for grading an applicant for employment, to a like number of years' experience in the handling of meats, fish, and fowl, and that graduation should equal three years' experience, the commission exceeded the scope of its powers and duties under the charter, that the board of health had determined that market inspectors should be "laymen experienced in the curing, canning, or packing or otherwise preparing of meat," and that the commission had no authority to substitute for these qualifications any number of years of experience or graduation as a veterinarian.

[1] In making the appointment of a market inspector the board of health is required to select the appointee from a list furnished by the Civil Service Commission, taken from those who have been examined, approved, and classified by the commission. Article 13, §§ 7, 10, Stats. 1913, p. 1613; Stats. 1899, p. 351. It may be conceded that the board of health has discretion in selecting the person appointed from the list furnished. But the board has no supervisory power over the proceedings of the commission in the matter of making examinations classifying the persons who pass, or in furnishing the list. It is not empowered to make regulations which shall control the commission in ascertaining the relative capacity of the persons examined for the eligible list, or the tests it will apply in so doing. These matters the charter commits exclusively to the commission. It follows that while the board of health may make regulations concerning the qualifications of its appointees, and may apply such regulations in making its appointments, so far as the charter permits in selecting from the list of eligibles furnished to it by the commission, it can do no more, and the regulations the board may make respecting such qualifications or capacity have no effect whatever on the powers of the commission, and cannot be considered as a limitation thereof. If the regulations of the board were intended to limit or affect those powers, or to give the board any power additional to that just mentioned, they were in excess of the powers of the board, and it is the board, and not the commission, that has exceeded its powers. The two bodies are independent of each other with respect to their powers. Each derives its power and authority from the charter, and neither is given authority to modify the duties of the other, except as the charter may provide. No authority is given to the board to invade the province of the commission by determining, contrary to the rules and decisions of the commission, the qualifications or capacity of the persons to be entered on the lists of eligibles in the classified civil service. The commission is not exceeding its powers in the particulars mentioned.

[2-5] The plaintiff further contends that the scope of the examination as declared in the above-quoted notice is not "practical" within the meaning of the charter (section 4, art. 13) that, by giving the experience of laymen in the actual work of handling meats, fish, and fowl no greater, indeed less, weight than the experience of a veterinarian who has never done such work, the commission has exceeded its power, and that by including in its notice the statement that they had a limited supply of the regulations of the board of health, and would furnish them to applicants so long as that supply lasted, thereby implying that they would not fur-

nish them thereafter, the commission has violated the provisions of section 18 of article 13 of the charter. The latter section provides that no person or official shall "furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person of being appointed, employed, or promoted."

It is a well-established proposition that a commission with the powers conferred upon the Civil Service Commission in the examination of applicants for public employment has a wide discretion with regard to the manner of performing its duties and exercising its powers. "Where the position is one as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification. In other words, if the classification of the commission clearly violates the Constitution or the statute, mandamus should issue to correct the classification. If the action of the commission is not palpably illegal, the court should not intervene." 1 Dillon on Mun. Corp. (5th Ed.) pp. 700, 701. This court has said in a case involving the powers and duties of the San Francisco Civil Service Commission:

"Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere." *Maxwell v. Civil Service Comm.*, 169 Cal. 339, 146 Pac. 871.

No facts are presented in the complaint which even tend to indicate that the method of holding the examination as outlined in the notice thereof above quoted is not practical. The courts are certainly not at liberty to assume that it is not practical, in the absence of some affirmative fact showing that, as a matter of law, it is impractical. The same reasons apply with equal force to the complaint that the commission has placed a veterinarian on the same plane as one experienced in the handling of meats, fish, and fowl. We cannot say that the commissioners abused their discretion in concluding that a person with the prescribed experience as veterinarian might be as well qualified to supervise the work of canners, curers, packers and preparers of meat and to inspect meat and meat products on sale as one of actual experience in the handling of meats, fish and fowl. The statement in the notice informing applicants that they could obtain copies of the regulations of the board of health from the commission so long as its supply held out does not appear to us to be

a violation of section 18 of article 13 of the charter. It is to be presumed that the printed regulations of the board of health could be obtained from the board itself, or, if not, that any applicant could examine the same by demanding an inspection of the record thereof. They could not, lawfully, be kept secreted from such applicants.

[6] The point that the provision in the notice that deductions would be made if the experience shown was not considered first-class would authorize an abuse of the discretionary powers of the commission seems to us to be without force. Obviously, it would be the duty of the commission to determine the nature of the experience shown to be possessed by the applicant, and if they did not consider it first class they should take due weight of that fact in giving to the applicant a certificate of qualification. Any power may be abused. But to enjoin its exercise on that ground, without showing that the abuse is threatened and imminent, would defeat a lawful grant of power, a thing not to be done by the courts. We find no ground upon which the complaint can be held to be sufficient to justify an injunction. The court below erred in overruling the demurrer.

The judgment is reversed.

We concur: ANGELLOTTI, O. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; MELVIN, J.; LAWLOB, J.

PEOPLE v. LAPARA. (Cr. 2176.)

(Supreme Court of California. Aug. 25, 1919.
Rehearing Denied Sept. 22, 1919.)

1. CRIMINAL LAW §814(17)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where prosecution relies upon direct evidence, and any circumstantial evidence is merely incidental to and corroborative of direct evidence, an instruction on circumstantial evidence is unnecessary.

2. CRIMINAL LAW §718 — ARGUMENT OF COUNSEL—CIRCUMSTANTIAL EVIDENCE.

Where prosecution relies on direct evidence, and any circumstantial evidence is incidental to and corroborative of the direct evidence, defendant's counsel may be prevented from arguing law of circumstantial evidence to jury.

3. CRIMINAL LAW §407(1) — ADMISSIONS — DENIAL OF CHARGE.

Where accused denied charges made in his presence, the accusatory statements are inadmissible.

4. CRIMINAL LAW §1186(4)—HARMLESS ERROR—EVIDENCE.

Error in admitting accusatory statements, which defendant denied, in a murder case, held harmless, where facts in statements were estab-

lished by other proof, in view of Const. art. 6, § 4½, prohibiting reversals except for errors substantially injuring accused.

5. HOMICIDE §308(5)—REQUESTED INSTRUCTIONS—MURDER IN SECOND DEGREE.

Refusing a requested instruction that accused could be convicted only of second degree murder if jury had reasonable doubt as to degree of his guilt is not erroneous, where accused was clearly guilty of first degree murder, and only defense was that of mistaken identity, although issue as to second degree murder was submitted to jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Antone Lapara was convicted of murder, and appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., J. H. Riordan, Deputy Atty. Gen., J. J. West, of San Francisco, of counsel, C. M. Fickert, Dist. Atty., and Fred L. Berry, Asst. Dist. Atty., both of San Francisco, and Jas. F. Brennan, of San Francisco, Special Prosecutor, for the People.

LENNON, J. Antone Lapara, the defendant herein, was charged with the crime of murder. He was convicted of murder in the first degree. This appeal is from a judgment of the superior court of the city and county of San Francisco imposing a death sentence as the penalty for the crime.

The principal points presented in support of the appeal involve the correctness and consequences of a ruling of the trial court concerning the admissibility of certain evidence and the refusal of the trial court to permit counsel for the defendant to argue the case to the jury upon the theory that it was one of circumstantial evidence. The evidence adduced upon the whole case, in so far as it is pertinent to the points presented, may be epitomized as follows:

On the morning of the 28th day of November, 1917, one Mario Alioto was shot and killed while riding in an automobile truck which he was driving on Columbus avenue, in the city of San Francisco. The murderer fired the fatal shot while standing on the running board of the truck, and then fled. The defendant was identified as the slayer of Alioto by the direct testimony of two witnesses. Witness Root, a special police officer, testified for the people that he was standing on a street corner near the scene of the murder when his attention was arrested by the sound of a shot. Looking along Columbus avenue, he noted a man, whose face he did not see, but whom he identified as the defendant, standing on the truck by Alioto. He testified that he saw this man fire two shots

into the body of the deceased and then run. Root gave chase, twice losing sight of the defendant momentarily, but never being more than 135 feet distant from him, and captured the defendant on Stockton street and took him to the Hall of Justice. Witness Drolet testified that at the time of the shooting she was standing on Columbus avenue with her friend, Mrs. Leonardine, waiting for a street car at a point about 40 feet ahead of the truck. She saw a man, whom she identified as the defendant, mount the truck. Shortly after this, her attention was again directed to the truck by the sound of the explosions caused by the firing of the shots. She then observed the murderer leaping from the truck, and at that moment she obtained a view of his face, which she said was that of the defendant. Mrs. Leonardine testified as a witness for the people that she was unable to identify the defendant as the man who shot Alloto, because she had only seen the back of the murderer. The defendant was also recognized and identified by the witness Emmons as the man who fled from the scene of the crime. Hon. John J. Sullivan, police judge of the city and county of San Francisco, as a witness for the people, testified to a conversation occurring in the Hall of Justice with Special Officer Root, the defendant being present and in the custody of Root, wherein Root, in response to an inquiry as to why he had the defendant in custody, said that he, the defendant, had "shot somebody on Columbus avenue," and that thereupon the defendant said, "Did you see me shoot him?" Root replied, "Yes, I did, and I have you here." Whereupon the defendant "in somewhat of an indifferent manner shook his head, but did not make any reply." Two firemen, Baldwin and Shay, testified to having observed the pursuit of the defendant. Baldwin joined in the chase, and, when he came up with the defendant, the latter was breathing heavily and said, "It's all over now," or something to that effect. It was shown by the witness Cuneo that three shots were fired, and that the assassin, whom she saw running, threw away some object in the course of his flight. By witness Zecker it was shown that a revolver with three empty shells was found at the place indicated by the witness Cuneo.

It will be noted that only one man was observed running from the scene of the murder. In this particular, the testimony of eyewitnesses is agreed, although they differ in the details of their description of the clothing worn by the fleeing man. Some witnesses swore that the man running had a coat on. Other witnesses, one in particular, who was standing within a few feet of the fleeing man, testified that he wore a cap, but no coat. Other witnesses were positive that the fleeing man had on neither cap nor coat. At the time of his arrest on Stockton street, between Chestnut and Lombard, within a few

blocks of the scene of the murder and very shortly thereafter, the defendant was wearing a coat and a cap. Two witnesses for the defense, who saw the murderer in full flight, swore that they knew the defendant, and that they glimpsed the face of the murderer as he ran, and that he was not Antone Lapara, the defendant. Testifying in his own behalf, the defendant denied that he did the killing, or that he was, at any time during the day of the killing, at the scene of the killing. Other witnesses for the defendant gave testimony intended to, if not tending to, support the testimony of the defendant. The eight year old daughter of the defendant, after qualifying as a witness, testified that while near the scene of the killing, on her way home from school, she saw one of two men on an automobile shooting, and then saw one of these men run down Columbus avenue, and that the man was not her father.

An analysis of the evidence thus outlined demonstrates that the prosecution relied primarily for a conviction upon direct evidence, and that whatever circumstantial evidence appears in the case was developed incidentally and for the purpose of corroborating the direct evidence. Witnesses Root and Drolet did not undertake to identify the defendant by means of his clothing. The discrepancies existing in the descriptions of the clothing worn by the man observed fleeing from the scene of the crime did not suffice to make the case one of circumstantial evidence. These discrepancies tended to do no more than discredit the testimony of the eyewitnesses to the killing, and create a doubt as to the identity of the man who was observed fleeing from the scene of the crime. True, the testimony of Root and Drolet was in a measure contradicted by the testimony of those witnesses for the defendant who swore that they glimpsed the murderer in full flight and that he was not the defendant; but this contradiction, coupled with the discrepancies of description, at most did no more than create a conflict in the direct evidence, which it was the province of the jury to resolve. Doubtless, such being the nature of the evidence, it was competent for counsel for the defendant to argue to the jury, as he very likely did, that the witnesses Root and Drolet were mistaken as to the identity of the defendant as the man who shot Alloto.

[1, 2] It is not now open to question that in a criminal case in which the prosecution relies for conviction upon direct evidence, the circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not be given, and that, in such case, it should not be intimated to the jury that the case of the people is one of circumstantial evidence. *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Burns*, 121 Cal. 586, 53 Pac. 1096; *People v. Holden*, 13 Cal. App. 354, 109 Pac. 495.

The reason for the general rule in this behalf is to be found in the danger of misleading and confusing the jury, where the inculpatory evidence consists wholly or largely of direct evidence of the crime. In such cases, as courts have repeatedly pointed out, it would be most mischievous to intimate to the jury that the prosecution was relying for a conviction upon circumstantial evidence. *Rains v. State*, 88 Ala. 91, 7 South. 315; *Coleman v. State*, 87 Ala. 14, 6 South. 290; *People v. Kaatz* (N. Y.) 3 Parker Crim. 129; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874. By a parity of reasoning it follows that, where the prosecution relies for conviction upon direct evidence, and the circumstantial evidence developed in the case is in fact merely incidental to and corroborative of the direct evidence, the trial court may well refuse to allow counsel for the defendant to argue the law of circumstantial evidence to the jury. The declaration of the trial court in the present case that "there is no such thing as circumstantial evidence with regard to this case" was tantamount to saying that the case was not one of circumstantial evidence, and, this being true as a matter of law, the trial court did not err in refusing to permit counsel for the defendant to argue the case to the jury upon the theory that it was one of circumstantial evidence.

[3, 4] Counsel for the defendant contends that the trial court erred to the prejudice of the defendant when it overruled an objection to and denied a motion to strike out evidence elicited from Police Detective James T. Gallagher, who testified as follows:

"I was detailed to investigate this affair, and in pursuance of that I went to the city prison with Detective Bunner, and when I went into the prison this man [the defendant] was there, and I was informed what he was there for, and I said, 'Oh, so you are Lapara, are you, the star witness in the Pedoni Cases. You are the fine gentleman who worked for the Simon Mattress Company, who did not know anybody, but who just accidentally came in the neighborhood. Why did you kill this man—you knew Alioto? You were the star witness in the Pedoni Cases, and you are the man. Now,' I said, 'why did you kill this man—what was your reason for doing it?' and he said, 'I did not kill him.'"

This testimony of the witness Gallagher was objected to, and followed by a motion to strike out upon the ground of its incompetency, irrelevancy, and immateriality, and upon the further ground that a denial by the defendant of the accusation of guilt rendered the accusation and the conversation which led to it inadmissible for any purpose. It was error to overrule the objection, and likewise error to deny the motion to strike out.

"It is only the guilty conduct or incriminating reply of a defendant in response to an accusation of crime or statements implicating him in its commission that constitute relevant and competent evidence" of that crime. "Ordinarily, when a defendant, under conditions which fairly

afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. *Jones on Evidence*, § 291; *People v. McCrea*, 32 Cal. 98; *People v. Ah Yute*, 53 Cal. 614; *People v. Louie Foo*, 112 Cal. 24, 44 Pac. 453; *People v. Mallon*, 103 Cal. 513, 37 Pac. 512; *People v. Amaya*, 134 Cal. 536, 66 Pac. 794. But if he promptly and fully deny the charge, the accusatory statements, standing alone, are not in any sense competent evidence of the defendant's guilt (*People v. Estrado*, 49 Cal. 171; *People v. Ah Yute*, 54 Cal. 90), and should in such a contingency be excluded from the consideration of the jury. * * * As was said in the case of *People v. Teshara*, 134 Cal. 542, 66 Pac. 798, 'the court and the district attorney seem to have lost sight of the fact that it is not the accusation but the conduct of the accused that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct.'" *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789.

In the Teshara Case, this court declared that the district attorney should not have offered the statement, knowing, as he did, that the accused had not stood silent before the accusation, but had repelled it at the time it was made; and it may not be amiss to reiterate that, for the same reason, the district attorney in the present case should not have offered the accusatory statement complained of.

Conceding that the fact that the defendant had appeared as a witness for the defendant in the case of *People v. Pedoni* tended, in connection with other circumstances, to show that the defendant was possessed of a motive which prompted him to commit the murder of which he was charged and convicted, still evidence of that fact should not have been presented by indirection through the medium of an inadmissible accusatory statement. But the error of its admission, in the form stated, must be held to have been harmless in the presence of previous proof, properly presented and received, without objection, of the defendant's participation as a witness in the Pedoni Case. Closely scrutinized, remaining portions of the accusatory statement may perhaps, depending upon the intonation, carry an insinuation against the probity of the defendant's testimony in that case. But upon the cold record before us we are not prepared to say that the jury so closely considered and critically construed the statement in question. But if, perchance, they did so construe it, the evil thereof was undoubtedly reduced to a harmless minimum, if not entirely eradicated, by the court's charge to the jury that the law presumed that the defendant testified honestly and truthfully when a witness in the other case. Then, stripping Gallagher's statement of the text thus shown to have been harmless, there is left merely an inadmissible accusation the error of which, standing alone, will not suffice, in the light of the entire record, to war-

rant a reversal. This is so because there is no presumption of prejudice to a defendant from such an error or irregularity arising during the course of a criminal trial. On the contrary, it must affirmatively appear to the satisfaction of this court that a defendant may well have been substantially injured by the error complained of before a reversal of a judgment of conviction may be had. Section 4½, art. 6, Const. We have carefully reviewed and considered the entire record, including the evidence, with the result that we are satisfied that the accusatory statement erroneously admitted in no degree contributed to or affected the verdict. This being so, a reversal cannot be ordered on account thereof. *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63; *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Fleming*, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881; *People v. King*, 23 Cal. App. 259, 137 Pac. 1076; *Jameson v. Tully*, 173 Pac. 577; *People v. Flood*, 182 Pac. 766; *People v. Laine*, 182 Pac. 986.

[5] We find no error in the instructions. The court defined every element of the offense charged clearly and correctly. While the court did not charge, as requested, that if the jury should find that the defendant did shoot and kill the deceased, but should entertain a reasonable doubt as to whether the defendant was guilty of murder in the first or second degree, they should find him guilty of the lesser degree, still, it being unquestionably clear from the evidence that the man who did the killing was guilty of murder in the first degree, and the defense interposed being solely that of mistaken identity, the court did not err in refusing to give the requested charge. The situation was not altered by the fact that the court defined murder in the second degree and submitted to the jury a form of verdict for that degree. The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; MELVIN, J.

Ex parte RUST. (Cr. 2242.)

(Supreme Court of California. Aug. 25, 1919.)

1. PHYSICIANS AND SURGEONS ⇐6(3)—OPTOMETRY ACT NOT APPLICABLE TO OSTEOPATHS.

Optometry Act 1913, § 10, permitting "physicians and surgeons" to treat eyes, etc., is inapplicable to osteopaths, in view of Medical Act of 1913, providing that osteopaths be given different certificates from those issued to physicians and surgeons, and prior legislation in which osteopaths were placed on a different basis than physicians and surgeons.

2. PHYSICIANS AND SURGEONS ⇐6(5)—PRACTICE OF OPTOMETRY NOT PERMITTED BY LICENSE AS OSTEOPATH.

A license to practice "osteopathy" does not authorize the practice of optometry, since the quoted word does not include the treatment of eyes, fitting of glasses, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Osteopathy.]

3. CONSTITUTIONAL LAW ⇐328—PHYSICIANS AND SURGEONS ⇐2—OPTOMETRY ACT NOT DISCRIMINATING AGAINST OSTEOPATHS.

Optometry Act 1913, § 10, authorizing physicians and surgeons, but not osteopaths, to treat eyes, etc., does not unreasonably discriminate against osteopaths, in violation of Const. art. 1, §§ 1, 11, 21, article 4, § 25, subds. 19, 33, and the Fourteenth Amendment to the federal Constitution.

4. CONSTITUTIONAL LAW ⇐88—OPTOMETRY ACT NOT INTERFERING WITH LIBERTY OF CITIZEN.

St. 1913, p. 1097, prohibiting the practice of optometry without a license, is not invalid upon the ground that it interferes with personal liberty of citizen to fit glasses, etc.

In Bank.

Habeas corpus proceeding by O. G. Rust against Thomas F. Finn, Sheriff of the City and County of San Francisco. Application denied, and petitioner remanded.

See, also, 35 Cal. App. 422, 169 Pac. 1050.

Chas. F. Hanlon, of San Francisco, for petitioner.

Oliver Dibble and John T. Williams, both of San Francisco, for respondent.

WILBUR, J. [1] Petitioner, being held under a commitment from the police court, seeks his release from the custody of the sheriff of the city and county of San Francisco. He is licensed to practice osteopathy. His license was issued March 6, 1907, under the law regulating the practice of osteopathy, passed in 1901 (Stats. 1901, p. 113). This statute was repealed by the General Medical Act of 1907 (Stats. 1907, p. 252), and this in turn by the Medical Act of June 2, 1913 (Stats. 1913, p. 722), which was amended in 1915 (Stats. 1915, p. 187), and in 1917 (Stats. 1917, p. 83), but petitioner's license to practice osteopathy has been continued in force by such statutes and proceedings thereunder (Stats. 1907, p. 258, § 16; Stats. 1913, p. 722, § 21). Petitioner was found guilty of a violation of the statute making it unlawful to engage in the practice of optometry without a license from the state board of optometry (Stats. 1913, p. 1097), which act, for convenience, we will hereafter refer to as the Optometry Act. Petitioner contends that he is a physician, and is entitled to practice optometry by reason of the exceptions con-

tained in section 10 of that act (Stats. 1913, p. 1101, § 10), which is as follows:

"Sec. 10. The provision of this act shall not be construed to prevent duly licensed physicians and surgeons from treating or fitting glasses to the human eye; nor to prohibit the sale of complete ready-to-wear eyeglasses as merchandise from a permanent place of business in good faith and not in evasion of this act by any person not holding himself out as competent to examine and prescribe for the human eye."

To support his contention that the practice of osteopathy is the practice of medicine, and, hence, that he is a physician, petitioner relies upon the general definition of a physician as one who practices the art of healing (citing Century Dictionary; Black's Law Dictionary), and upon cases in which those engaged in the practice of osteopathy have been held guilty of violating laws regulating the practice of medicine, such as Bragg v. State, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925. He also cited People v. Siman, 278 Ill. 256, 115 N. E. 817, where the court held that an osteopath was a physician within the meaning of the law requiring physicians to register under what was known as the Vital Statistics Act. He also claims that he is a "physician" practicing "medicine" within the meaning of the Medical Act of 1901, in force at the time his license to practice osteopathy was issued. This act provided:

"Sec. 16. The following persons shall be deemed as practicing medicine or surgery within the meaning of this act: * * * 4. Those who, for a pecuniary or valuable consideration, prescribe or use any drug or medicine, appliance, or medical or surgical treatment, or perform any operation for the relief or cure of any bodily injury or disease." (Italics ours.)

The question is not free from difficulty, for the reason that neither the medical act of 1876 (Stats. 1876, p. 792), nor any of the succeeding acts (Stats. 1901, p. 56; Stats. 1907, p. 252), defines a "physician" or "surgeon," or a "physician and surgeon," or expressly provides for the license of a "physician." The Optometry Law of 1903 (Stats. 1903, p. 288, § 16), in stating the exception, is similar to that of 1913, § 10, as is the amendment of 1907, § 16 (Stats. 1907, p. 63), in using the term "physician and surgeon," etc.; but the amendment thereto in 1909 of section 16 uses the expression "physician or surgeon." (Italics ours.) There is therefore some basis for the claim that at the time of the issuance of petitioner's license (March 6, 1907) these terms "physician" and "surgeon," not being defined by statute, should be construed in their broad and general acceptation. However, the same Legislature which adopted the Optometry Law of 1913 also adopted a law regulating the practice of all systems of healing. Stats. 1913, p. 722. By this law provision was made for the issuance of a certificate known as a "physician and

surgeon's" certificate, and another to be known as a "drugless practitioner's" certificate, the latter certificate covering the right to practice osteopathy, and also continued in force all licenses previously issued under "any medical act of this state." Section 21 provided:

"Nothing in this act shall be construed to prohibit the practice by any person holding an unrevoked certificate heretofore issued under or validated by any medical practice act of this state, but all such certificates may be revoked for unprofessional conduct in the same manner and upon the same grounds as if they had been issued under this act."

It also provided (sec. 22):

"Nor shall this act be construed so as to discriminate against any particular school of medicine or surgery, or any other treatment, nor to regulate, prohibit or apply to, any kind of treatment by prayer, nor to interfere in any way with the practice of religion."

For the reasons stated by the District Court of Appeal of the First District, in deciding upon a previous application of petitioner (In re Rust, 35 Cal. App. 422, 169 Pac. 1050), we hold that the provision of section 10 of the Optometry Law of 1913 refers to those holding a "physician and surgeon's certificate," as authorized by the Medical Act of the same year. This construction of these two acts is, however, not altogether decisive of the question arising as to certificates issued under preceding statutes. The Medical Act of 1913 recognized the right of holders of licenses under previous "medical acts" to practice, and to that extent, in effect, continued the preceding acts in force. We think it fairly apparent, however, that the Legislature has, in effect, always used the terms "physician" or "surgeon" and "physician and surgeon," as applied to those practicing medicine and surgery within the meaning of the various medical acts, as contradistinguished from the practitioners of osteopathy. For instance, the first law regulating the practice of osteopathy provided: "The system, method, and science of treating disease is hereby declared not to be the practice of medicine or surgery within the meaning of" the act of 1876, regulating the practice of medicine. The corresponding Medical Act passed by the same Legislature a few days previous (Stats. 1901, p. 56) declared that those were deemed to be practicing medicine or surgery who held themselves out "as being engaged as doctors, physicians, or surgeons," etc. (Stats. 1901, p. 63, § 16, sub. 1). We thus have the legislative declaration that an osteopath is not practicing medicine or surgery, and that "physicians" and "surgeons" are practicing medicine. The reference to the Medical Act of 1876 (repealed by the Medical Act of 1901) may be disregarded, as evidently the two acts of 1901, the Osteopathic and Medical Acts, are to be

construed together. The Medical Act of 1907 (Stats. 1907, p. 252), in which for the first time medicine and surgery and osteopathy are treated in one legislative act, is entitled "An act for the regulation of the practice of medicine and surgery, osteopathy," etc; and in section 2, providing for the organization of a joint board, it is provided that "each member of said board shall, before entering upon the duties of his office, * * * make oath that he is a graduate in medicine and surgery or osteopathy, and a licensed practitioner of medicine and surgery, or of osteopathy, of this state"; thus recognizing a distinction between "medicine and surgery" and "osteopathy" existing before its passage; and in section 6 (Stats. 1907, p. 252, § 6), provides for the issuance of a license to practice "medicine and surgery," and a separate and distinct license "to practice osteopathy." This distinction, requiring separate and distinct licenses for the practice of medicine and surgery and of osteopathy, is maintained in the amendment of 1911 to the Medical Act (Stats. 1911, p. 1437, § 6). The same distinction is also made in the title to this amendment of 1911. In section 13a of the latter amendment, while we have the phrase, "pursuant to any laws regulating the license and registration of physicians, osteopathic physicians, or persons lawfully engaged in practicing any other system or mode of healing the sick or afflicted," we also have the phrase, "medicine, surgery, osteopathy, or any other system or mode of treating the sick or afflicted," used nine times in that section (pp. 1439-1440), and also a provision prohibiting the use of the word "doctor" in any advertisement by any person as indicating or implying that he is a doctor of medicine. It follows that when the Optometry Law of 1906, and its amendment of 1907, and 1909, used the phrase "physician and (or) surgeon authorized to practice under the laws of the state of California," the phrase is synonymous with the phrase "licenses to practice medicine and surgery," used in the acts regulating the practice of medicine, then a part of "the law of California," and thus excludes the holder of a license to practice osteopathy, although in the broad sense of the term an osteopath may properly be said to be a "physician." The phrase "duly licensed physicians and surgeons," used in section 10 of the Optometry Law of 1913, excludes osteopathic practitioners, and includes those licensed to practice "medicine and surgery" under previous medical laws of the state. We hold, therefore, that the license of petitioner, although issued before the Optometry Act and the Medical Act of 1913, does not authorize him to practice optometry under the exception in favor of physicians and surgeons in section 10.

[2] The petitioner also contends that his license to practice osteopathy authorizes the practice of optometry because the practice of

optometry is included in the practice of osteopathy, and that, therefore, the law prohibiting the practice of optometry without a license should not be construed as prohibiting that practice by one authorized so to do by a license issued under another statute, even though no express exception is contained in the statute. If it is true that the general license to practice osteopathy does authorize the practice of optometry, the point may be well taken. The statute of 1901, regulating the practice of osteopathy, does not define osteopathy, nor is the definition contained in the present state Medical Act. Webster defines osteopathy as follows: "A system of treatment based on the theory that diseases are chiefly due to deranged mechanism of the bones, nerves, blood vessels, and other tissues, and can be remedied by manipulations of these parts"; while optometry is defined by statute "to be the employment of any means other than the use of drugs for the measurement of the powers or range of human vision, or the determination of the accommodative and refractive states of the human eye, or the scope of its functions in general, or the adaptation of lenses or frames for the aid thereof." Osteopathy is discussed at length in the *Encyclopedia Americana*, vol. 11 (see, also, the title "Osteopathy, its discovery, development, and institutions"; see, also, *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190); and it is sufficient to say that we cannot see therefrom that the fitting and prescription of eyeglasses comes properly within the practice of that mode of healing. But petitioner's argument that osteopathy includes optometry is based rather upon legal considerations than upon the meaning and significance of the word "osteopathy." It is argued, in effect, that the license to practice osteopathy includes all means of healing other than major surgery or the use of drugs. This claim is based upon the statute and license issued thereunder. It is true that under the law the certificate issued to petitioner expressly provides: "This certificate does not authorize the holder thereof to prescribe or use drugs nor to perform major surgery." See Stats. 1901, p. 114, § 5. This provision was, no doubt, intended to assure what is elsewhere declared, namely, that the license to practice osteopathy should not be deemed to authorize the practice of medicine within the meaning of the state Medical Act then in force. Stats. 1901, p. 115, § 9; Stats. 1876, p. 792. It does not follow, however, that the license to practice osteopathy issued under the law of 1901 authorizes the licensee to practice every known healing art which does not involve the use of drugs, nor major surgery, including optometry. The present law authorizes the petitioner to practice osteopathy, and nothing more (Stats. 1913, p. 722, § 21), by reason of his license issued under the law of 1901 and its registration. We cannot say

that the science of osteopathy includes optometry.

[3] Petitioner claims that if he is not authorized to practice optometry by his license to practice "osteopathy," and a physician and surgeon is authorized to practice optometry by his license as a "physician and surgeon," the law in question is unconstitutional, as violative of article 1, §§ 1, 11, and 21, and article 4, § 25, subds. 19 and 33, of the California Constitution, and also of the Fourteenth Amendment of the federal Constitution, because the law unreasonably discriminates between the holder of a "physician and surgeon's" license and the holder of an osteopathic license. But, as has been stated, the law under which the petitioner received his license to practice osteopathy recognized that that practice was separate and distinct from the practice of medicine and surgery, and the requirements for a license to practice osteopathy and for a physician and surgeon's license have always been different. Under the law of 1913, passed by the same Legislature that adopted the law regulating the practice of optometry, provision was made for the issuance of different forms of certificate—one a "physician and surgeon's" certificate, another a "drugless practitioner's" certificate. Those applying for the first time to practice osteopathy were required to secure a "drugless practitioner's" certificate, while those desiring to practice medicine and surgery were required to secure a "physician and surgeon's" certificate. The applicant for the latter was required to have 4,800 hours' study to his credit, including 60 hours' study of ophthalmology, which includes optometry, while no study of that branch was required of the drugless practitioner. Stats. 1913, p. 722. With some modifications these distinctions were continued by the amendment to the Medical Act, which also expressly authorized the issuance of a physician and surgeon's license to the holder of a license to practice osteopathy, upon proof that the applicant has practiced osteopathy for four years, and upon passing "an oral, practical, or clinical examination" for a physician and surgeon's license. Stats. 1917, p. 105, § 6, amending § 121, Stats. 1915. It also provides for the issuance of a physician and surgeon's certificate to persons who hold a drugless practitioner's certificate, upon the completion of the course required for a physician and surgeon's certificate. Stats. 1917, p. 102, § 5, amending § 11, Stats. 1915. The discrimination complained of between the holder of the physician and surgeon's certificate and the holder of a certificate to practice osteopathy is not unreasonable, for it is based upon different training. See *Ex parte Whitley*, 144 Cal. 168, 77 Pac. 879, 1 Ann. Cas. 13; *People v. Jordan*, 172 Cal. 391, 156 Pac. 451.

[4] Petitioner also contends that the law

regulating the practice of optometry is unconstitutional for the reason that it interferes with the personal liberty of a citizen to perform the "merely mechanical act of fitting glasses." *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558, *People v. Smith*, 208 Ill. 31, 69 N. E. 810, and *Martin v. Baldy*, 249 Pa. 253, 94 Atl. 1091, are cited as authority for this proposition. In *Bessette v. People*, supra, the Supreme Court of Illinois held an act unconstitutional which required a blacksmith to practice the business of horseshoeing for four years and to submit to an examination by a state board of examiners and pay a license fee for the privilege of exercising his calling as horseshoer. In the case of *Martin v. Baldy*, supra, it was held that the action of the state board of medical examiners in attempting to regulate the practice of optometry was without legal authority, for the reason that optometry was not included in the practice of medicine or surgery within the meaning of the statute, which declared it should not be lawful "for any person in the state of Pennsylvania to engage in the practice of medicine or surgery or to hold himself or herself forth as a practitioner in medicine or surgery, or assume the title of doctor of medicine or surgery, or doctor of any specific disease, or diagnose diseases, or to treat diseases by the use of medicine or surgery," etc. But it is conceded in that case that the practice of optometry might properly be regulated by legislative action. The case of *People v. Smith* does not deal with the legislative power to regulate optometry, but holds that the Medical Act of that state does not prohibit the practice of fitting and grinding of eyeglasses, or optometry. The distinction between fitting eyeglasses and horseshoes is too obvious to require comment.

We find nothing in these latter cases which would indicate that a law requiring some evidence of skill as a prerequisite to fitting glasses to the human eye is not a valid exercise of the police power. The same considerations of public health which justify the requirement of a license to practice medicine and surgery and osteopathy authorizes the legislation in question. It is therefore a valid exercise of the police power of the state. See *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Ex parte Whitley*, supra; *People v. Jordan*, supra.

The finding of the court in this case is that the petitioner "adjusted various lenses to the eyes of said Knox and finally fitted glasses to his eyes and sold the same to him"; that he was "guilty of a misdemeanor, to wit, the practice of optometry without having a license for so doing," etc. The law prohibits such conduct, and is constitutional.

The petitioner is remanded.

We concur: LENNON, J.; SHAW, J.; LAWLOR, J.; MELVIN, J.; OLNEY, J.

In re McNAMARA'S ESTATE.

McNAMARA v. McNAMARA et al.

(L. A. 5530.)

(Supreme Court of California. Aug. 25, 1919.
Rehearing Denied Sept. 22, 1919.)

1. APPEAL AND ERROR ⇨833(5)—REHEARING IN BANK—ORDER.

A written order for a rehearing in bank, made within 30 days after the decision in department, as prescribed by Const. art. 6, § 2, is not invalidated because erroneously dated a day later, or because not marked as filed by the clerk until after the 30-day period.

2. BASTARDS ⇨3—PRESUMPTION.

In determining the legitimacy of a child born after its parents had separated, it will be assumed the parents had intercourse during the last night they lived together.

3. EVIDENCE ⇨6, 51 — JUDICIAL NOTICE — GESTATION.

Judicial notice may be taken regarding the period of gestation, and the court may inform itself from technical publications, etc.

4. EVIDENCE ⇨6 — JUDICIAL NOTICE — GESTATION.

Judicial notice will be taken that 304 days exceeds the normal gestation period.

5. BASTARDS ⇨3 — PRESUMPTIONS — STATUTE.

Civ. Code, § 194, providing that children born within 10 months after dissolution of a marriage are presumed to be legitimate, creates only a prima facie presumption.

6. BASTARDS ⇨3 — PRESUMPTION — STATUTE—CONSTRUCTION—TEN "MONTHS."

In Civ. Code, § 194, creating a presumption that children born 10 "months" after dissolution of a marriage are legitimate, the quoted word refers to periods of 30 days although under section 14, Civ. Code, provisions refer to calendar months, unless the context requires a different meaning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Month.]

7. BASTARDS ⇨3 — PRESUMPTIONS — CONCLUSIVENESS.

There is no conclusive, but only a prima facie, presumption regarding the legitimacy of a child born during wedlock, where the mother left her husband to cohabit with another 304 days before the child's birth, since such period exceeds the normal time for gestation.

8. BASTARDS ⇨6 — SUFFICIENCY OF EVIDENCE.

Evidence that a child was born 304 days after its mother left her husband to cohabit with another, etc., held to overcome the prima facie presumption regarding legitimacy of children born during wedlock, and sustain a finding of illegitimacy.

9. BASTARDS ⇨13 — LEGITIMATION — RECEIVING INTO "FAMILY"—STATUTE—CONSTRUCTION.

In Civ. Code, § 230, providing that a father may legitimate a child by receiving it into his "family," etc., the quoted word does not necessarily mean the father's relations, but may mean the family in which the father resides, even though it consists of the child and its mother.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Family.]

10. BASTARDS ⇨13 — LEGITIMATION — EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a father had legitimated his child by adopting it pursuant to Civ. Code, § 230, requiring a public acknowledgment of paternity, treatment of child as if legitimate, and its reception into father's family.

11. BASTARDS ⇨5 — EVIDENCE — ADMISSIBILITY.

In action involving the legitimacy of a child, the mother's testimony that her husband had no access to her during the normal gestation period prior to the child's birth is admissible under Code Civ. Proc. § 1870, subdivisions 1, 15, specifying facts which may be proved, and section 1879 making all persons, with immaterial exceptions, competent witnesses.

12. EVIDENCE ⇨291 — DECLARATIONS BY DECEDENT—ADMISSIBILITY.

In action involving the legitimacy of a child, declarations by the mother's deceased paramour that he was the child's father is admissible to show legitimation by adoption, pursuant to Civ. Code, § 230, and also under Code Civ. Proc. § 1870, subd. 4, providing that declarations by a deceased regarding persons related to him constitute competent evidence.

13. TRIAL ⇨59(2)—ORDER OF PROOF—EVIDENCE.

In action involving the legitimacy of a child, admitting declarations by the mother's paramour that he was the child's father, before it was shown that the mother's husband could not have been its father, involves merely the order of proof, and is almost entirely within the trial court's discretion.

14. EVIDENCE ⇨269(2) — DECLARATIONS — ADMISSIBILITY.

In action involving the legitimacy of a child, declarations by the mother's husband, made when she left him, that he was going to another town, held admissible.

15. APPEAL AND ERROR ⇨1050(2)—HARMLESS ERROR—EVIDENCE.

In action involving the legitimacy of a child, any error in admitting declarations by the mother's husband that he intended to go to another town held not prejudicial.

Melvin, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of John A. Mc-

Namara, deceased. Petition by John Hamilton McNamara, a minor, by Rosalie Nettle Bettencorte, guardian of his person and estate, for partial distribution of the estate. From an order awarding partial distribution, Mary Jeanette McNamara and Margaret J. McNamara appeal. Reversed in department, and the case ordered reheard in bank. Judgment in department reversed, and order of Superior Court affirmed.

Rehearing denied in bank; Melvin, J., dissenting.

Daniel M. Hunsaker, Joseph L. Lewinsohn, Hunsaker & Britt and Le Roy M. Edwards, all of Los Angeles, and Boyd C. Barrington, for appellants.

John W. Carrigan, of Los Angeles, for respondent.

OLNEY, J. [1] Preliminary to the discussion of this appeal it is advisable to correct the record of this court regarding it. It was decided by us in department on December 18, 1918. A petition for rehearing in bank was duly filed, and on January 17, 1919, an order was signed by the Chief Justice and two Associate Justices directing a rehearing. This was within 30 days after the judgment in department, and therefore within the time prescribed by the Constitution within which rehearings may be granted. It appears, however, that the order was given the date of January 18, 1919, which was 31 days after the department decision, and not within the prescribed time. The order was also marked by the clerk as filed on January 18, 1919.

The fact that the paper on which the signed order was written was not marked by the clerk as filed until after the expiration of the period of 30 days from the time of the department decision is not material to the validity of the order. The joint action or concurrence of four Associate Justices or of the Chief Justice and two Associate Justices "is the thing required to constitute the action of the court" (Const. art. 6, § 2), and, in contemplation of law this joint action is taken when the required number of justices "have, in writing, declared their concurrence in the order with intent to make it an order." "The filing of the order in the clerk's office within the prescribed time was not essential to its validity," if it was regularly made within that time by the necessary number of justices. *People v. Ruef*, 14 Cal. App. 624, 626, 114 Pac. 48, 54; *Niles v. Edwards*, 95 Cal. 47, 30 Pac. 134; *Von Schmidt v. Wilder*, 99 Cal. 515, 34 Pac. 109. It is therefore unnecessary, as matter of law, to correct the entry as to the time of filing, or to order a filing nunc pro tunc as of January 17, 1919. But as the date of the order makes it appear that it was made after the expiration of the 30 days, contrary to the fact, and might tend to cast doubt on the validity of further

action by the court in the case, we deem it advisable to correct the order in that respect.

It is therefore ordered that the order heretofore made in this case vacating the judgment previously entered herein in department, and directing a hearing thereof before the court in bank, be, and the same is hereby, corrected as to its date by striking out the words "January 18th, 1919," as written therein, and inserting instead thereof the words "January 17th, 1919," the same being the true date of the making of said order.

Passing now to the consideration of the appeal itself, it appears that the decedent, John A. McNamara, died May 10, 1916, unmarried and without a valid will. In the course of the administration of his estate, one John H. McNamara, a minor, through his guardian, presented a petition for partial distribution of the estate to him, alleging that he was the illegitimate child of the decedent, and that he had been legitimated by adoption in the manner prescribed by section 230 of the Civil Code. The section mentioned provides for legitimation rather than for adoption in the ordinary sense, and, in order that the petitioner's right of heirship be established, it was necessary for him to show that he was in fact the illegitimate son of the decedent, and also that he had been adopted by the decedent in the manner specified by the Code section. The heirs of the decedent, if the child were not his heir, were two sisters, and these sisters filed objections to the child's petition, and in particular took issue with the allegations of the petition as to both of the two elements required by the Code section for legitimation; that is, as to the petitioner being in fact the offspring of the decedent, and as to his having been adopted by him. There were other issues made, but the two issues mentioned were the real issues and alone need to be considered. The cause was tried without a jury, the lower court found for the child upon both issues, and made an order of partial distribution in his favor. From this order the sisters appeal, and urge that the finding of the lower court in the child's favor is not supported by the evidence as to either issue. Certain rulings in the admission of evidence are also complained of. The chief contention is over the finding of paternity, and will be first considered.

The salient facts are that the petitioner is the child of a Mrs. Bettencorte. She was quite a young woman, and had married one Antonio F. Bettencorte in July, 1913, and lived with him, occupying the same apartment, up to and through the night of December 23d of the same year. On the morning of the following day she went with her husband to the city of San Jose, a few miles from where they resided, and there left him about noon to go immediately with McNamara, the decedent, with whom she lived

practically continuously thereafter until his death. She never saw her husband again but once, and then under circumstances that preclude the possibility of intercourse between them. As throwing some light on the relations of the parties and the character of the mother, it may be mentioned that she had been engaged to McNamara, had had some quarrel with him, and had immediately married Bettencorte. She seems to have found herself very unhappy in her marriage, never to have lost her affection for McNamara, and in her unhappiness to have turned to him. She had no illicit relations with McNamara prior to her finally leaving her husband, and there is in the record no evidence, in fact no breath of suspicion, that she had illicit relations with any one but McNamara.

On October 24, 1914, just 10 calendar months, or 304 days, after Mrs. Bettencorte left her husband, the child was born. No question seems ever to have occurred to anyone until after McNamara's death but that the child was his. Certainly no question occurred to him. No physician was present at the birth, and McNamara himself made out and signed the birth certificate, specifying himself as the father. In letters to the child's mother he addresses her as his wife, and speaks of her as such and of the child as their child. He endeavored to make a will leaving his property to "Rosalie A. Bettencorte, the mother of my son, and with whom I have been living as my lawful wife for the past year pending the securing of a divorce by her. She is to have all and everything that I die possessed of for the benefit of herself and her child." He also directs Mrs. Bettencorte, in case of his death, to communicate with his sister, one of the appellants here, saying that she will see that his wishes are carried out. The will failed because not witnessed and not entirely written in McNamara's own hand. The child and the mother lived with him, accompanied him on trips away, and he supported them both. So far as appears, the relations between the three were the usual relations of a family of father, mother, and child.

In addition to the foregoing Mrs. Bettencorte testified (and in view of the court's finding her testimony must be taken as true, if competent) that she had her regular menstrual period commencing December 20, 1913, four days before she left her husband, and ending the day she left, and that she had another regular and full period commencing January 23d or 24th following, and that she had another menstruation, apparently shorter, in February. She also testifies that she first suspected she was pregnant in March or April. It also appears that the child when born was a fully developed and normal baby. It was not weighed, but the mother testified that her mother said at the time it was born that it weighed about 11 pounds. Another witness testified that it weighed 8 or 9

pounds. If the child did in fact weigh 11 pounds at birth, it was exceptionally large, and this fact might be a slight indication of a prolonged pregnancy. But estimates as to the weight of a new-born baby are proverbially unreliable, and the most that can be said is that the child was full-sized. On the other hand, there was no unusual circumstance accompanying either the pregnancy or the birth, and the fact of the mother's safe delivery without a physician may be a slight indication that the child was not of unusual size. The only medical evidence introduced was that of a physician called by the appellants, who testified that a period of gestation of 304 days or more was possible and not very unusual.

Upon the foregoing facts and evidence the point most strongly urged upon us on behalf of the appellants is that the question of the child's paternity is determined by a conclusive presumption of legitimacy. It is urged that it appearing that Mrs. Bettencorte and her husband were together on the night of December 23d, it must be presumed, as a matter of law, that intercourse took place between them at that time, and it further appearing that a child was born of Mrs. Bettencorte 304 days thereafter, and that this period is within the period of possible gestation, there is a conclusive presumption of law that the child is legitimate; that is, is the offspring of Mrs. Bettencorte's husband and not of the decedent.

[2] That it must be assumed, as urged by appellants' counsel, that the husband and wife had intercourse on the night of December 23d, when they were together, cannot be doubted. That such is the rule in cases where the issue of legitimacy is involved is established in this state by *Estate of Mills*, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175. The question, therefore, presented by appellants' contention is this, Is there a conclusive presumption of legitimacy when it appears that the mother has had intercourse with her husband 304 days before the birth of the child, but not subsequently?

The presumption of legitimacy is discussed in *Estate of Walker*, 181 Pac. 792. It is there said that if it appear that it is possible by the laws of nature for the husband to be the father of the child—that is, if he had intercourse with his wife during the period of possible conception—he is conclusively presumed to be the father, that the law will permit no guessing or weighing of probabilities as between the husband and some other man, when both have had intercourse with the mother during the critical time, and either may in fact be the actual progenitor. This rule in cases where only a usual and normal period of gestation is involved is thoroughly well established, and the reasons of policy upon which it is based are so strong that it is the rule of both the civil and the common law. There was, however,

no attempt in the Walker Case to do more than state the rule in a general way. Nothing more was necessary, as the evidence of intercourse with the husband there relied on to prove legitimacy was of intercourse during the time when, according to the usual operation of the laws of nature, the children involved must have been conceived. The application of the rule to such a case is not open to doubt.

But in the present case it appears conclusively that the husband did not have intercourse with his wife for a period of 304 days preceding the birth of the child. This period, if not exceeding, at least approaches, an exceeding of the usual and normal period of gestation. Two questions, therefore, present themselves, neither of which was presented in the Walker Case or there determined. The first of these is, Is the period of 304 days greater than the usual or normal—not merely the average—period of gestation—that is, is it contrary to the usual operation of the laws of nature? This is a pure question of fact. The second question is one of law, namely, Does the conclusive presumption of legitimacy apply where the period of gestation necessary in order that the husband be the father is not an impossible one, but is yet exceptional, and not according to the usual operation of the laws of nature?

[3, 4] The first question, while one of fact, is one as to the operation of natural laws, and therefore as to a fact of which the court may take judicial notice, and as to which it is not confined to the evidence in the record, but may seek information elsewhere, and in particular in published technical works and articles by those recognized as authorities in this branch of human knowledge. An examination of recent medical text-books and articles leaves no doubt as to two points: First, that 304 days is a possible period of gestation; and, next, that it is quite an exceptional one. While the average period of gestation is generally taken as 280 days, there are instances vouched for by reputable authorities where the period has exceeded 330 days, and there are instances, too well authenticated apparently to admit of reasonable question, where the period has exceeded 320 days. See, for instance, the case reported by Dr. Taussig in his monograph on Prolonged Pregnancy, appearing in XLIV American Journal of Obstetrics, 519. In this same article also Dr. Taussig compiles (page 524) a list of well-authenticated cases which would seem to justify his conclusion that "in this total of 61 reliable cases of partus serotinus (delayed birth) we have a mass of evidence that should make even the most conservative acknowledge that this condition occurs in the human race, just as it has long since been proved to exist in the lower animals." See, also, Cragin, The Practice of Obstetrics, pp. 156-164; Edgar, The Practice

of Obstetrics, vol. 1, p. 128; 2 Witthaus and Becker, Medical Jurisprudence, pp. 507-520; 3 Wharton & Stille, Medical Jurisprudence, pp. 30-39.

On the other hand, a reading of these same authorities makes it plain that any period in excess of 300 days is quite exceptional, and that with each day over 300 the exceptional character of the case is much intensified. Dr. Taussig in his article endeavors to compile all well-authenticated cases where the period exceeded 300 days, and accepts but 61 as falling with reasonable certainty within this class. This small number strongly evidences the exceptional character of such cases, as does also the fact that those investigating the subject concern themselves with every case where the period may be supposed to exceed 300 days. This would not be true if such cases were not looked upon as quite exceptional, and therefore worthy of note and investigation. A number of authorities (see page 514 of 2 Witthaus & Becker) fix 300 days as the extreme limit, a conclusion which apparently must be abandoned in the light of more recent information; but the fact that such an opinion could be held at all by capable modern investigators indicates that instances of more than 300 days are entirely beyond the usual order of things. That this is the common experience of mankind is also indicated by the fact that in other countries 300 days has been adopted by statutes as the limit of the presumptive period of gestation. Article 315 of the French Civ. Code; *McNeely v. McNeely*, 47 La. Ann. 1321, 17 South. 928. Dr. Edgar quotes Von Winckel (2 Witthaus & Becker, 575) as saying that "in 6.8 per cent. [of cases] the duration is over 300 days." But the article in which this statement was made was published in 1890, and in 1900 or 1901 Von Winckel published the results of his examination of 30,500 cases, in which as best we can judge from the references to the article, he found but 31 cases, or less than one-tenth of one per cent., wherein it was reasonably certain the period was 302 days or more. We can but conclude that the period involved in this case, 304 days, is quite exceptional, and not according to the usual and normal operation of the laws of nature.

This conclusion makes necessary a consideration of the second question, Is the conclusive presumption of legitimacy applicable to such a case? This is not determined by any statutory provision. Section 1962, subdivision 5, Code of Civil Procedure, provides: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Read literally, this section would apply only where the wife is cohabiting with her husband at the time of issue; that is, of birth. This was not the fact in the present case. But putting upon the section the meaning it undoubtedly should have, namely, that issue of

a wife cohabiting with her husband at the time of conception must be indisputably presumed legitimate, it yet does not determine the present case, for it still leaves open the very question involved of when was conception or during what period must it be presumed to have taken place?

[5] Section 194 of the Civil Code provides: "All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage." This presumption is but *prima facie*. *Estate of Walker*, 176 Cal. 402, 408, 168 Pac. 689. It is urged, however, in effect, that it is a statutory declaration of policy that 10 months is to be taken by the law as not exceeding the reasonable or normal period of gestation, so that all the incidents of birth within the normal period, such as the conclusive presumption of legitimacy, attach. There are several answers to this, but two will suffice. The presumption of the Code section is but *prima facie*, and the reasons of policy which would justify or induce a *prima facie* presumption in such a case are very different from those which would justify or properly induce a conclusive presumption. The Legislature might well deem it wise to provide that a child born within 10 or 11 or even 12 months after separation of husband and wife, as was actually done in Pennsylvania, should be presumed legitimate in the absence of any other evidence, when it would be wholly unwilling to make such presumption apply contrary to all other evidence.

[6] In the next place the 10 months mentioned by the statute must be taken to be months of 30 days. No other construction will give it a reasonable operation. It is dealing with the working of natural laws, where any proper measure of time must be an absolute and regular one, such as days or hours, not an irregular one, such as calendar months. If this be not so, the legitimacy of a child might depend on the purely fortuitous circumstance that the marriage of its mother was dissolved in one month of the year instead of another. The long months occur irregularly during the year, and more of them accumulate in one period of 10 months than in another. For example, if the child were born 306 days after the dissolution of its mother's marriage, it would be presumed legitimate if the dissolution had happened to occur on any day in April prior to the 29th, while, if the child were so unfortunate as to have had the dissolution of its mother's marriage occur in any day in February, it would not be presumed legitimate by the statute unless it were born within 303 days thereafter. Such arbitrary and unreasonable inconsistencies and distinctions affecting so vital a matter would make the law ridiculous, and are to be avoided if by reasonable construction of the statute they can be. The word "month," when spoken of as a regular and

constant measure of time—each month having the same length—as is not infrequently done, is commonly conceived of as having 30 days. The statute is applying the measure of months to something which should be measured by a constant and regular standard, where each month must have the same length, and the reasonable construction is to put upon the word "month" as so used the meaning which it commonly has when used in that manner, that is, a month of 30 days, so that the ten months' period specified is one of 300 days. We believe that the necessity for this meaning is so plain that it is one "apparent from the context" within the language of section 14, Civil Code. This construction we are the more willing to put upon the statute in view of the fact that in those countries where there is a presumptive period of gestation it is more usually this time.

[7] Other than the two Code sections mentioned, there is no statutory provision which bears upon the question. Nor is much assistance to be derived from previous decisions. So far as the question has been presented to the courts at all, the trend is apparently to the view that the conclusive presumption does not apply where the period of gestation required, in order that the husband be the father, is an exceptional, although a possible, one.

The point was presented in the *Gardner Peerage Case* (Le Marchant's report). There the child was born 311 days after the wife left the husband to join her paramour, with whom she continued for some time. There was much testimony pro and con as to this time being a possible period of conception, and counsel for the child urged strongly that the testimony showed it was a possible period, and that, this being the fact, a conclusive presumption of legitimacy followed. The House of Lords determined that the child was illegitimate. The decision, however, cannot be given much weight here, for the reason that the evidence that 311 days was a possible period was strongly controverted, and the two lords delivering opinions put them briefly on the ground that they were convinced of the fact of illegitimacy without stating anything more. It may fairly be said that they may have believed 311 days was not a possible period, and have reached their conclusion for that reason.

In *Burnsby v. Baillie*, L. R. 42, Ch. Div. 282, the period between the separation of husband and wife and the birth of the child was 279 days. The child was found to be illegitimate. There was a good deal of testimony as to the ordinary period of gestation, and Judge North, who decided the case, in his opinion says that, "having regard to the normal or usual period of gestation," he is unable to come to a positive conclusion, and finally puts his decision on the ground that he was satisfied the parties had not had intercourse for some time before their separa-

tion. The inference from the decision, but it is only an inference, is that the conclusive presumption was applicable in the court's mind only in the case of intercourse by the husband within the usual period of gestation.

Bosville v. Attorney General, L. R. 12, Prob. Div. 177, comes nearest to being directly in point. The facts are practically identical with those of the case at bar, except that the period intervening between separation of husband and wife and the birth of the child was but 277 days. The medical testimony introduced was to the effect that the normal time of gestation was from 270 to 275 days, and that a longer time, although not unknown or even uncommon, was exceptional. The case was left to the jury, which found the child illegitimate. On review the very argument here urged upon us was urged upon the court. It was contended that, it appearing that the husband and wife had occupied the same apartments up to 277 days before the birth, it must be presumed that intercourse was had between them as late as 277 days before birth, and that, such time being within the period required for gestation, a conclusive presumption of legitimacy followed. This contention was overruled and the verdict of the jury upheld. The case may, therefore, be fairly considered as directly holding in opposition to the contention of appellants here. It is not entitled to particular weight, however, because of the unsatisfactory reason given, which is that one presumption cannot be built upon another, a proposition which we do not believe applicable to such a case.

People v. Case, 171 Mich. 282, 137 N. W. 55, may perhaps be considered as tending the other way. It was there held in a bastardy proceeding that a child born only 253 days (8 months and 13 days) after the husband's liberation from jail and a renewal of relations with his wife must be conclusively presumed legitimate. The decision was based on evidence that the maximum period of gestation was 300 days and the minimum 240. The point under discussion here, however, was not considered or apparently suggested.

So far as we are aware, the foregoing are all the authorities which can be said to have any real bearing on the question. We are therefore compelled to treat it as one of first impression. So approaching it, it is apparent at the outset that the conclusive presumption of legitimacy must either be extended to apply to every case where the period of gestation necessary in order that the husband be the father is a possible one, no matter how exceptional or extraordinary such period may be, or else it must be limited in its application to those cases where the period necessary to make the husband the father is within normal or usual limits. There is no middle ground. It is apparent also, from what has already been said, that the facts with which the law has to deal in this regard

are that while the average period of gestation is 280 days there are exceptional and rare instances where it exceeds 320 days, and it is probable that there are instances where it exceeds 330 days. The situation therefore is either that a child born 320 days after separation of husband and wife, and probably a child born 330 days or more after, must be conclusively presumed to be legitimate, regardless of what the evidence may show as to the mother having intercourse with another man than her husband during the normal period of conception and the entire absence of any symptoms of prolonged pregnancy, or else the conclusive presumption must be limited to cases where the husband has had intercourse with the wife during the normal period of conception. The mere statement of this proposition involves its answer. The conclusive presumption cannot be applied to such extreme and exceptional cases. To do so would be wholly unreasonable, and would be contrary to the legal presumption which exists in this state, that "things have happened according to the ordinary course of nature." Section 1963, subd. 28, Code Civ. Proc.

Nor is there any reason of public policy which requires such extending of the conclusive presumption. The prima facie presumption of legitimacy, which requires clear and satisfactory proof for its overcoming, is founded on the policy of protecting the integrity of the family, of preventing the bastardizing of issue born in wedlock except upon clear and certain evidence. The reason for going beyond this prima facie presumption, and applying a conclusive presumption whenever the husband has had intercourse with the wife during the time when the child must normally have been conceived, although others as well may have had intercourse with her during the same period, is the impossibility of determining under such circumstances who is the father. As was said in *Com. v. McCarty*, 2 Clark (Pa.) 356, the process of conception is a hidden one, and the organs perform their appropriate functions without the volition of the female and without her being conscious that the process is going on. Where she has had intercourse with more than one man at about the same time, and a child has resulted, neither she nor any one else can say with reasonable certainty which is the father. Any weighing of probabilities under such circumstances is but guessing, and, where the husband is one of the possible fathers, he must bear the burden of his relation to the woman and be taken to be the father of her child.

There is one class of cases where it is recognized, in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for in-

stance white, and it appears that the wife has had intercourse with a man of another race, as for instance a negro, and the child is of mixed blood. *Watkins v. Carlton*, 10 Leigh (Va.) 560; *Bullock v. Knox*, 96 Ala. 198, 11 South. 339; *Wright v. Hicks*, 12 Ga. 161, 56 Am. Dec. 451; *Cross v. Cross*, 3 Paige (N. Y.) 139, 23 Am. Dec. 778. The reason why the conclusive presumption is not applied in such instances is that the element of indeterminability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable.

The same element of indeterminability is lacking in the class of cases under consideration where, in order that the husband be the father, the period of gestation, while a possible one, is exceptional and contrary to the usual course of nature. The actual fact as to paternity can be determined with reasonable certainty, if the probative facts capable of being known are made to appear. The courts must reason in accordance with the usual operation of the law of nature, and where it appears that the child was born at such a time that the husband might possibly be the father, but only in case of a very exceptional departure from the usual operation of the laws of nature, and it also appears that the wife has had intercourse with another at the time when by the usual operation of these laws he would be the father, the conclusion that the latter is the father is, in the absence of any symptoms or circumstances indicating an exceptional period of pregnancy, well nigh irresistible. Nor is there any reason why this conclusion should not be followed in this class of cases as in other cases where the fact that the husband is not the father is capable of being shown clearly and satisfactorily and is so shown. The courts are reluctant to reach the conclusion of illegitimacy in any case, but, reaching it, there is no hesitation, and should be none, in giving it effect. Our conclusion in the present case is that the issue of paternity is not determined by any conclusive presumption of legitimacy.

It does not follow that the *prima facie* presumption of legitimacy is not applicable. That presumption applies in every case of a child born in wedlock and can be overcome only by clear and satisfactory evidence. *Estate of Walker*, *supra*. It remains to consider whether the evidence in the present case is of that character.

[8] The circumstances in evidence leave no room for reasonable doubt. In addition to the fact that the child was born at a time much exceeding the normal period, if the husband were the father, we have the further circumstances that during all the time when normally it would have been conceived the

mother was cohabiting with McNamara; that in January, nearly a month after leaving her husband and after conception must have taken place if he were the father, she had a full menstrual period—something which may occur after conception, but ordinarily does not; that computing from the commencement of this menstrual period as that preceding conception, as is usually done, the period of gestation was 274 days, or only 6 days removed from the average period of 280 days, and wholly within the limits of normal variation; and, finally, that every one concerned—McNamara, the girl, the girl's family, and so far as appears Bettencorte himself—believed without question that the child was McNamara's. The combined force of these circumstances is sufficient certainly to justify the finding of fact of the lower court as to paternity.

[9, 10] The evidence is likewise fully sufficient to sustain the finding on the issue as to adoption. The requirements of the Code (section 230, Civ. Code) for legitimation by adoption are two: First, that the father must publicly acknowledge the child as his; and, next, that he must treat it as if it were legitimate, and in particular must receive it into his own family as his child. The evidence is ample on both points. A more public acknowledgment than the act of McNamara in signing the child's birth certificate, describing himself as the father, it would be difficult to imagine. In addition the child was with him and its mother most of the time after its birth, and the evidence shows that the relation openly assumed by him was that of father. His statements and his actions were both a public acknowledgment of the child as his, and a consistent treatment of it as if it were legitimate. It was also received into his family within the meaning of the Code. It has already been decided by this court that the word "family," as used by the Code in this connection, does not necessarily mean relations, but may mean the family in which or as part of which the father abides. *Estate of Gird*, 157 Cal. 542, 108 Pac. 499, 137 Am. St. Rep. 131; *Estate of Jones*, 166 Cal. 108, 135 Pac. 288. In this sense the only family McNamara had after the birth of the child was the child and its mother, with whom he abided, with occasional absences, until his death, with full assumption of the relation of father, mother, and child. It is worthy of note in this connection that while McNamara was so living with Mrs. Bettencorte and her child, his sister, one of the appellants, visited and stayed with them for some days. The relation between McNamara and Mrs. Bettencorte was, to be sure, unlawful, but this does not negative the plain fact that the family relation existed. It is attempted to distinguish this case from *Estate of Jones*, *supra*, where the facts establishing an adoption were much weaker, on the ground that McNamara had no fixed habitation. The par-

ties did change their abode several times, but it was a change of abode. They were not mere wanderers or travelers. Where they were, they made their home. When they finally moved to the place where McNamara died, they did not rent the place, but actually arranged to purchase it.

The alleged errors in the admission of evidence are three: First, the admission of testimony by Mrs. Bettencorte that she left her husband on December 24, 1913, and, except on one occasion immaterial here, did not see him again, in other words, testimony by a wife tending to show nonaccess by her husband; second, the admission of evidence of declarations by McNamara that he was the father of the child; and, third, the admission of testimony as to a declaration of Bettencorte at the time (December 26, 1913) he left the residence of Mrs. Bettencorte's parents, where he and she had been residing, that he was going to Redding, in the northern part of the state.

[11] The admission over objection of testimony by Mrs. Bettencorte, tending to show nonaccess by her husband, presents a question on which the courts are in hopeless confusion. So far as rulings in this state are concerned, it was held in *Estate of Mills*, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175, that testimony by a wife that she did not have intercourse with her husband at a time when she was cohabiting with him was not competent on an issue as to the legitimacy of her child. This ruling is a necessary result of our Code provision that the issue of a wife cohabiting with her husband is indisputably presumed legitimate. It not being permitted to dispute the presumption of legitimacy under such circumstances, evidence disputing it is of course incompetent. Further than this our decisions have not gone. Mrs. Bettencorte's testimony does not come within the rule of *Estate of Mills*, supra, for she did not testify, nor was it claimed, that she did not have intercourse with Bettencorte as long as they cohabited. Her testimony was as to a separation between them and that she did not meet him afterwards.

A reading of our Code sections would seem to settle the question. Section 1870, Code of Civil Procedure, reads:

"In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: 1. The precise fact in dispute; * * * 15. Any other facts from which the facts in issue are presumed or logically inferable."

Section 1879, Code of Civil Procedure, reads (the italics are ours):

"All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. * * *"

The next two sections (sections 1880 and 1881, Code of Civil Procedure) purport to set forth the instances in which a person having direct knowledge of the facts is yet not competent as a witness. Testimony by a wife showing, or tending to show, nonaccess by her husband is not mentioned in either section. More explicit language could not well be devised, and these sections are in our judgment controlling. It is true that they were considered in *Estate of Mills*, and it was there said, in effect, that they do not abrogate the rule of the common law on this particular point. But this statement was not necessary for the decision, which could have been rested solely on the ground that the evidence there presented was inadmissible, because material only to dispute an indisputable presumption. Even if the Code sections were not controlling, from which conclusion we see no escape, the fact that any such rule of incompetency as is contended for by appellants actually exists at the common law has been seriously questioned, and the reasons of policy advanced to justify it severely criticized. See 8 Wigmore on Evidence, §§ 2063 and 2064.

Our conclusion on this branch of the case is that the rule of *Estate of Mills*, supra, should not be extended further than it was actually there set down and applied—that is, to evidence by either wife or husband of nonintercourse between them at a time when they were cohabiting together—the evidence being offered on an issue as to the legitimacy of a child born to the wife; and that the rejection of the evidence in that instance is justified not so much because it is incompetent, as because it is immaterial, being offered to dispute an indisputable presumption. Within this rule the testimony of Mrs. Bettencorte does not come.

[12] The next objection is to the evidence of declarations by McNamara that he was the father of respondent. The objection made is not so much that such evidence was wholly incompetent as that it was incompetent until it had been shown the husband, Bettencorte, was not the father. As to its competency generally there can be no doubt. It was clearly competent for the purpose of proving the acknowledgment of paternity by McNamara and his adoption of the child in the manner required by the Code for legitimation. Being competent and material upon that issue it was, of course, admissible. Furthermore, McNamara being deceased, his declarations as to the relationship of the child to him were also admissible under the familiar pedigree rule. On this latter point section 1870, subdivision 4, Code of Civil Procedure, provides that evidence may be given of "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person." See, also, section 1852, Code

Civ. Proc.; *Estate of Heaton*, 135 Cal. 385, 67 Pac. 321.

[13] As to the point that the evidence was incompetent until it had been shown that Bettencorte was not the child's father, this, in the first place, was a matter of the order of proof, and almost entirely within the discretion of the trial court. In the next place, such evidence is not incompetent on the issue of paternity, which is the point really made on behalf of the appellant. *Hargrave v. Hargrave*, 9 Beavan, 552; *Morris v. Davies*, 5 Cl. & Fin. 163; *The Aylesford Peerage*, L. R. 11 Ap. C. 1. The real point of the authorities cited by appellants' counsel in this connection is either that declarations by the putative father are not alone sufficient to overcome the presumption of legitimacy, or else that, where nonintercourse between husband and wife is not shown, such declarations are wholly immaterial. Both of these propositions are true, but neither has application here.

[14] The final objection of appellant is to the admission of declarations by the husband, Bettencorte, immediately after his wife left him, that he was going to Redding. These declarations were made at the time he left the residence of his wife's parents, where he had been residing, and in connection with his actual departure. The fact that he went to Redding, where his wife was not, was material on the question of their separation. The fact that he departed, and that he intended to go to Redding, is some evidence that he did go, and it is well established that declarations of intention are admissible under such circumstances. For a quite notable case where, on this particular point the facts are almost identical with those presented here, see *Mutual, etc., Co. v. Hillman*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706.

[15] It should perhaps also be stated that even if this evidence were strictly inadmissible, its bearing on the real matter in dispute is so slight that it is impossible that the appellants were prejudiced by its reception.

There are no other material errors complained of.

Order affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

MELVIN, J. I dissent. The policy of the law has always been to favor legitimacy, and to prevent, except upon the most convincing proof, the bastardization of a child born to a married woman. I believe the opinion of Mr. Justice OLNEY, in which all of my other Associates concur, forsakes this oft-declared policy, and is, moreover, against the letter of our statute. I believe this decision, as a result of which a woman is permitted successfully to attach the stigma of illegitimacy to her little boy, will stimulate many similar

efforts on the part of others who desire to spend the money left by deceased bachelors.

The presumption arising because of the ancient policy of the law, to which I have referred above, is well set forth in an opinion written by the learned author of the prevailing opinion in this case. I refer to *Estate of Walker*, 181 Pac. 792, at page 794. In the opinion in that case I find the following language:

"There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted."

In the opinion delivered by Mr. Justice Victor E. Shaw upon the former appeal in that case (*Estate of Walker*, 176 Cal. 402, 168 Pac. 689) he quoted approvingly the following language from *Powell v. State*, 84 Ohio St. 165, 95 N. E. 660, 86 L. R. A. (N. S.) 255:

"Public policy requires that the status of a child born or begotten in lawful wedlock should be fixed and certain, and the immediate exigencies, or even the apparent justice, of any particular case, will not justify a departure from the rule so necessary and salutary to the best interests of society. The law is not willing that a child shall be declared a bastard to suit the whim or purpose of either parent, nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant."

Continuing, Mr. Justice Victor Shaw used the following language:

"Before such a child can be adjudged a bastard, the proof must be clear, certain, and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child."

The court cited the following authorities: *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *Kraus v. Kraus*, 98 Mo. App. 427, 72 S. W. 130; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; *Ewell v. Ewell*, 163 N. C. 236, 79 S. E. 509, Ann. Cas. 1915B, 373. (It is to be noted that, through a printer's error, the last quoted sentence, as appears on page 410, of 176 Cal., 168 Pac. 689, is erroneously credited to the opinion in *Powell v. State*, supra.) It is true that the old English rule known as the "quattuor maria rule," which conclusively assigned legitimacy to a child born to a married woman while the husband was within the four seas, except upon proof of his impotence, has been modified by modern decision. Generally, courts have

adopted the rule laid down by Lord Langdale to the effect that "the presumption may be wholly removed by proper and sufficient evidence showing that the husband was impotent; entirely absent, so as to have no intercourse or communication of any kind with the mother; entirely absent at the period during which the child must, in the course of nature, have been begotten; or present only under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." 3 R. C. L. 727. This rule, however, is still based upon the presumption arising from the policy of the law in favor of legitimacy. That policy was in existence when subdivision 5 of section 1962, Code of Civil Procedure, was adopted. That subdivision declares that "the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Read in view of the policy of the law in favor of legitimacy, it seems to me that this subdivision means that the issue of a wife, born within the possible period of gestation, after proven access of her husband, he being not impotent, is indisputably presumed to be legitimate. Mr. Justice O'LENEY, in the prevailing opinion, concedes that the subdivision applies to the issue of a wife cohabiting with her husband at the time of conception. Let us suppose that in the present case the period of separation of the spouses instead of ten months had been nine. It seems to me that under the logic of the opinion the child would be conclusively presumed legitimate, for the case would then be like that of a husband living with his wife during all of the usual period of gestation. In such a state of facts I take it the paternity might not be impeached by a showing that the infant was small and probably a child born eight months after conception. What reason is there for preventing inquiry in possible cases of subnormal pregnancy and permitting it in instances of that which may be abnormal? I can see none. Undoubtedly, in the operation of subdivision 5 of section 1962, Code of Civil Procedure, some children who are actually bastards will be held legitimate without power on the part of any one to attack their standing in that regard. But that is in accord with the policy of the law, which looks not to the possible foisting of a child upon a husband who might not have been the father, but seeks to prevent all possibility of a legitimate child having the stain and sorrow of illegitimate birth unjustly attributed to it as a sinister inheritance.

Does the unquestionable presumption of legitimacy cease with the period of 280 days after the last cohabitation of man and wife, that being, as we are informed, the average period of gestation? If not, when does the whole matter become open to the court's inquiry? Is it open to fully inquiry on the 281st day or any day thereafter on which a child shall be born to the woman? Would this court

sustain a finding that the child in this case was illegitimate if, instead of a little more than three weeks, the birth had passed the average period by only a day? If not, when would the passage of time become sufficient to justify such a finding? Would it be one minute after 300 days, since we are told that instances of pregnancy of more than 300 days are "entirely beyond the usual order of things"? Is the period covered by the indisputable presumption subject to the guessing of each judge of the superior court who may have a problem of this sort, he to be governed not by the testimony of experts, but by such knowledge of the laws of nature as he may be able to acquire from medical works to which he may have access? These are questions no one of which is answered by the prevailing opinion.

Suppose, for illustration, a case exactly like this, except that instead of being true to one lover, after deserting her husband, the woman had possessed half a dozen to whom she had yielded herself very soon after the desertion.

According to the logic of the opinion, it would then be the duty of the court to guess whether the husband, the deceased lover, whose estate was sought, or some one of the living but possibly impecunious Don Juans, was the father, or as some one jestingly said at the oral argument, whether or not the baby was "of the progeny of a syndicate." It seems to me that many evils must flow from the announced rule of this court, and that the wisdom of extending the presumption of the statute to the utmost possible period of gestation is enforced by the illustration.

If the matter of legitimacy or bastardy is one purely of fact, to be drawn from the evidence adduced as in any other case, then the presumption of intercourse from possible access should be abolished; but this court upholds the doctrine of *Estate of Mills*, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175, and by it supports the conclusion that the husband and wife had sexual relations on the last night on which they were together, which is founded, as was declared in the opinion in that case, upon "good morals and public policy." To allow cohabiting married people thus to impeach the legitimacy of children born in wedlock would be, as well stated in the opinion in *Estate of Mills*, "to allow evidence which shocks every sense of decency and propriety." Yet in the case at bar evidence quite as shocking was permitted, namely, the statement of Mrs. Bettencorte regarding her alleged menstrual periods. This is the sort of testimony which may be manufactured with out fear of contradiction. Its admission puts a premium upon perjury. In the case at bar it is evident that one of the controlling elements of the finding of the probate court was the testimony of the woman regarding her menstrual periods. Such testimony should have been excluded under what I believe to

be the true interpretation of subdivision 5 of section 1962, Code of Civil Procedure.

All of these considerations make me adhere to the doctrine now repudiated by this court, but expressed so clearly and forcibly by Mr. Justice Olney in the opinion in the Walker Case that I venture to quote it here a second time (following the pious example of clergymen who sometimes emphasize a text by repetition):

"There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted." (The italics are mine.)

SLANKARD v. WAGNON. (Sac. 2663.)

(Supreme Court of California. Aug. 26, 1919.
Rehearing Denied Sept. 25, 1919.)

1. EVIDENCE §460(3) — PAROL EVIDENCE IDENTIFYING LAND TO BE CONVEYED ADMISSIBLE.

In action for breaching a contract which compromised defendant's failure to convey certain property, oral testimony identifying the land which it had been agreed to convey *held* admissible.

2. VENDOR AND PURCHASER §344 — THAT VENDEE DID NOT OFFER TO RECONVEY ON VENDOR'S BREACH IMMATERIAL.

In action for breaching a contract which compromised defendant's failure to convey certain land, the fact that plaintiff did not offer to reconvey land outside the agreed boundaries which had been conveyed to him by defendant *held* immaterial.

3. TRIAL §395(2)—WHEN FINDINGS AS TO BREACH OF CONTRACT TO CONVEY LAND SUFFICIENT.

In action for breaching a contract which compromised defendant's failure to convey certain land, a finding, setting forth the original contract for conveyance between the parties and defendant's failure to comply with it, *held* not uncertain or argumentative.

4. VENDOR AND PURCHASER §345—EFFECT OF ACCEPTANCE OF DEED CONVEYING LESS THAN CONTRACTED FOR.

In an action for breaching a contract which compromised defendant's failure to convey certain land, it is no defense that plaintiff accepted a deed from defendant from which the deficiency in the land conveyed might have been discovered.

5. APPEAL AND ERROR §959(2)—RULINGS AS TO AMENDMENTS TO PLEADINGS IN DISCRETION OF COURT.

Rulings on requests to file new pleadings will not be disturbed on appeal, except for an evident abuse of discretion.

6. PLEADING §140 — FILING CROSS-COMPLAINT AFTER RESTING IN DISCRETION OF COURT.

In action for breach of contract, refusing to receive a cross-complaint for a rescission of the contract after defendant had rested *held* not an abuse of discretion.

7. APPEAL AND ERROR §1050(1)—ERROR IN ADMISSION OF EVIDENCE HARMLESS.

Any possible error in admitting evidence containing a suggestion of compromise in a breach of contract case *held* not reversible error, since action was based on a written contract, which was not altered by defendant's belief as to whether he was or was not bound by its terms.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by G. F. Slankard against William B. Wagon. A judgment for plaintiff was reversed by the District Court of Appeal, and case transferred to the Supreme Court in bank. Judgment of District Court of Appeal reversed, and that of superior court affirmed.

Sterling Carr, of San Francisco, for appellant.

McCoy & Gans, of Red Bluff, for respondent.

MELVIN, J. Plaintiff sued successfully for damages on account of a breach of a certain contract whereby defendant had promised to indemnify him for a shortage in the acreage of a tract of land in Tehama county sold by Mr. Wagon to plaintiff, and conveyed on defendant's account to Mr. Slankard by one H. G. Stevenson.

There is little conflict with reference to the facts, which are, substantially, as follows:

Defendant had a contract for the purchase of a tract of 515 acres from Mr. Stevenson. On August 2, 1913, the parties hereto entered into a written agreement for the purchase by plaintiff of a portion of the 515 acres, and in the fulfillment of that contract defendant, Wagon, caused the owner to make a deed to plaintiff, Slankard. The property was described in said deed as follows:

"Lots 1, 2, 3, and 4 of block 31; lots 5, 6, 7, and 8 of block 30; lots 5, 6, 7 and 8 of block 29; lots 1, 2, 3 and 4 of block 32; and the westerly 456 feet of lots 6 and 7 of block 28, and the westerly 456 feet of lots 2, 3, 6 and 7 of block 33, as the said lots and blocks are laid out, designated and delineated upon a certain map entitled 'Richfield Colony Tehama County,' surveyed by H. C. Shackelford, license-

ed surveyor, filed in the County Recorder's office, of Tehama County February 6th, 1899. Containing 215 acres, more or less."

Before closing the transaction of the purchase of the land from Stevenson, the defendant engaged a surveyor to run the lines of the property. Owing to the shortness of time in which he was required to report, the surveyor did not promise absolute accuracy, but agreed to do his best. He reported, soon afterwards, that the property described in the contract with Stevenson was 59 acres short of the amount agreed to be conveyed. Believing that the land conveyed to Slankard was short of the acreage specified in the deed, Mr. Wagon sought an interview with Mr. Slankard. Their negotiations at that time resulted in the written agreement upon which this action was subsequently based. That contract, dated August 31, 1914, recites that Wagon had agreed to convey to Slankard the most westerly 215 acres of the land which Stevenson had promised to sell to the former; that Wagon had caused Stevenson to give the former's grantee a deed which was supposed to convey the most westerly 215 acres of said land; that subsequently it appeared that the land described in the deed did not contain 215 acres; that Wagon, not having received a deed from Stevenson, was unable then to make good the shortage; that a suit was pending in the superior court by Wagon against Stevenson and wife for the purpose of compelling conveyance of all the land described in the contract of May 22, 1913, between said Stevenson and said Wagon; and that Wagon desired "to secure said G. F. Slankard in the conveyance of said remaining 59 acres of land in case he, the said William B. Wagon, obtains the same from said H. G. Stevenson, or in lieu thereof to properly indemnify said G. F. Slankard for such shortage." In consideration of these premises and of certain covenants of the party of the second part (Slankard) and for other good and valuable considerations the party of the first part (Wagon) covenanted and agreed in the event of full recovery in his action against the Stevensons to convey to Slankard within two months "the remaining fifty-nine (59) acres of the land described and referred to in said contract of August 2, 1913, between said William B. Wagon and said G. F. Slankard, said land to be free and clear from all incumbrances or liens of any nature whatsoever," or in lieu thereof certain described lots situated in the tract known as the Corning Irrigated Farms.

The party of the second part (Slankard), in consideration of the premises, of the covenants of the first party and the performance thereof, and for other good and valuable considerations, agreed to forbear from bringing any suit upon his previous contract with Wagon, or for the recovery of the lands

therein described, or for the moneys therein specified until two months after the entry of judgment in the suit by Wagon against the Stevensons.

It was also agreed that in the event of a compromise of that litigation William B. Wagon would immediately convey to G. F. Slankard the 59 acres "constituting the remainder of the land referred to in said contract" of August 2, 1913, or in lieu thereof the specified lots in Corning Irrigated Farms.

There was a settlement of the lawsuit of Wagon against Stevenson and wife, but he refused to comply with the terms of the agreement of August 31, 1914. The result was this suit, based upon the alleged breach of that agreement by the defendant.

By his answer defendant admitted the execution of the agreement of August 31, 1914, but asserted that the information upon which he relied in making that contract was erroneous. It was averred in the answer that plaintiff did receive and then held 215 acres of land—all that was called for in the deed from Stevenson. It was further alleged that the deed from Stevenson was a warranty deed, that it was accepted by plaintiff in full performance of defendant's contract of sale, and that plaintiff's remedy, if the actual land received by him was less than that for which the deed was given, was against Stevenson. There was no prayer for the cancellation of the agreement of August 31, 1914, nor for its amendment.

Upon the issues thus joined the cause was tried before the court, without a jury, and judgment for plaintiff in the sum of \$4,987.65, with interest, was given.

The appellant denies that there was sufficient evidence to support four certain findings. Another finding is attacked as uncertain and argumentative and the evidence in support of it is declared to be inadmissible, but appellant contends that, even if it was properly admitted, the conclusion drawn from it is erroneous. Error is also predicated upon the admission of testimony regarding offers of compromise, and upon the court's refusal of defendant's request for permission to file a cross-complaint.

Finding No. 10, one of those attacked by appellant, was to the effect "that the property conveyed to plaintiff by the Stevenson deed was 44.24 acres short, and that plaintiff does not now hold any greater acreage than 170.76 acres." The other questioned findings are of like import. The theory upon which these findings, and, indeed, all the material ones, were made may be best understood by reading the following paragraphs from the clear and logical opinion of Judge Ellison, who tried the case:

"From the testimony introduced and the measurements made by certain surveyors employed for that purpose, it must be held that the calls in the deed from Stevenson to the

plaintiff, when measured out upon the ground, make an area of 215 acres, provided the section lines are where they locate them.

"If this were all of the case, it would seem that the defendant would be entitled to a judgment, but the fact, as disclosed by the evidence, is that before the plaintiff contracted to buy the 215 acres he was taken upon the ground by the defendant, Wagon, and thereon the westerly boundary of the land which he contracted to sell to him was pointed out to him as being a fence running north and south. The land east of this north and south fence deeded to the plaintiff does not contain 215 acres.

"A plat of the subdivision showing the land described in the deed to the plaintiff, when placed upon the ground, would seem to run some distance westerly of this fence, to what is claimed to be the section lines. It is this land between the fence that was pointed out, and the so-called location of the section lines that caused the dispute between the parties.

"It sufficiently appears from the testimony that at the time the deed was made to the plaintiff, and now, the land west of this fence, and between it and what is supposed to be the section lines, was in the possession of other parties, and had been for a great many years, they claiming to be the owners thereof, and that said fence was the easterly boundary line of their lands.

"When the contract of August 31, 1914, was entered into it was clearly the belief of both the plaintiff and defendant that the westerly boundary line of the land deeded to the plaintiff was this fence, and it was clearly their understanding that the land easterly of the fence deeded to the plaintiff contained 59 or thereabouts acres less than the amount agreed to be conveyed to him, to wit, 215 acres, and with this knowledge the contract of August 31, 1914, was entered into.

"It is now claimed by the defendant that, as the calls in the plaintiff's deed extend westerly from the fence far enough to make 215 acres, he has received from the defendant all that he was entitled to. But it was evidently not the intention of the parties in executing the contract of August 31, 1914, to put the plaintiff to the expense or trouble of bringing litigation against the occupants of the land west of the fence to recover the same. The defendant definitely contracted to convey to him 59 acres more land than he had received, or in lieu thereof to convey him certain lots. He has done neither.

"The rule is invoked that a party who buys land in the possession of another must ascertain the rights of the person in possession, or buys the land at his peril without making such investigation. But this rule is not applicable to this case, because the plaintiff was not informed that any one was in possession of any part of the land that he was buying. In fact, no one was in possession, so far as the evidence shows, of any of the property east of the fence referred to, and no intimation was made to him that he was buying any land west of the fence, but the contrary was stated. Hence he was under no obligations to make any inquiries as to the ownership or possession of the lands lying west of the fence.

"Interpreted in the light of all the facts and circumstances of the case, the defendant's con-

tract with the plaintiff was to convey to him 215 acres lying easterly of the fence that was pointed out to him as the westerly boundary of the land that he was to buy, and it was not contemplated or expected that he should bring any suits to recover any lands lying west of said fence, or make any effort to take possession of the same. And it was in the light of this situation that the defendant agreed that upon the determination or compromise of the suit which he had brought against Mr. Stevenson he would make a conveyance to the plaintiff of 59 acres of land, or in lieu thereof convey to him the lots in the Corning Irrigated Farms tract.

"The contract between the parties is in writing, and is supported by an adequate consideration, to wit, the mutual promises of the parties and the settlement of a controversy then existing between them as to the acreage the plaintiff was to receive compared with the acreage he had received, the consideration on the part of the plaintiff being that he would forbear to bring any suit against the defendant until the final determination or compromise of the suit of Wagon against Stevenson. This the plaintiff has done, as is alleged in his complaint and admitted on the trial, and the contract, so far as he is concerned, is fully executed, and the defendant has received the consideration thereof, to wit, the forbearance to bring any suit."

[1] But it is earnestly asserted that the oral statements of defendant with reference to the location of the fence upon the westerly boundary of the land were not admissible, because their effect was to vary by parol the terms of a written contract. These statements were not admitted, however, for any such purpose. It is to be remembered that this action was based, not upon the original contract of sale, but upon the later compromise agreement. It was proper to show the circumstances attending, surrounding, or explaining its execution. There was, perhaps, a mutual mistake of both parties to the agreement regarding the paper title—that is to say the area included within the description in the deed—but there was no mistake about the land actually occupied by the plaintiff and the fact that it was far short of containing 215 acres. This shortage gives the reason for the contract of August 31, 1914. The oral testimony explains the intention of both Wagon and Slankard regarding the land agreed to be conveyed, and it also identifies the said land. The written instrument of August 2, 1913, and the deed from the Stevensons to Slankard were varied (so far as it lay in Wagon's and Slankard's power so to vary them) by the agreement of August 31, 1914. It is by this last specified instrument, and not by the parol testimony, that the terms of those instruments were changed, or, rather, superseded. The authorities cited by appellant upon the subject of attempted variation of written agreements by oral testimony are consequently not in point.

[2] Nor was there any significance in the fact that plaintiff did not offer to restore to defendant the former's title, if any, in and

to the land to the west of the fence. It does not appear that Wagon completed his purchase from the Stevensons, nor that he would be entitled in any event to a quitclaim deed to that part of the property deeded to Slankard but never possessed by him.

[3] The other finding attacked by the appellant is the one numbered 15. That finding is one whereby it is set forth that—

At the date of the execution of the original contract of sale between Wagon and Slankard "it was the understanding and belief of both parties thereto that the westerly line of the 215-acre tract contracted to be sold to the plaintiff by the defendant was certain old established fences running north and south; that at said time all of the lands lying west of said fence lines were in the possession of other persons claiming said fence lines as the eastern boundaries of their lands, and they had been so in possession and so claiming for many years."

The finding then sets out the going of plaintiff upon the land with defendant, and the latter's act of pointing out the fences as the western boundary of the land to be sold, and, further, that—

"The land contracted to be sold to said plaintiff, and which was deeded to him by said H. G. Stevenson and wife, does not contain 215 acres, if said fence lines were the western boundary thereof, but it contained 44.24 acres less than 215 acres; that it was by reason of these conditions that said defendant herein brought the suit against said Stevenson and wife referred to in said Exhibit B [the contract dated August 31, 1914], and while said suit was pending said Exhibit B was executed; that it is true that if the western line of the land conveyed to plaintiff herein by said Stevenson and wife can be placed west of the said fence lines and on certain section lines, he would then have title to 215 acres of land, but all of the land west of the said fence lines would be of lands in the possession of other persons claiming to own the same, and with no certainty that they can be dispossessed by litigation, or otherwise; that it was to meet this situation that said Exhibit B was executed; that said Exhibit B was not executed by reason of any mistake on the part of the defendant herein, nor by reason of any mistake on the part of the plaintiff herein, but it was executed for a valuable consideration, which has been fully executed by the said plaintiff, and for the purpose of placing upon said defendant the burden and duty of securing title to the additional 44.24 acres of land comprising said shortage, so that said plaintiff would have the beneficial use and enjoyment thereof, or, failing to convey the same to him, then to convey to him the other lands described in said Exhibit B."

We fail to agree with appellant in his statement that this finding is uncertain and argumentative. On the contrary, it is a clear statement of the facts and of the reasoning of the court as given also in the opinion which we have quoted above.

Nor is the objection to the evidence upon which finding 15 is based a valid one. It is aimed particularly at the statements of Mr. Slankard that Mr. Wagon and a surveyor both pointed out the old fence as being on the western boundary of the land. In the first place it appears that there was no objection to this line of testimony until all of the essentials had been twice stated by the witness. Then objection was made to a recapitulating question involving the very matter regarding which the witness had spoken without objection. The basis of the objection was that the parol statement tended to vary the terms of the written agreement. This was not a tenable objection for reasons which we have heretofore discussed.

Finding 15 is also supported by the evidence which clearly showed the understanding of the contracting parties that the fence marked the western property line, and that Exhibit B was not executed solely by reason of this mistake, but also for the valuable consideration which had been subsequently fully executed by plaintiff.

[4] The conclusion of law based upon finding 15 is declared by appellant to be erroneous. Appellant cites authorities holding that acquiescence in a wrong boundary is treated as a mistake when the true boundary may be ascertained by a deed and neither party is estopped from claiming the true line. But this is not a controversy between coterminous owners, and the authorities invoked are not applicable. Mr. Wagon had pointed out to his vendee certain lands east of a certain fence, and had made a contract to sell said lands. Later he learned that these lands did not contain the represented area, and he made a new agreement, supported by a valuable consideration, that he would make the shortage good. With all of the conditions of this agreement plaintiff complied.

[5, 6] During the trial the court made a ruling that if plaintiff should prevail in the action the measure of damages would be the value of the lots in the Corning Irrigated Farms, rather than that of the acreage in the other tract. Plaintiff thereupon asked and was given permission to amend his complaint so that it should contain an allegation of the area and the market value of the said lots. Defendant specifically waived objection to such amendment. After the testimony had been taken and during the progress of the argument the following occurred, as shown by the record:

"Mr. McCoy (counsel for plaintiff): I forgot to offer this morning that amendment.

"The Court: All right.

"Mr. Carr (counsel for defendant): We will have time, I presume, to answer this?

"Mr. McCoy: Well, yes; you can have time, or you can consider it answered.

"Mr. Carr: And I wish at this time—I over-

looked it—to file a cross-complaint for the rescinding of this contract.

"Mr. McCoy: The evidence is all in, and we are arguing the case, and the case has been tried on the issues made, and we shall object to the filing of a cross-complaint.

"Mr. Carr: My cross-complaint would be for the rescinding of the contract, Exhibit B, and I will consider it denied.

"The Court: I don't think I will permit the cross-complaint to be filed at this late stage of the case.

"Mr. Carr: At this time may it be stipulated that there is a denial of the value of this land?

"The Court: It is denied it has any value exceeding \$25 an acre?

"Mr. Carr: Yes.

"The Court: All right."

Appellant now insists that he was refused permission to amend his answer and to file a cross-complaint, and that such refusal was error necessitating reversal of the judgment, citing in that behalf *Third Street Improvement Co. v. McLelland*, 28 Cal. App. 369, 137 Pac. 1089. It will be apparent at once that defendant was only refused permission to file a cross-complaint, and that the amended complaint was deemed answered by stipulation or understanding that defendant denied a greater value than \$25 an acre for the lots in question. Amendments to pleadings and the filing of new pleadings are so thoroughly within the discretion of the superior court that this court is slow to hold as serious error a refusal to permit a change in the theory of a defense or a case for plaintiff at the eleventh hour. On appeal this discretion of the court in which the trial took place either in granting or refusing permission to file new pleadings will not be disturbed except in case of evident abuse thereof. 21 *Ruling Case Law*, 573; *Hawthorne v. Siegel*, 88 Cal. 100, 25 Pac. 1114, 22 Am. St. Rep. 291; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Dunphy v. Dunphy*, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; *Postlethwaite v. Minor*, 168 Cal. 227, 142 Pac. 55. We find no abuse of discretion in the ruling here attacked. In this case the defendant knew, long before he went to trial, that the deed to plaintiff, by its terms, included 215 acres. He knew all of the circumstances surrounding and preceding the execution of the last agreement with plaintiff, yet he did not ask for a rescission thereof until after he had put in all of his evidence and rested. In the case cited by appellant the facts were quite different, for there it appeared that at the trial a circumstance most essential to plaintiff's cause of action, namely, a mistake, consisting of defendant's failure to give it a proper credit, was discovered during the trial. It was there properly held that the court abused its discretion in refusing plaintiff's request to amend in accordance with the facts.

[7] Finally, appellant contends that the court erred in admitting testimony tending to show an offer of compromise on his part. Plaintiff testified that defendant had called upon him, and in answer to the question, "What did he say?" replied:

"He said he would fix it up with me and give me the land when Mr. Crittenden got back from New York. I waited on him something like—well, until that date I brought suit there, and I didn't even hear nothing from any of them, and so I come up here and brought the suit. And, in fact, I wrote him a couple of letters, and he has never answered them."

The objection to this testimony probably should have been sustained, but it did not, accurately speaking, amount to an offer of compromise, but merely to a declaration that defendant felt himself at that time bound by his written contract. However, treating it as an offer of compromise and objectionable under the authority of *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871, we do not see how plaintiff was injured by its admission. The action was based upon the written contract, and that instrument was neither altered nor strengthened by defendant's subsequent belief either that he was or was not bound by its terms.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

ELMER BROS. v. CARPENTER. (Civ. 1960.)

(District Court of Appeal, Third District, California. July 12, 1919.)

1. SALES §347(2)—BREACH OF WARRANTY—PURCHASE-PRICE NOTES—CONSIDERATION.

Where fruit trees, expressly warranted to be merchantable, were, in fact, unmerchantable under Pol. Code, § 2322, as amended St. 1917, p. 627, and section 2322i, as added by St. 1917, p. 637, purchase-price notes were without consideration except as to amount received for a portion buyer was able to sell to other parties.

2. TRIAL §360—FINDINGS—SURPLUSAGE.

In seller's action on purchase-price notes, where buyer set up, and court found, breach of express warranty, and where there was no attack on sufficiency of evidence to sustain findings, the force and validity of the findings held not affected by statement in conclusion of law that there was an implied warranty; such statement being mere surplusage.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Elmer Bros. against W. H. Carpenter. From judgment for plaintiff giving him insufficient relief, he appeals. Affirmed.

R. M. Wright, of San Jose, and Webster & Blewett, of Stockton, for appellant.

Keyes & Thomas, of Oakland, for respondent.

BURNETT, J. The action was brought on two promissory notes given in consideration for the sale by plaintiff to defendant of about 1,200 fruit trees. The defense was based upon the claim of the violation of an express warranty as to the quality of the trees. There were two counts in the complaint, relating separately to the two notes, and as to the first the court found: "That the said note referred to in paragraph 2 of these findings was wholly without any consideration whatever, in this, that the said note was executed by this defendant for fruit trees bought from the plaintiff by the said defendant; that the said purchase was made prior to the delivery and inspection of the said fruit trees; that the plaintiffs and each of them represented to the defendant that the fruit trees aforesaid were good, sound, and healthy fruit trees, and were not diseased; that this defendant believed the representations of the said plaintiffs and each of them; and relied implicitly upon their representation that the said fruit trees were good, sound, and merchantable fruit trees, and, relying upon said representations, which he believed at the date he executed the said note, he did execute the same to the said plaintiffs; that the said fruit trees were not merchantable trees, and were diseased with a black rot, and were prohibited from being sold or planted or used as such fruit trees under the provisions of section 2322 of the Political Code of the state of California as amended by St. 1917, p. 627, and under the provisions of section 2322i of the said Political Code as added by St. 1917, p. 637, the said trees were condemned as not merchantable."

The finding as to the second count is similar, except, that it appears the defendant sold to other parties a portion of the trees, receiving therefor the sum of \$52.60, and hence the judgment was in favor of plaintiff for that sum. Being dissatisfied, it appealed therefrom.

Appellant says:

"The sole question to be determined by this court in this matter is whether or not an implied warranty arose from the transaction in question. The lower court specifically found that there was an implied warranty that the fruit trees sold by plaintiffs to defendant for which the notes were given were merchantable, and that the consideration for said notes failed by reason of the unmerchantable character of said trees sold."

Appellant then proceeds to argue, with quotations from certain cases, that the facts are not sufficient to show an implied warranty, the point of contention being that the general rule is that there is no implied warranty in a mere contract of sale (section 1764, Civ. Code), and that the evidence does not show the case to be within the exception provided in section 1771 of the same Code, as follows: "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable." The matter is discussed because among the conclusions of law the trial court stated: "That there was an implied warranty that the fruit trees sold by plaintiff to defendant, for which said notes were given, were merchantable."

[1, 2] But it is clear that this may be entirely ignored without affecting the integrity of the judgment. The court fully found the facts as we have shown, from which the conclusion necessarily follows that the consideration for the notes failed, except as to the said \$52.60, and that plaintiff was entitled to a judgment for only that amount. Indeed, from the facts the court properly concluded:

"That the consideration for said notes failed by reason of the unmerchantable character of the trees sold, except to the extent of \$52.60, value received by said defendant; that plaintiff is entitled to judgment in the sum of \$52.60 without costs."

The force and validity of these findings are not affected in the least by the erroneous inference that there was an implied warranty, instead of stating it to be, as it was, an express warranty.

We may add that as to this objection urged by appellant there is evidence in the record to the effect that when the trees were purchased they were not accessible to the examination of respondent, as that term should be applied in a case like this, and the court might have found the fact in the language of said section 1771 of the Civil Code. The defendant, however, set up in his answer an express warranty and its violation. The court so found, and the sufficiency of the evidence to support that finding is not attacked. We may therefore disregard the said statement as to an implied warranty as mere surplusage.

We conclude, after an examination of the record, that the decision was entirely just, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

GREEN et al. v. HYNES. (Civ. 2839.)

(District Court of Appeal, First District, Division 1, California. July 11, 1919. Rehearing Denied Aug. 9, 1919.)

1. GIFTS \S 30(1), 66(1)—BANK BOOK.

That there was found among decedent's personal effects a bank book showing a deposit of \$2,500 and a paper on which was written in German, "Money and all that I have give you to," certain persons, held not to show a gift of the bank deposit *inter vivos* or *causa mortis* by decedent to such persons.

2. PRINCIPAL AND AGENT \S 43(1)—REVOCATION OF AGENCY—DEATH OF PRINCIPAL.

One's agency to deliver for the donor property to the donee is revoked by death of donor prior to delivery.

3. PLEADING \S 36(3)—EFFECT OF ADMISSIONS IN ANSWER.

Defendant may not contend he should not have been sued as administrator, but individually; the complaint, which, after setting forth defendant's representative capacity of administrator, alleging he as such administrator obtained possession of money and property, and, after demand for delivery thereof to plaintiffs, refused and still refuses to so deliver them, not having been demurred to, but such allegations having been specifically admitted by the answer.

4. APPEAL AND ERROR \S 117(8)—DISPOSITION OF CAUSE—ERROR IN FINDINGS.

Though on the facts the findings and judgment should to a certain extent have been for the other party, and it is unlikely that there can be materially different testimony, yet it not being in the province of the appellate court to correct findings, the case must be remanded for new trial.

Appeal from Superior Court, City and County of San Francisco; Thos. E. Graham, Judge.

Action by Frances Green and another against W. J. Hynes, administrator. Judgment for plaintiffs, and defendant appeals. Reversed and remanded for new trial.

Cullinan & Hickey, Shelton & Levy, and David L. Levy, all of San Francisco, and Lawrence L. Levy, of New York City, for appellant.

R. W. Gillogley and Algernon Crofton, both of San Francisco, for respondents.

WASTE, P. J. Frederick Driessen died intestate. After his death there were found among his personal effects, among other things, a bank book showing that the deceased had a deposit in the Bank of South San Francisco, in the sum of \$2,584.70, a promissory note and mortgage securing the same, in the sum of \$1,250, executed by Ambrose D. Savage and Emma J. Savage, to

said Driessen and a paper on which was written in German, the following: "Money and all that I have give you to Mrs. Green and Miss Green." This note was in the handwriting of Driessen, and was signed by him. The bank book and these papers were delivered to a former employer of Driessen, and were afterwards delivered to the defendant as administrator of the estate of said deceased. The plaintiffs, claiming to be the owners of and entitled to the possession of the money on deposit in the bank, and the promissory note and mortgage, brought suit for the recovery thereof against Hynes, in his representative capacity, as administrator of the estate of Driessen, and obtained judgment. From this judgment defendant appeals.

The court found that on the 24th day of September, 1914, plaintiffs gave to said Frederick Driessen the sum of \$1,339, which said money belonged to the plaintiffs; that said Driessen, at the time of receiving the said money, agreed with the plaintiffs to invest the same, for and on behalf of said plaintiffs, and to lend the same to Ambrose B. Savage and Emma J. Savage and take a mortgage executed by said parties therefor; that the said Driessen, on the 25th day of September, 1914, loaned to Ambrose B. Savage and Emma J. Savage the sum of \$1,250, the same being a part of said sum of \$1,339, and took as security therefor the promissory note and mortgage of said Ambrose B. Savage and Emma J. Savage, executed to said Driessen as mortgagee; that said mortgage and promissory note stand in the name of said Driessen, but belong to, and are the property of, these plaintiffs.

This finding, supported by the uncontradicted testimony of both plaintiffs, and by Ambrose B. Savage and Emma J. Savage, who executed the note and mortgage for \$1,250, is not challenged by appellant, who distinctly disavows any claim for the note and mortgage, or the money secured thereby.

The court also found that the plaintiffs were the owners and entitled to the possession of the \$2,584.70 in cash, which, at the time of the death of said Driessen, was on deposit in his name in the Bank of South San Francisco. We fail to find any evidence supporting this finding.

As before stated, the bank book showing this deposit was in Driessen's personal effects, at the home of the witness Elvizio Cassellini. A few days before Driessen's death, he called at the Cassellini home, where he kept his effects, took the note and mortgage, and bank book showing his account with the South San Francisco bank, from his pocket, and placed them in a valise, containing his personal effects, which he gave to Mrs. Mary Cassellini, saying, "This is for you." Her further testimony concerning what happened

is as follows: "When he handed the valise to me, he said, 'Keep it for yourself,' and he mentioned the name of Mrs. Green, but I did not know what he meant by it or who Mrs. Green was, because I did not understand everything. On the last day when Fred went away, he said it was better to die, and that it was better down at Holy Cross." On cross-examination she testified that he said: "I want you to have \$500, and the rest to go to Holy Cross." The witness also testified that Driessen was in the habit of coming in her house and opening this satchel at any time he saw fit. There is not to be found in the testimony of either of the plaintiffs, or of any other witness, a single reference to the money on deposit in the South San Francisco bank. The only testimony concerning the bank book is as to its being found in the valise among the decedent's effects, and by Cassellini turned over to Driessen's former employer.

[1, 2] We are unable to find from the foregoing facts either a gift *inter vivos*, or a gift *causa mortis*, by decedent to plaintiffs. *Beebe v. Coffin*, 153 Cal. 174, 94 Pac. 766; *Noble v. Garden*, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001; *Fite v. Perry*, 8 Cal. App. 85, 96 Pac. 102. Neither does the evidence support the theory advanced by respondent that there was a sufficient delivery to Mrs. Cassellini for the plaintiffs. If Mrs. Cassellini was the agent of the decedent to deliver the property to the plaintiffs the agency was revoked by his death before the delivery was made, and no title passed to them. *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005, 16 Ann. Cas. 370; *Beebe v. Coffin*, *supra*; *Hart v. Ketchum*, 121 Cal. 426, 53 Pac. 931; *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575.

The finding of the trial court, and the conclusion of law based thereon, that plaintiffs were the owners and entitled to the possession of the \$2,584.70, in the South San Francisco bank, are not supported by the record.

[3] Appellant contends that the plaintiffs cannot maintain this action, to recover the specifically described property and money, against the defendant in his official capacity as administrator of the estate of Driessen; that an administrator, in his individual capacity alone, is liable to the rightful owner for a wrongful conversion of money or property. Assuming this to be true, there is a sufficient reason why appellant should not be allowed to interpose this point.

The complaint, after setting forth the representative capacity of Hynes, as administrator of the estate of Driessen, alleges that he "as such administrator obtained possession of said money on deposit in the Bank of South San Francisco, and the said note and mortgage," and, after demand for the delivery thereof to plaintiffs, "has refused, and still refuses, to deliver to plaintiffs the said

money, or any part thereof, or the said promissory note or mortgage." No demurrer was interposed to this complaint, and the answer specifically admits the foregoing allegation. Appellant is bound by the admission on which he submitted himself and the controversy in the lower court.

[4] From the whole record before us it seems unlikely that the testimony on a retrial can be materially different from that already taken. On the facts thus appearing findings and judgment should be in favor of the plaintiffs for the recovery of the note and mortgage and in favor of defendant for the money in the bank. It is not within the province of the appellate court, however, to correct findings. *Clark v. Huber*, 20 Cal. 196, 198. Consequently, the case must be remanded for a new trial.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

RAMSDELL v. RAYMOND. (Civ. 1881.)

(District Court of Appeal, Second District, Division 1, California. July 15, 1919. Rehearing Denied by Supreme Court Sept. 11, 1919.)

1. EXCHANGE OF PROPERTY §11—RESCISSI- ON—LACHES—LAPSE OF TIME AND CHANGE OF POSITION.

An action, treated as one for rescission of exchange of contracts for lands, *held* barred by laches, being brought 3½ years after plaintiff had demanded rescission and defendant had refused unless he should be paid a certain sum, and after defendant had disposed of the property obtained from plaintiff.

2. EXCHANGE OF PROPERTY §13(3)—FRAUD- ULENT REPRESENTATIONS—EVIDENCE.

Fraudulent representations in exchange of contracts for lands *held* not shown by evidence in action based on such representations.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Dora B. Smart Ramsdell against R. B. Raymond. From a judgment for plaintiff and from an order denying motion for new trial, defendant appeals. Reversed.

Valentine & Newby, of Los Angeles, for appellant.

C. S. Foltz, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered against defendant and from an order denying his motion for a new trial.

In the year 1910 defendant had bargained for the purchase of a certain 13 unsurveyed lots then owned by one Clark, and as evidence of his right to such property had received the following writing:

"Received of R. R. Raymond four thousand dollars in payment for (13) thirteen lots in Laurel Canyon known as the Clark addition, a part of the Hermit Place. These lots are to be 25x100 in size and the title to be perfect.

"E. H. Clark."

At the same time plaintiff was the owner of an equitable interest in certain real estate for which she had paid about the sum of \$2,500. This equitable interest she agreed to exchange with defendant for the rights which he had acquired in the lots first mentioned, and the exchange was effected. In consummating the deal, plaintiff was taken by defendant into the presence of Clark, and a new receipt was executed by Clark in favor of the plaintiff, which was identical in terms with that above set out, except that plaintiff's name was inserted instead of the name of the defendant. Plaintiff was informed at the time that the lots had not been surveyed. The lots were never surveyed, and deed was never delivered to the plaintiff, notwithstanding her demand therefor, which demand was made upon Raymond; and it appears that at the time of the transaction an attachment had been levied against the property out of which the lots were to be carved by a creditor of Clark's, and the property was afterwards sold under execution. It was bid in by a friend of Clark's for the latter's benefit, but before the period of redemption expired another creditor of Clark's redeemed from the purchaser, and so the legal title which had rested in Clark at the date of the transaction herein referred to was taken away. More than 3 years after the date of the transaction plaintiff brought this action.

It is difficult, indeed, to determine just what character to give the alleged cause of action set forth in plaintiff's amended complaint, for it contains allegations in part appropriate to the equitable action of rescission, and in part allegations appropriate to the legal action for damages by reason of failure of consideration. The action as first brought included both Raymond and Clark as defendants, but before the trial dismissal was made as to Clark. In the complaint it was alleged that Raymond and Clark conspired together to cheat and defraud the plaintiff, and that they falsely and fraudulently represented that defendant Raymond was the owner of 13 lots in Laurel Canyon, the same being known as Clark's addition, and that Clark stated that Raymond had purchased the said 13 lots from him (Clark) and had paid the sum of \$4,000 therefor, and that Raymond exhibited a receipt signed by Clark wherein it was fraudulently represented that Raymond had paid to Clark the sum of \$4,000 as the purchase price of said lots. It is further alleged—

"That said receipt and each and every part thereof was a fabrication, false and fraudulent,

and was shown to and exhibited to plaintiff for the further purpose of deceiving and misleading her to believe the said false and fraudulent representations and statements so made by defendants and each of them as to the existence of the Clark addition, and of the ownership thereof by Raymond, for which he had paid to defendant Clark in cash a large sum of money, as defendants Raymond and Clark and each of them well knew the same and each and every of said statements to be false. That in fact and in truth the said defendant Raymond had not then and there nor prior thereto and has not since paid to said Clark the sum of \$4,000 or anything of value whatever for said Laurel Canyon lots, and the said Clark did not then, nor theretofore, nor at any time thereafter own a clear or an incumbered or any title to 13 lots, or to any lot or piece or parcel of land in Laurel Canyon; that there was not then and there or ever before or since that time any lots in said Laurel Canyon known as lots in the Clark addition, and there never has been any such addition in said canyon laid out or recorded or laid out and recorded or at all, as provided or otherwise or at all, * * * and defendant Raymond then and there, and in the presence of Clark offered to convey and transfer to plaintiff said 13 lots in Laurel Canyon by good and sufficient title thereto free from all liens and incumbrances, in even exchange for plaintiff's interest in real estate in the town of Monte Vista."

Further allegation was made "that, relying upon the integrity and good faith of said defendant Raymond, plaintiff believed said statements, and each of them, as to his ownership of the said described Laurel Canyon lots, and, relying upon his said promise to convey to plaintiff said lots by a good and sufficient title free from all liens and incumbrances, * * * conveyed the interest owned by her in the Monte Vista property. Allegations followed that Raymond had refused to convey the lots, and that the plaintiff had offered to rescind and demanded that title to her property be restored to her. Further allegation followed to the effect that Raymond had appropriated plaintiff's real estate to his own use and benefit, which she alleged he held "in trust" for plaintiff; and the complaint concluded with the following prayer:

"Plaintiff prays for judgment against said defendant Raymond upon an implied contract for direct payment of money in the sum of \$4,000, the value of the real estate so conveyed away by him in violation of his said trust, and that an attachment against the property of defendant Raymond issue forthwith for the amount of said debt; and for such further relief. * * *"

The court made findings which in general followed the allegations of the complaint as to the alleged fraudulent representations made, and concluded by first entering judgment for the sum of \$4,000. Later, when the motion for new trial was presented, the court made an additional order that unless plaintiff remit all amounts ex-

cept the sum of \$2,500 the motion for new trial would be granted. The excess was accordingly remitted.

It will be noted that plaintiff did not allege that Raymond represented that title to the lots which rested in Clark was then free and unincumbered. She does allege that the title was not unincumbered, but she knew when she completed the transactions that by the terms of the receipt itself Raymond had no title which he could then convey to her, and that the legal title rested in Clark; in other words, that Raymond's interest was a mere equitable one evidenced by an unrecorded receipt. She was also informed, as the undisputed evidence shows, that Clark was to survey the property and furnish the deed. That she exchanged her equity for the rights which were evidenced by the receipt from Clark to Raymond seems to us to be beyond the possibility of debate. Plaintiff in her testimony stated that the property composing the 13 lots was shown to her, and offered no evidence to show that the property was not of great value, or that it was not the same property that Clark owned at that time. She offered Clark as a witness, and he testified to his ownership of the same, admitted his obligation to transfer the lots, and explained first that he had not had them surveyed because he lacked the money to pay for the same, and explained also how it happened that title to the property was taken away from him through the attachment proceedings and redemption by his creditors. It appeared by his testimony that he had been a man of considerable wealth. He accounted for the fact that he was not at the time of the trial financially responsible by showing that he had had to respond to the liabilities of others with whom he had become interested or as surety, and that he had given to members of his family large sums of money. It cannot altogether be inferred from his testimony, however, if such matter is material to this controversy, that he had not been, within a reasonable time after the date of the transaction between plaintiff and defendant, of sufficient financial responsibility to make good the value of the lots which he had agreed to convey. It was asserted in the complaint that the recitation in the receipt of the payment of \$4,000 was false, and that Raymond had given nothing for his contract with Clark. The evidence showed that Raymond had exchanged with a man named Jones, in whose interest Clark issued the first receipt, property or an equity in property of some considerable value—the evidence fixed it at about \$2,500. So, by way of remark, it may be said that under the evidence the defendant had paid for his contract with Clark about the amount that plaintiff had paid for her equity in the Monte Vista property. Considering the question of fraud, it is nowhere

contended that the evidence shows that either Clark or Raymond had any knowledge at the time of this transaction that an attachment had been levied upon the property of Clark. So we think, as will appear from what has been stated, that the effect of the exchange transaction between plaintiff and defendant was to invest the plaintiff with the right to have conveyed to her by Clark a good title to 13 lots, or an equivalent amount of the same property. When she concluded her deal it was altogether within her power to have ascertained the condition of the title to the Clark property, and by so doing have become informed of the ability of Clark to convey to her title when demanded. Clark was produced before her, and made assurances that he was an honest man and would carry out his agreement, and plaintiff was in no wise left in the dark as to who was the owner of the legal title to the property and as to who would be her grantor under the receipt. We cannot by any effort of construction say that the complaint states a cause of action against Raymond as a guarantor of the responsibility of Clark.

[1] Defendant specially pleaded that plaintiff had been guilty of laches in pursuing her remedy, and had allowed defendant to change his position of ownership with reference to the property which he secured from plaintiff. This defense, no doubt, is presented with the idea of meeting the claim that this action should be deemed one in equity for rescission, and if we were so to treat the action we think that under the evidence that plea should have been sustained. This transaction occurred in March, 1910. Plaintiff testified that in June of the same year she demanded of Raymond that he return to her her property, and she stated:

"He said that he would return me my property. I told him that something must be done; the time was going by. Mr. Raymond said he would return me my property if I would give him \$500 bonus besides paying up all of whatever interest accrued, or what indebtedness. I told Mr. Raymond that I saw no reason why I should give him \$500 bonus when he had given me nothing whatever. He replied that that was the settlement that he would make and no other. I demanded that he return my property to me or give me the deeds, and he refused to return me the property unless I paid him the \$500 bonus."

The amended complaint in this action was not filed until November 26, 1913, more than 3 years and 5 months after plaintiff had made her demand for rescission and been definitely informed of the only terms upon which defendant would accede.

[2] The grounds of reversal asserted by appellant and to which we have given consideration are entitled to be sustained. We think that under the complaint and the admitted facts the findings of the court cannot

be confirmed. That the plaintiff had a cause of action against Clark cannot be gainsaid, but she abandoned that action and elected to proceed against this appellant alone.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

MACEY v. BRIDGE (Civ. 2856.)

(District Court of Appeal, First District, Division 1, California. July 15, 1919. Rehearing Denied by Supreme Court Sept. 11, 1919.)

EVIDENCE §442(1) — PAROL EVIDENCE — MORTGAGE FORECLOSURE.

Where mortgagor, pending foreclosure, conveyed property to trustee named in a deed of trust constituting another incumbrance upon the property, in consideration of trustee's agreement to try to sell property and give mortgagor half of profit, letter stating such agreement, being silent as to time within which trustee was to try to make sale, could be explained by parol testimony, showing that trustee's efforts to sell were to be made before property had been sold under the mortgage being foreclosed.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by David I. Mackey against Henry S. Bridge. Judgment for defendant, and plaintiff appeals. Affirmed.

Nowlin, Fassett & Little, of San Francisco, for appellant.

Edwin T. Cooper, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant. The action is one to have it declared that a relation of trust existed between one Wm. H. Nelson, the predecessor in interest of the plaintiff, and the defendant, in relation to the ownership and sale of a certain piece of real estate, upon which the plaintiff predicates his demand for an accounting and division of the proceeds of the sale of said real estate. The facts of the case are substantially these:

In the latter part of the year 1906 Wm. H. Nelson was the owner of a certain tract of land in Yuba county, Cal., upon which there were two outstanding incumbrances. The first of these was a mortgage to one Gatkins, securing a note then due from said Nelson to the mortgagee for the sum of \$15,500, together with \$1,017.10 overdue interest. The second incumbrance was in the form of a deed of trust to H. S. Bridge, the defendant herein, securing an indebtedness of \$4,600 due by said Nelson to the wife of said Bridge, which was also, with considerable interest, overdue.

An action had been commenced to foreclose the Gatkins mortgage, in which said Nelson had made no appearance and was in default, and in which also the Bridges, husband and wife, having been made parties, had defaulted. The real estate thus affected had been suffered by the mortgagor to be much neglected and out of repair, while the taxes upon the same had for some time been unpaid. While things were in this desperate and deplorable condition, one Herman Murphy, who had been the agent of Nelson in negotiating the loan from the Bridges, had an interview with the defendant, H. S. Bridge, in an endeavor, apparently, to save something out of the impending wreck of Nelson's fortunes, as a result of which said Bridge and Murphy prepared the following letter:

"San Francisco, Nov. 26, 1906.

"Mr. Wm. H. Nelson—Dear Sir: In consideration of your deeding me the ranch at Horn-cut, instead of my selling it under trust deed, I hereby agree to endeavor to sell it, and agree to give you half the profit beyond cost to me; cost to be estimated as amount of liens now against the property and any advances I may make; said advances to draw interest at 1½% per month.

"Am very truly, Henry S. Bridge.
"Witness: Herman Murphy."

This letter was delivered by Murphy to Nelson, who thereupon executed a quitclaim deed to H. S. Bridge covering his involved property, which deed said Murphy had prepared. Immediately following this letter and deed, H. S. Bridge endeavored to make a sale of the property for a sum slightly in excess of the amount required to pay the indebtedness against it, but was unable to do so, and on February 9, 1907, the property was sold at public auction under the Gatkins foreclosure, and was bought in by Gatkins for the sum of \$17,962.08, the amount, with costs, then due upon the judgment in his foreclosure suit. A month or so after this sale Bridge applied to a friend named Aaron for a loan to the former's wife of a sum of money sufficient to enable her to redeem the property from the Gatkins sale. He was able to secure a loan from this source of the sum of \$15,000. Mrs. Bridge supplied from her own funds the addition sum of \$3,368.56 needed to make up the sum then required for the redemption of the property, which being paid to Gatkins, he executed a quitclaim deed of the property to H. S. Bridge, who took the title to the same as his wife's trustee. Almost immediately after the Bridges had thus taken over the title to the property, a disastrous flood swept over the land, destroying in large part the buildings and fences thereon, and requiring an expenditure of several thousand dollars to put the premises in a state of repair. The money for this outlay was provided by Mrs. Bridge and

amounted to about \$8,000. Other expenditures to a considerable amount were also made by the Bridges during the years which intervened between the date of their acquisition of the property and the time when they began disposing of the same to various parties. The first of these sales was made to Chas. A. Wetmore, Jr., in September, 1909, who then bought a portion of the property for the purchase price of \$35,000. About a year later said Wetmore bought the remainder of the property for the purchase price of \$22,000. Both of these purchases by Wetmore were made on long-time payments; the latter evidently expecting to pay for the property by resales to other parties, who, as they bought, took deeds directly from the Bridges. Altogether the Bridges realized from these sales of the property and from rents in the meantime the sum, as the court found, of \$67,536.91; the payments aggregating this sum extending over a period of nearly 10 years, and there being still a small amount due from Wetmore upon his contracts of purchase at the time this action was begun in June, 1917.

In the meantime Nelson had disposed of whatever interest he may have had in the matter by virtue of the above-quoted letter from H. S. Bridge. Meeting Murphy in the latter part of 1906, and needing money badly, the latter advanced him \$25. It appears that Nelson had already borrowed the sum of \$250 from Murphy, acting as the agent of his brother-in-law, David I. Mackey, the plaintiff herein, for which he had taken Nelson's note, and which he now agreed to return to Nelson, if he would sign a written order on H. S. Bridge, directing the latter to pay to Mackey all sums due or to become due Nelson by virtue of the agreement contained in the above-quoted letter from Bridge to Nelson. Murphy prepared and Nelson signed this paper, and it furnishes the foundation for the plaintiff's claim. From the time of the execution of this document in December, 1906, and until the spring of 1916, neither Murphy nor Mackey informed the Bridges of the existence of this writing, or of any interest acquired or held by them or either of them in the proceeds of the sale of the Nelson property, nor asked for any accounting thereof. Their first activities in that direction were manifested in the early part of 1916. This action was commenced on June 14, 1917. Upon the trial of the cause the plaintiff offered in evidence the above-quoted letter from Bridge to Nelson, and also the letter from Nelson to Bridge, purporting to transfer to the plaintiff whatever interest Nelson had acquired in the proceeds of sales of his former property by virtue of the aforesaid letter from Bridge to him. The plaintiff also offered evidence as to the transfer of the property by Nelson to the Bridges and the later transactions involved in its sale by

them. With these proofs the plaintiff rested his case, whereupon the defendant undertook to offer parol evidence as to the circumstances surrounding the signing of his said letter to Nelson and the execution of the quitclaim deed from Nelson to him. To these offers the plaintiff objected, upon the ground that such evidence was inadmissible to vary the terms of the writing or to explain its real meaning and effect. The court, however, admitted this evidence, and upon the strength of its admission and effect gave its decision in the defendant's favor. It is upon the alleged error of this ruling that the appellant chiefly relies for a reversal of the case.

We are of the opinion that the trial court was not in error in its admission of the oral evidence offered on behalf of the defendant showing the circumstances under which the letter from Bridge to Nelson was written, and explaining the meaning and effect of its terms. It is to be noted that, although the letter of Bridge to Nelson seems as to some of its phraseology to agree to give Nelson one-half of the profit realized by Bridge as the result of his endeavor to sell the property conveyed by quitclaim deed to him, it is silent as to the time within which such endeavor on Bridge's part was to be exercised. This omission, taken in connection with other clauses of the letter, and particularly with the proofs offered by the plaintiff himself as to the imminent peril of a total loss of the interests both of Nelson and of the Bridges in the event of a sale of the property under the Gatkins foreclosure, involves the writing as a whole in serious doubt as to just what Bridge was to endeavor to do as a consideration for the quitclaim deed to him, and also as to the time within which his endeavor to dispose of the property was to be confined. It is to be noted that the consideration for these endeavors on the part of Bridge was that of "your deeding to me the ranch at Horncut, instead of my selling it under the trust deed." This of itself was a comparatively slight consideration, since by the sale of the property under the terms of the trust deed Bridge could at small expense and in a brief time have acquired the entire interest of Nelson by the purchase thereof at the trustee's sale. It was to save to both Bridge and Nelson this small expense and brief delay that the expedient of giving and taking the quitclaim deed was adopted; and, this being so, the services to be performed by Bridge in his endeavor to sell the property, as well as the time within which these were to be exercised, must be measured by the value of the foregoing consideration.

In view of these facts, it would be an unreasonable interpretation to place upon the writing that Bridge had thereby bound himself for all the future period of his ownership of the property derived from this quitclaim deed to hold the same in trust for Nelson's

benefit, and to continue his endeavor to sell it in order that the grantor of the perishing interest in the property transferred by such quitclaim deed might realize half the profits derived from its eventual sale. This much seems certain: That under any construction of the terms of said writing it was not within the contemplation of the parties that the Bridges were to undertake to redeem the property from the threatened foreclosure sale, or to make the large borrowings and advances necessary so to do, nor to meet the other expenditures almost immediately necessary to preserve the property from the effects of neglect and flood. Under the circumstances shown by the plaintiff's own evidence in the case it was, we think, the duty of the trial court to admit oral testimony as to the real intent of the parties in relation to what Bridge was to undertake to do as a consideration for the transfer to him of Nelson's interest in the property in question, and as to the time within which his duty to Nelson in the premises would have been fully performed. This evidence thus properly admitted sufficiently shows that Bridge's endeavors to make a sale of the property were to be exercised before the interest of Nelson had become fully lost by the foreclosure and sale of the property under the Gatkins mortgage. The evidence shows that he did in good faith essay that endeavor, but without success. In due course the interest of Nelson was transferred to Gatkins through the foreclosure sale. Thereafter the interest of the Bridges in the property was precisely the same as it would have been if they had also sold out and bid in the Nelson interest under their deed of trust. They had succeeded to Nelson's right to redeem the property from the foreclosure sale by the payment of the amount due upon the Gatkins judgment. This they chose to do; but to hold that in so doing, and in all of their later outlays and endeavors to dispose of the property, they were acting in the capacity of trustees for Nelson, and were bound to an accounting with him or with his successors in interest for one-half of the profits of their eventual disposition of the property, would be to do violence to the obvious situation and understanding of the parties as disclosed by the evidence in the case.

This conclusion as to the main issue in the case disposes of the other contentions of the appellant as to the sufficiency of the evidence to sustain certain findings of the court as to the profits realized by the respondent through the ultimate disposition of the property in question.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

In re MCKAY'S ESTATE. (Civ. 2956.)

(District Court of Appeal, First District, Division 1, California. July 23, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. WILLS \Leftrightarrow 440—CONSTRUCTION.

Testator's intention must be extracted from the express terms of his will.

2. WILLS \Leftrightarrow 525—CONSTRUCTION—SHARES—IMPOSSIBLE DEVISE.

A will devising all of testator's estate as follows: "To my wife one-fifth part thereof, and to each of my children, H. and E., the undivided four-fifths part thereof," when construed in accordance with Civ. Code, §§ 1324, 1325, gives to each child an equal undivided portion of the four-fifths remainder; the use of the word "each" not rendering the devise void for uncertainty and impossibility of consummation.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Angus McKay, deceased. From decrees of partial distribution, made upon separate petitions of Horton L. McKay and others, involving the construction of a will, Elizabeth M. McKay appeals. Decrees affirmed.

Wm. M. Cannon and Wm. M. Abbott, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant.

Redman & Alexander, of San Francisco, for respondent.

RICHARDS, J. The two appeals in this case are from decrees of partial distribution, made upon the separate petitions therefor of the respondents herein, Horton L. McKay and Ethel M. Newman, formerly Ethel M. McKay. The testator, Angus McKay, made his last will and testament, which was duly admitted to probate, and thereafter, in the course of such probate proceedings, the petitions for partial distribution above referred to were filed. The will of Angus McKay is, in point of brevity, and, with the single exception in respect to which it is assailed herein, in point of clarity, a model. The devising portion of said will is the second paragraph thereof, which reads as follows:

"2nd. I give, devise and bequeath all my estate, real and personal, whatsoever and whosoever, in manner following: To my wife Elizabeth M. McKay the one-fifth ($\frac{1}{5}$ th) part thereof, and to each of my children Horton L. McKay and Ethel M. McKay the undivided four-fifths ($\frac{4}{5}$ ths) part thereof."

[1] The point of the appellant's assault upon this will is directed to the concluding clause of the above paragraph thereof, it being the contention of the appellant that the phrase, "to each of my children Horton L. McKay and Ethel M. McKay the undivided

four-fifths ($\frac{4}{5}$ ths) part thereof," renders the entire will void for uncertainty, because a strict, literal, and grammatical interpretation of said clause would result in an attempted disposal of nine-fifths of the testator's estate. It is undoubtedly settled law relative to the interpretation of wills that the intent of the testator must be extracted from the express terms of his will, and that courts are not permitted to indulge in conjecture or surmise, for the purpose of arriving at an intent which is not reasonably to be drawn from the language of the document itself. It is also true that, in accordance with section 1324 of the Civil Code, "the words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained," from the terms of the document and its language. It is, however, also true that, as stated in section 1325 of the Civil Code:

"The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative."

[2] Bearing in mind the foregoing principles of interpretation, let us look to the four corners of this testator's will, to see whether his intent can be fairly ascertained therefrom, with the view to sustaining said will. It must be evident upon such inspection that the testator had in mind an attempted disposition of the whole of his estate, and no more. The use of the fraction "the one-fifth ($\frac{1}{5}$ th) part thereof" in the bequest to his wife, and of the fraction "the undivided four-fifths ($\frac{4}{5}$ ths) part thereof," in the attempted bequest to his two children, would seem to clearly indicate that it was five-fifths, and not nine-fifths, of his estate which he was proposing to dispose of by will. This being clear, the difficulty which presents itself is that of determining what the testator intended by the use of the word "each" in relation to the bequest to his children. Standing alone and read in its ordinary and accepted sense, the word "each" might seem to require the interpretation which appellant seeks to place upon it, and which would result in giving to these two devisees eight-fifths of the testator's estate, which being impossible of consummation, would render the bequest void.

But the word "each" in this will is not to be given such interpretation, if, taking the language of the will as a whole, it is reasonably susceptible of another interpretation which would sustain the will. Thus regarding this word, it is to be noted that the testator, by his preceding bequest, has disposed of one-fifth of his estate, thus leaving four-fifths thereof subject to further disposition. The use of the word "undivided" in connection with his attempted disposition of this remaining four-fifths of his estate is evidence that he intended that his children share equally therein, and in every part thereof, or, in other words, that he wished the remainder of his estate to go to his children together and in an undivided portion, rather than separately and in a segregated two-fifths bequest to each of them. This evident intent on his part works a modification of the use of the word "each" in the phrase in question, and indicates an intent upon the part of the testator that his two children were to share equally and together the remaining portion of the estate which he was seeking to devise to them. The testator would perhaps have expressed this intent more clearly, had he devised to each of his children an "equal share" in the remaining four-fifths of his estate, in the above precise terms. But, taking his will as a whole, we are of the opinion that this was his real intent, and that such intent is fairly inferable from the entire context of his will.

The principal authority cited by the appellant in support of her contention is the case of *Rodisch v. Moore*, 257 Ill. 615, 101 N. E. 206, wherein a testator devised one-half of his estate to one person, one-fourth to another; and one-half to a third; but that case is clearly distinguishable from the case at bar, since it would be plainly impossible to determine which one of the above bequests should be diminished in the distribution of the estate.

For the foregoing reasons we think that the will of said testator was susceptible of the construction which the trial court placed upon it, and for that reason the decrees of partial distribution appealed from are affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

**EXPOSITO v. UNITED RAILROADS OF
SAN FRANCISCO. (Civ. 2878.)**

(District Court of Appeal, First District, Division 2, California. July 21, 1919.)

**1. WITNESSES §40(2) — COMPETENCY OF
CHILD IN DISCRETION OF COURT.**

Under Code Civ. Proc. § 1880, the competency of a child under the age of 10 years to testify is a matter left largely to the discretion of the court.

**2. APPEAL AND ERROR §203(3)—FAILURE TO
OBJECT TO WITHDRAWAL OF INFANT WIT-
NESS, PRESUMED ACQUIESCENCE.**

Court's action in requiring 9 year old child, called by plaintiff as a witness, to be withdrawn without an examination as to whether she was mentally capable of receiving an impression and truthfully relating it, where not objected to, will be presumed to have been acquiesced in by plaintiff; such act not being deemed excepted to under Code Civ. Proc. § 647.

**3. EVIDENCE §147—DENYING OCCURRENCE
OF ACCIDENT ADMISSIBLE.**

In action against street railway for injuries to passenger, where defense was that alleged accident had not occurred, testimony of crews of cars which, according to schedule, passed the point where the passenger claimed to have boarded car, from a short time prior to until a short time after time she claimed to have boarded it, that no such accident occurred upon the cars they were operating, was admissible, though negative in character.

**4. EVIDENCE §586(2)—THAT EVIDENCE IS
NEGATIVE AFFECTS WEIGHT.**

The negative character of testimony affects its weight and sufficiency.

**5. EVIDENCE §596(1) — CONCLUSIVE PROOF
UNNECESSARY.**

Conclusive proof is never necessary to justify the verdict of a jury.

**6. APPEAL AND ERROR §996—JURY CAN
DRAW INFERENCES FROM TESTIMONY.**

The jury had the right to draw its own inferences from the testimony.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Rosina Exposito against the United Railroads of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Ambrose Gherini, of San Francisco (Edwin H. Williams, of San Francisco, of counsel), for appellant.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment rendered against her upon a verdict of a jury. The action was

one for damages for personal injuries claimed to have been sustained by plaintiff while attempting to alight from one of defendant's street cars at Fifteenth and Church streets in San Francisco. The complaint alleged that, while the plaintiff was attempting to alight from the defendant's car, the car started and threw her to the ground, causing serious internal injury.

The appellant argues two questions upon the appeal. The first contention is that the court erred in refusing to permit a 9 year old child to testify for plaintiff, on the ground that she was too young, without any examination of the proffered witness. The plaintiff testified as to the occurrence of the alleged accident, and her testimony was corroborated by that of Primo Mileti, alleged to have been with her at the time. She also offered the testimony of her 9 year old daughter, who, it is asserted by her, was present at the time of the accident and witnessed it. The preliminary questions by the court disclosed the fact that at the time of the accident the child was 8 years and 4 months old; that she was 9 years old on the 9th day of August, 1916, and the trial took place about a month later. The trial judge stated that from the appearance of the child he would think that she was between 7 and 8 years old at the time of the trial, and that she was too young at the time of the alleged accident to be permitted to testify in regard to the occurrence. Appellant argues that it was improper to exclude the testimony of the child, without an oral examination directed to whether or not she was mentally capable of receiving an impression and truthfully relating it, and that, as no such examination was made, the exclusion of the testimony was error.

[1] Section 1880, Code of Civil Procedure, enumerates the classes of persons who may not testify, and among such are included:

"Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

The competency of a child under the age of 10 years to testify is a matter which is left largely to the discretion of the court. *People v. Craig*, 111 Cal. 460, 44 Pac. 186. The trial judge observed the child, and stated that she appeared younger even than her age. However, it becomes unnecessary for us to discuss this matter, because it appears that plaintiff acquiesced in the suggestion of the court and withdrew the witness without objection. The record does not show that objection to the competency of the witness was interposed by the defendant, but it shows that when the child was offered as a witness the court and counsel engaged in a colloquy as follows:

"Mr. Williams: Marguerite, will you take the stand? The young lady is only 9 years old.

"The Court: When did the accident occur?

"Mr. Williams: On the 27th of December last; about last Christmas; about 8 months ago.

"The Court: How old is she now?

"Mr. Williams: She is 9 years old.

"The Court: When was she 9 years old?

"Mr. Williams: The 9th of August.

"Mr. Cannon: Probably about 8 years and 4 months when the accident happened.

"The Court: Well, she is too young, being only about 8 years old at the time of the accident.

"Mr. Williams: Well, would it be proper for us to make a showing?

"The Court: I should judge from the appearance of the child she was between 7 and 8 years.

"Mr. Williams: As I understand it, she was between 8 and 9 at that time.

"Mr. Cannon: According to your figures, she was about 8 years and 3 months.

"The Court: The trouble is you cannot impress upon the child the obligation of an oath.

"Mr. Williams: The act provides that they must be under 10 and of such a condition of mind that they cannot truthfully receive an impression and truthfully relate it.

"The Court: Yes, sir; I think perhaps you had better withdraw the little girl."

[2] This portion of the record is set out in the appellant's brief, and it is then stated by appellant that the witness was withdrawn. It does not appear from the record that any objection was made. This is not one of the judicial acts enumerated in section 647, Code of Civil Procedure, which are deemed excepted to, and, as no objection was interposed by plaintiff to the action taken by the trial court, acquiescence is presumed.

[3] Appellant's next objection is in regard to the nature of the evidence offered by the defendant to establish its defense that the accident to which the plaintiff testified never in fact occurred at all. In regard to the time at which the accident occurred, the plaintiff testified that she had gone to visit her husband at the hospital, and remained there until about 8:10 p. m. and after leaving the hospital she walked about a block to Fillmore street, and boarded a street car at about 8:15 p. m., and rode to Fifteenth and Church streets, where the accident occurred. The defendant produced the crews of the various cars which, according to the company's

183 P.—87

schedule, would have passed Fillmore and Church streets at 8:07, 8:13, 8:16, 8:19, 8:22, and 8:28 p. m., and the conductor upon the car that was scheduled to pass that point at 8:10 p. m., all of whom testified that no such accident occurred upon the cars which they were operating. This evidence, although negative in character, we think was admissible. *Thompson v. Los Angeles, etc., Co.*, 165 Cal. 750, 752, 134 Pac. 709.

Further objection is made that no showing was made by the defendant that the actual running time of the cars corresponded to the schedule time. While it is true that there is not much evidence upon this point, yet there was some evidence which would warrant the jury in concluding that the cars were running on schedule time. Mr. Donald Piercy, who testified that he was a car dispatcher at the car barn of the Turk and Fillmore division, which division was the line on which plaintiff claimed to have been injured, testified that, if the cars had been delayed, he would have known it by reports sent to his office.

[4-6] Appellant's further point with regard to this evidence is that it does not completely exclude the possibility of the accident; it is not conclusive, and it is possible that the plaintiff may have been upon yet another car; and appellant argues especially that as the crew of car No. 36, scheduled to pass Fillmore and Church streets at 8:25 p. m., was not produced, there was no evidence offered against the possibility that this particular car was the one on which the accident occurred. It is, of course, within the range of possibility that the plaintiff was upon this car No. 30 or upon yet another car passing later, about which the record offers no information, and the jury might have so concluded. The jury has, however, concluded that the probability was the other way, and has given a judgment for the defendant. The defendant offered the only kind of evidence available in the nature of the case. Its negative character affected its weight and sufficiency. Conclusive proof is never necessary to justify the verdict of a jury. The jury had the right to draw its own inferences from the evidence. It drew such an inference as conflicted with plaintiff's testimony and to their minds overcame it.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

RUCKER v. SAN DIEGO ELECTRIC RY. CO. (Civ. 2854.)

(District Court of Appeal, Second District, Division 1, California. June 27, 1919.)

1. APPEAL AND ERROR ¶1071(3)—HARMLESS ERROR—FINDINGS WITHOUT EVIDENCE—LIABILITY IN ANY EVENT.

In an action by an intending passenger, struck by a street car, defendant cannot complain that the evidence does not sustain a finding that the car windows were so obscured by mist that the motorman could not see and that he neglected to remove such obstruction, since, if not so obscured, the motorman could have seen, so that it was negligence to suddenly start the car and run it against plaintiff, when he was immediately in front of it.

2. CARRIERS ¶315(3)—INJURY TO PERSON ATTEMPTING TO BOARD CAR—ISSUES AND PROOF—PURPOSE OF STOPPING CAR.

Where plaintiff was injured while crossing defendant's street car track in front of a car, which had stopped and was suddenly started, that it was not shown that the car had stopped for the purpose of permitting passengers to board the same, *held* immaterial, where the car had stopped to discharge passengers, so that plaintiff and others might approach expecting to board it.

3. CARRIERS ¶347(3)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR COURT OR JURY.

It cannot be said as a matter of law that plaintiff, injured by a street car, was negligent when he attempted to pass in front of it while it was standing still at a street crossing; the fact of care or want of care on plaintiff's part being a matter for the court or jury to determine from surrounding circumstances.

4. CARRIERS ¶322—PASSENGERS—PERSONAL INJURIES—NEGLIGENCE—FINDINGS.

In a personal injury action against a street railway company, allegations of the complaint *held* to charge clearly that the injuries were received as a direct result of defendant's negligence in the operation of its south-bound car, and the court having so found, the result of the action could not be changed by a finding for defendant with respect to negligence in the operation of its north-bound car which struck plaintiff subsequently.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Stella G. Rucker, as administratrix (substituted for P. R. Rucker, deceased), against the San Diego Electric Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Read G. Dilworth, of Coronado, and Titus & Davin, Horton L. Titus, and El L. Davin, all of San Diego, for appellant.

Frank J. Macomber, Morris Binnard, C. A. A. McGee, and Henning & McGee, all of San Diego, for respondent.

CONREY, P. J. The defendant appeals from a judgment awarding to the plaintiff damages for personal injuries caused by the negligent operation of a street car of the defendant. Paragraphs IV to XVI of the court's findings are as follows:

"IV. That on February 24, 1915, at about the hour of 7 o'clock in the evening, the plaintiff, P. R. Rucker, desirous of becoming a passenger on the south-bound car of the defendant operated on Fifth street in said city of San Diego, hailed one of said cars owned by defendant as it was approaching the intersection of Fifth street and Redwood street in the said city of San Diego.

"V. That the said car, so signaled by the said P. R. Rucker, was brought to a stop on said Fifth street at the north side of Redwood street.

"VI. That while said car was at a standstill the plaintiff, in order to become a passenger thereon, started to cross the track directly in front of said car.

"VII. That said car, which was in charge of and being operated by a servant of the defendant, while the plaintiff, P. R. Rucker, was passing immediately in front thereof, without warning of any kind or character whatsoever, was suddenly started forward and run against the plaintiff and threw him upon the east parallel electric car track of defendant on said Fifth street, upon which car tracks were operated the north-bound cars of the defendant company.

"VIII. That while plaintiff was helpless, and before he had an opportunity to obtain proper control of his movements, the plaintiff, P. R. Rucker, was run against and struck by a car owned by the defendant San Diego Electric Railway Company, and operated by its servants.

"IX. That at the time the plaintiff left the curb on the east side of Fifth street for the purpose of becoming a passenger upon the south-bound car of the defendant he looked both northerly and southerly along Fifth street and observed the various obstructions and vehicles upon the street, and that the car coming northerly, at the time plaintiff stepped from the curb or was about to step from the curb, was about 300 feet away, and that the said south-bound car was at a standstill or about to come to a standstill.

"X. That at the time the plaintiff had crossed the north-bound tracks and was about to step over and cross the south-bound tracks the said south-bound car was at a standstill.

"XI. That at the time the motorman in charge of the south-bound car started his said car, after said car had been brought to a stop for the purpose of permitting passengers and the plaintiff to board the same, and for some time prior thereto, the windows in front of said car were obscured by mist to an extent that it was impossible for the motorman to see any object or person directly in front of the car by reason thereof, and that said motorman took no precaution to remove such obstruction from the glass or to open the window so that he would have a clear and unobstructed view of the street immediately before the car.

"XII. That the motorman in charge of said south-bound car started the same after the plain-

tiff, P. R. Rucker, had committed himself to the crossing of the south-bound car tracks, without sounding gong or giving any other notice or warning that he was about to put the car in motion.

"XIII. That the plaintiff, P. R. Rucker, had no reasonable opportunity to extricate himself from his position in front of the south-bound car after the same had been started in motion by the servants of the defendant without notice or warning, or to take any precaution to avoid being struck, crushed or mangled thereby.

"XIV. That the plaintiff, P. R. Rucker, had no reasonable opportunity to extricate himself from his position of danger, or any danger, of being struck by the north-bound car after he had been placed in this position by reason of being run against by the south-bound car, or to take any precautions so as to extricate himself from the danger of being struck, crushed or mangled by the defendant's car.

"XV. That the plaintiff used all due care and precaution in and about crossing the said Fifth street at the intersection of Redwood street on said February 24, 1915, at the hour of 7 p. m. or thereabouts, and took all due care and precaution in stepping upon the tracks whereon said cars of defendant were operated.

"XVI. That the plaintiff was not negligent or careless in any respects whatsoever."

The points relied upon by appellant are stated as follows: (1) There is no evidence to support or sustain the finding of the court that the windows in front of defendant's south-bound car were obscured by mist to an extent that it was impossible for the motorman to see any object or person directly in front of the car by reason thereof, and that said motorman took no precaution to remove such obstruction. (2) There is no evidence to support the finding that the motorman in charge of defendant's south-bound car brought it to a stop for the purpose of permitting passengers and the plaintiff to board the same. (3) The plaintiff was chargeable with contributory negligence as a matter of law. (4) The court erred in failing to find upon material issues made by the pleadings, to wit: Whether the defendant was negligent in approaching Redwood street at a rate of speed approximately 20 miles an hour; whether the motorman on the north-bound car was negligent in failing to see the plight and condition of the plaintiff before he was struck by the north-bound car; whether the defendant was negligent in the operation of the north-bound car in failing to slow down said car when approaching the intersection of Fifth street and Redwood street; whether the defendant was negligent in the operation of said north-bound car by running into, against and upon the plaintiff.

[1] In any view of the case, point 1 cannot benefit appellant, which claims that the windows in front of the car were not obscured. If they were not obscured, then there was nothing to prevent the motorman from seeing the plaintiff, who was then im-

mediately in front of the car. That being so, and the plaintiff being plainly in view, where he easily could be seen, it was negligence on the part of the motorman to suddenly start the car and run it against the plaintiff.

[2] Under point 2 appellant admits that the car had been stopped for the purpose of discharging passengers, but contends that it was not shown to have been stopped for the purpose of permitting passengers or the plaintiff to board the same. To our minds, the important fact is that the car was standing still at a street crossing, and that under such circumstances passengers had the right to alight from the car, or to approach the car if they desired to obtain passage thereon.

[3] The third point is that plaintiff was chargeable with contributory negligence as a matter of law. The argument of appellant here seems to be directed chiefly to the relation between the plaintiff and the approaching north-bound car. But no question of negligence on the part of plaintiff or defendant, with respect to that car, is material under the facts of this case. At the moment of the accident the plaintiff had passed the north-bound track and was free of danger from the north-bound car. If there had been no south-bound car there would have been no accident and no injury to the plaintiff. It cannot be said as a matter of law that the plaintiff was negligent when he passed in front of the south-bound car at a time when it was standing still at a street crossing. *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 604, 611, 93 Pac. 677. The fact of care or want of care on the part of a person crossing the street in front of a standing car at such a place is generally a matter to be determined by the court or jury from the circumstances surrounding him at the time.

[4] The fourth point relates to the alleged negligence of the defendant in the operation of its north-bound car. In their argument, counsel for appellant refer to the complaint and claim that the plaintiff was attempting to base his cause of action upon a violation of the last clear chance rule; that the plaintiff nowhere alleges in his complaint that the injuries he suffered resulted from the negligent operation of the south-bound car; that, on the contrary, the plaintiff clearly relies upon injuries occasioned by the negligence of the motorman of the north-bound car. On examination of the complaint, however, we find it alleged:

"That while plaintiff was attempting to cross the track in front of said car which was at a standstill as aforesaid for the purpose of getting on the same, and before plaintiff had passed or had reasonable opportunity to pass clear of the front of said car, the motorman on said car carelessly and negligently and without any warning whatsoever suddenly started said car

in motion; that plaintiff observing his immediate danger and realizing that he would be unable to cross said track without being struck, crushed and mangled by said car so negligently and carelessly started as aforesaid, endeavored to extricate himself from said danger, and before he had reasonable opportunity so to do, and without any fault or omission on his (plaintiff's) part was struck and run against by said car and thrown onto, upon or near the east parallel electric car track of defendant on said Fifth street; that before plaintiff could recover himself from the impact of said car, and while he was in such helpless condition, he was run against and struck by a north-bound car operated by defendant, * * * upon said east track of said Fifth street at said intersection."

Allegations follow which charge the defendant with negligence in the operation of the north-bound car. Nevertheless, it is then alleged "that by reason of the negligent acts and conduct of the defendant as set forth herein and as a direct result therefrom" the plaintiff suffered the described injuries. These allegations taken together clearly charge that the injuries were received as a direct result of the negligence of the defendant in the operation of the south-bound car. The court having found this charge to be true, the result of the action could not be changed by a finding in favor of the defendant with respect to the charge of negligence in the operation of the north-bound car, and the failure of the court to make a finding upon this last fact alleged furnishes no ground for sustaining the appeal.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

SCHMALING v. SWAIN et al. (Civ. 2039.)

(District Court of Appeal, First District, Division 1, California. July 18, 1919. Rehearing Denied Aug. 18, 1919; Denied by Supreme Court Sept. 15, 1919.)

BROKERS \Leftrightarrow 94—AUTHORITY TO BIND PRINCIPAL—SALE OF LANDS.

Under authority to broker to sell lands, terms "not less than one-fifth cash down, balance in four equal annual installments," principals were not bound by a sale, $1\frac{1}{2}/2\frac{1}{2}$ of price payable at date by transfer of an equity to broker, balance in two annual installments, shortly afterwards discounted and paid to broker, and appropriated by him, all without knowledge of principals.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by F. W. Schmalting against A. B. Swain and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. B. Mering and J. R. Gilbert, both of San Francisco, for appellant.

T. J. Geary and Geary & Geary, all of Santa Rosa, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action instituted by the plaintiff to recover the sum of \$2,550, claimed to have been paid to an authorized agent of the defendants upon a purchase of a piece of real estate which the latter refused to consummate. The facts of the case, regarding which there is practically no dispute, are as follows:

The defendants were the owners of a certain tract of land in Sonoma county, consisting of about 80 acres, which had been subdivided into lots, each embracing 10 acres, more or less. On June 25, 1914, the said defendants entered into a written contract with Charles P. Wagner and Charles P. Rogers, real estate agents, by which they agreed to employ the latter as their exclusive agents for a period of 6 months to sell said tract of land according to the map of the subdivision thereof at \$175 net per acre to the owners:

"Terms to be not less than one-fifth cash down, and the balance in four annual equal installments, with interest on deferred payments payable semiannually, quarterly or monthly, at the rate of 6 per cent. per annum. All payments on account of principal to be divided equally between the first and second parties hereto until the parties of the second part shall have received the difference under each contract between the sale price as above stipulated. Time is of the essence of this agreement."

At some time prior to the date of the above contract the plaintiff herein had bought from Charles P. Wagner a piece of land in another tract with which the defendants herein had no connection, and had paid to said Wagner as part of the purchase price thereof the sum of \$1,500. The plaintiff had become dissatisfied with that transaction, whereupon Wagner, who had in the meantime obtained from the defendants the foregoing contract, proposed to the plaintiff that he would take the land embraced in his former purchase back, and would allow the said sum of \$1,500, which the plaintiff had paid thereon to be applied upon the purchase price of lot 10 of the defendants' tract of land. In so proposing Wagner did not disclose to the plaintiff the defendants' ownership of said land, or the fact that he was their agent, but, on the contrary, purported to deal with said lot 10 thereof as his own; and, the plaintiff having agreed to this exchange, Wagner made a written agreement with him in his own name, by which he agreed to sell and convey to said plaintiff said lot 10 for the sum of \$2,600, in gold coin of the United States, payable and to be paid as follows:

"Fifteen hundred dollars at the date of this agreement, and the remainder in two equal installments of \$550, together with interest at the rate of 6 per cent. per annum on the unpaid balance due after each payment, payable annually, on the first Monday of May, 1916 and 1917, thereafter until the whole amount of this contract and interest is fully paid."

This contract between Wagner and the plaintiff was dated April 8, 1915, and upon its execution the plaintiff handed back to Wagner his prior contract for the purchase of the former tract, paying him no money, but receiving a credit of \$1,500 upon the purchase price of lot 10. A day or two after this latter transaction Wagner wrote a letter to the defendants, wherein he stated that he had received a deposit of \$50 on lot 10, "to be closed about May 1st," and from time to time thereafter during the next few months wrote other letters assuring the defendants that "the deal on lot 10" was still good, but never informing them as to the actual transaction. In the meantime he procured from the plaintiff two additional payments of \$500 each on the purchase price of lot 10, by agreeing to make a discount of \$100 on the amount remaining due. Having thus obtained practically the whole of the purchase price of said lot 10 from the plaintiff, but having neither disclosed the facts of the transaction to the defendants nor made any remittance to them of the moneys so received, Wagner absconded, leaving for parts unknown, learning which some time later, the plaintiff demanded of the defendants a conveyance of said lot 10 of their tract under his written agreement with Wagner. The defendants repudiated the entire transaction, whereupon the plaintiff commenced this action for the recovery of the money claimed by him to have been paid to their agent, Wagner, under the plaintiff's said written agreement with him.

The foregoing facts were established by the testimony of the plaintiff himself upon the trial of the case. The court gave its judgment for the defendants, and the plaintiff appeals.

Upon this appeal the appellant urges several contentions involving the authority which the defendants conferred upon Wagner and his associate, through their written contract with them, to execute contracts for the sale of the subdivisions of their tract of land and to receive payments thereon. The respondents combat the propositions thus urged, and on their part contend that said Wagner had no authority under his said contract with them to enter into an agreement in his own name for the sale of any portion of their lands. It does not seem to us, however, that the exigencies of this case require us to decide these counter contentions of the parties, for the following reason, which seems to us decisive of this case; for, conceding that the contract between Wagner and the defendants

created an agency ample enough to have empowered the former to make and enter into such an agreement as the one which is embodied in the writing between Wagner and the plaintiff herein, and conceding that had such writing expressed the actual contract between the plaintiff and Wagner, the defendants, as the latter's undisclosed principals, would have been bound thereby, the fact remains, as disclosed by the plaintiff's own testimony, that the real and only existing contract between the plaintiff and Wagner was not that which the writing expressed, but was an entirely different contract, and was one which clearly the said Wagner, under his written agency from the defendants, had no authority to make. The written contract of agency between Wagner and the defendants authorized him to sell the lots in the defendants' tract of land for \$175 per acre net to them, the terms of each of such sales to be:

"Not less than one-fifth cash down, and the balance in four equal annual installments, with interest on deferred payments payable semi-annually, quarterly, or monthly at the rate of 6 per cent. per annum."

Under this contract the agents might sell the lots in said tract for as much more than \$175 per acre as they were able to obtain, the surplus to be their reward, but in any event the transaction was to be a cash transaction. Was the transaction between the plaintiff and Wagner a cash transaction? Not at all, in so far as the primary credit upon the purchase price of the lot in question is concerned. The plaintiff herein had an equitable interest in another tract of land which Wagner, acting entirely independently of these defendants, had contracted to convey to him. He had no longer any interest in or control over the money which he had paid to Wagner upon this first transaction, and there is no evidence that Wagner had any portion of that particular money or its equivalent in other funds on hand at the time of the second transaction out of which the present cause of action is claimed to have arisen. On the contrary, a very strong inference arises out of the proven facts of the case that Wagner had neither said money nor its equivalent on hand at the time; and, this being so, the transaction, as the plaintiff himself explains it, amounted to nothing more than an attempted exchange of the equity held by him in the property which was the subject of his former purchase for a like equity in the property of the defendants. It requires neither argument nor authority to uphold our view that Wagner, under his contract of agency with the defendants, had no authority to bind them or their property by engaging, either in his own name or in their names, in such a transaction.

This disposes of any necessity for determining just what power Wagner and his asso-

clate possessed under the terms of their agency to execute contracts calling for sales of the defendants' said property according to the terms specified in the writing defining such agency, nor what authority they, or either of them, had to accept money upon such sales, since no such actual transaction is before this court. It follows that upon the plaintiff's case, as made out by his own testimony, the trial court rightly determined that the plaintiff had not made out his case. Its judgment in favor of the defendants must therefore be affirmed.

It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

HAY v. HOLLINGSWORTH et al.
(Civ. 2631.)

(District Court of Appeal, Second District, Division 1, California. July 16, 1919. Rehearing Denied Aug. 12, 1919; Denied by Supreme Court Sept. 11, 1919.)

1. VENDOR AND PURCHASER — 334(6) — RECOVERY OF EARNEST MONEY REMEDY WHEN OWNER DISAPPROVES CONTRACT.

Where defendants, owner's agents, did not act in bad faith in failing to complete the contract contemplated by the earnest money receipt they issued to plaintiff's agent, such receipt making the deal subject to the approval of the owner, and the owner's approval not being given, plaintiff's only right was to recover the earnest money deposit.

2. PLEADING — 205(2) — COMPLAINT ALLEGING TWO CAUSES OF ACTION SUFFICIENT, IF ONE MAINTAINABLE.

Where a complaint attempted to allege a cause of action for breach of contract to convey and a cause of action for the return of earnest money paid, and the only demurrer interposed was a general one, if the complaint states sufficient facts for recovery of the earnest money, disregarding the other allegations, it must be held sufficient.

3. PRINCIPAL AND AGENT — 188 — IN ACTION BY UNDISCLOSED PRINCIPAL, JOINDER OF AGENT UNNECESSARY.

In suit by an undisclosed principal for breach of a contract to convey, it was not necessary that the agent of plaintiff be joined as a party because of some after interest which he was to have in the land, had it been secured.

4. ASSIGNMENTS — 19 — PRINCIPAL AND AGENT — 143(2) — UNDISCLOSED PRINCIPAL MAY RECOVER BENEFITS OF TRANSACTION.

The benefits to be derived from a transaction may always be assigned, and they may likewise always be enforced by an undisclosed principal, where full consideration has been rendered by the agent.

5. VENDOR AND PURCHASER — 339 — ON VENDOR'S DISAPPROVAL OF AGENT'S CONTRACT, EARNEST MONEY RECOVERABLE.

Where purchaser obtained a receipt from the vendor estate's agent for earnest money paid, which provided for sale of land upon the estate's approval, and for the payment of additional money by purchaser at a fixed date, purchaser was entitled to an approval of the sale before making the additional payment, and where approval was refused could recover the first payment, without having tendered the additional payment.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Henry Hay against W. I. Hollingsworth and others, doing business as W. I. Hollingsworth & Co. From a judgment for defendants on a directed verdict, and also from an order denying his motion for a new trial, plaintiff appeals. Judgment and order reversed.

J. O. Downing and Davis, Kemp & Post, all of Los Angeles, for appellant.

J. Wiseman Macdonald, O'Melveny, Stevens & Millikin, and Walter K. Tuller, all of Los Angeles, for respondents.

JAMES, J. Plaintiff appeals from a judgment entered for defendants on a directed verdict, and also from an order made denying his motion for a new trial.

In December, 1910, defendant Hollingsworth held an agency agreement with the Keating estate, authorizing him, under certain limitations and restrictions, to dispose of real property belonging to that estate. Defendant Marsh had made a conditional arrangement to purchase some of this property. J. O. Downing desired to purchase 50 acres of the land which Marsh was endeavoring to secure, and he negotiated with Marsh, with the result that he made a deposit of \$2,500, for which a receipt was issued to him by Hollingsworth in the following words:

"Received of J. O. Downing the sum of twenty-five hundred (2,500) dollars, as a deposit and part of the purchase price, an additional fifteen hundred (1,500) dollars to be paid on or before December 14, 1910, also as a deposit and part of the purchase price, of the following described real property, situate in the county of Los Angeles, state of California: Being the southeast quarter of lot three (3) as shown on map prepared by W. I. Hollingsworth, said map being of the Keating estate property, containing fifty (50) acres, a little more or less. Full purchase price of said property to be eleven hundred (1,100) dollars per acre. Terms of sale, one-third (1/3) of the purchase price, including the above-mentioned deposits, to be paid on or before January 15, 1911; balance to be paid in three equal annual payments, bearing interest at the rate of six (6) per cent. net, payable semiannually. The Keating estate agrees to give a good and sufficient deed and certificate of title, showing the title to be free and clear of incumbrance,

through the Title Guarantee & Trust Company. Said company to give a declaration of trust covering the above points. The said company to reserve the discretionary power to date the transaction, and said deferred payments shall become due in one, two, and three years from said time. This deposit is taken subject to the approval of the Keating estate. If title is not good, this deposit to be returned.

"W. I. Hollingsworth & Co.,
"Per W. I. Hollingsworth, Agent."

Marsh and Downing attached their names to this receipt, under the word "Approved," below the signature of Hollingsworth. It will be noted that the deposit was taken upon the express condition that the sale should be approved by "the Keating estate." In passing, we may pause to remark that it appeared to be the evident intention, judging from the wording of the instrument, that the approval of the Keating estate should precede the requirement that more money should be paid by Downing under the terms agreed upon. There is no dispute at all under the evidence but that the Keating estate refused to approve this sale; that Downing was notified to that effect, and it was stated to him that he might have back the \$2,500 first deposited. Mr. Hollingsworth, in the course of his testimony, said:

"In the latter part of February or the first of March (1911) Mr. Downing called on me in regard to the matter, and I telephoned for Mr. Marsh to come down to my office, and he did. I told him we had tendered the balance of our first payment to the trust company and had been refused. Mr. Marsh repeated over, I think, again what I said, and told him we had made a strong effort to try and get the contract fulfilled, but had failed. Mr. Marsh told Mr. Downing he would be glad to return the \$2,500. Mr. Downing said he didn't want it. He said he would not take it. I never told Mr. Downing that I had any interest in the purchase which Mr. Marsh was making. I had no interest. I told him Mr. Marsh's money entirely at the time made the purchase."

At another point in his testimony Mr. Hollingsworth said:

"I told Mr. Downing at least two times that he could have his money back at any time he wanted it."

He said further:

"I remember about the 15th of January (1911) we had a talk about the matter. That was the time when he should have completed the first payment, and I said to him, 'Mr. Downing, I am very much in hopes of carrying this through for you at that time. But you can have your money.'"

Without further stating the evidence, we may again repeat that there was no claim made by either of the defendants that they were ever able to fulfill their contract with Downing. They accepted his deposit of \$2,500 conditionally only, and the condition never occurred which enabled them to com-

plete the transaction; they notified Downing that they could not complete it. This action was brought in the name of Hay to recover damages for breach of contract by reason of the failure of the defendants to convey. It was alleged that in making the purchase Downing acted as the agent for Hay; Hay being an undisclosed principal. In the prayer of the complaint damages in the sum of \$25,000 was first asked for, upon the theory that, as borne out by some of the allegations in the complaint, the defendants had not acted in good faith in refusing to carry out the deal, but refused because it was of greater interest to them to take that course. The second item of damage for which recovery was asked—the deposit of \$2,500—which prayer was predicated upon a statement of the facts of the transaction, together with this allegation found in the complaint:

"That the defendants in this action, since the 18th day of December, 1910, have retained the said sum of \$2,500 paid by the plaintiff to the defendants, and have not at any time offered to return the said sum, or any part thereof, notwithstanding the fact that the said defendants on the 29th day of March, 1911, refused to carry out any of the terms and conditions of said contract on their part, and the said sum of \$2,500, together with interest thereon from the 18th day of December, 1910, is due, owing and unpaid from the defendants to this plaintiff."

[1] Separate briefs have been filed on behalf of defendants. We think argument is unnecessary to sustain the judgment refusing general damages because of alleged breach of contract to convey the real property. In that particular we think that the evidence was sufficient to authorize the court in concluding that defendants did not act in bad faith in failing to complete the deal, and that the particular sale contemplated under the receipt issued to Downing was refused approval by the Keating estate. Such being the case, the contract necessarily failed of consummation, and Downing's only right was to recover the \$2,500 deposited. We have noted that this money was in words offered back to him, and that he announced that he would refuse to accept it.

[2] Defendant Marsh, by his counsel makes the contention that the complaint was inconsistent, first, in that there was attempted to be alleged a cause of action for breach of contract, which necessarily assumed the existence of such a contract; and, secondly, a cause of action for the return of the \$2,500, to sustain which the assumption must be indulged that there was no contract. No demurrer was interposed to this complaint, except the general one, that it failed to state facts sufficient to constitute a cause of action. No special ground was alleged against its form or substance. That being true, if sufficient facts can be gleaned from the complaint to show a cause of action for the recovery of the \$2,500, disregarding the other

allegations, then as to that branch of the case the complaint must be held sufficient; and we think the facts are so sufficiently stated. To be sure, the terms of the receipt are not fully exhibited in the complaint, especially as to the condition that approval should be had of the Keating estate; nevertheless it is alleged that the deposit was made and that the defendants failed to complete their part of the transaction. The ultimate fact we think was sufficiently stated, although the facts as shown in evidence not only explained and justified the refusal of defendants to make conveyance, but showed that they had in good faith offered to return the \$2,500 and that Downing had refused to accept the same. However, on the evidence, presented to the court, we can see no legal reason why Downing should not have recovered the \$2,500 he deposited.

[3] A number of additional questions concerned in the controversy are quite elaborately argued in the brief of defendant Hollingsworth. At the outset we agree with the contention of this defendant that no recovery should have been had against him for the deposit money, because Downing's deal was made with Marsh. The evidence sufficiently shows this to be the case. Downing in his testimony stated that, when he paid the \$2,500 to Hollingsworth, Hollingsworth stated to him that it was Marsh's money and that he would give it to him. As our conclusion just announced as to this defendant puts him out of the controversy, it is unnecessary to give particular attention to much of the further argument presented by his brief, although we will notice one or two of the main propositions, as they are matters which apply equally to the codefendant.

Attention has already been called to the fact that this transaction was entered into on the one part by J. O. Downing. The reason that this action was brought in the name of Hay was explained by Downing. Downing testified that, while he acted apparently in his own right in making the deal with defendants, he in truth was the attorney in fact for Hay, and that it was Hay's money which he expended and was to expend on account of the purchase of the land. He testified that he was to have had some interest in the returns from the property; but the testimony was clear to the fact that the money expended was Hay's, and that Hay was the principal party entitled to be represented in the transaction. We think there is no merit in the contention that Downing should have been joined as a party because of some after interest which he was to have in the land had it been secured.

[4] As to the question of the right of an undisclosed principal to sue in his own name in a transaction of this kind, this is made the subject of a lengthy argument in one of the briefs. It is stoutly contended that the con-

tract attempted to be made between Downing and the defendants, or Downing and Marsh, was one in which there could be no substitution of an undisclosed principal against the wishes of the other contracting parties; this on the familiar ground that a person generally has the right to choose the party with whom he will contract, and that it will be assumed, where the real principal is totally undisclosed, that such parties looked to the individual honesty, credit, and standing of the person who afterwards claims to be only an agent, and that they have the right to insist upon the contract being carried out as to parties precisely as made. There is no disputing this rule; it is a familiar one, and applies to a variety of conditions and cases, but has no application here.

In the first place, this is not an action to compel specific performance, and there are no obligations to be performed in the future, for which Downing's credit and standing may be available to defendant Marsh. The benefits to be derived from a transaction may always be assigned, and they may likewise always be enforced by an undisclosed principal, where full consideration has been rendered by the agent. *Mechem on Agency* (2d Ed.) vol. 2, §§ 2062, 2063, et seq. We may add that there never was a completed contract in this case. The deposit was taken as a preliminary and the receipt issued; those things having occurred with the express condition that the approval of the Keating estate should be secured before the parties were to become bound to the further terms agreed upon. That approval was not secured, and the negotiations were closed and terminated. There was nothing more for Downing to do, but there did remain in the hands of Marsh the \$2,500 belonging to Hay, which Marsh was bound to return.

[5] It is contended further that, even as to the \$2,500, this money could not be recovered by the depositor until he had offered to perform the further conditions set forth in the memorandum. As we construe those terms, the depositor was entitled to have an approval of the deal made before he would be called upon to pay any more money. Conceding that he was not so entitled, nevertheless it was announced at about the time the second payment became due, and continuously thereafter, that defendants were unable to procure the approval of the Keating estate, and they offered that Marsh would return the money deposited. The case is not at all like that of *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87, where a broker sought to recover a commission and he had not produced in sufficient manner a buyer who was ready, able, and willing to purchase. The court there held that he could not rely upon the statement that the vendor would refuse to sell, and in order to complete his right to a commission he must do those things which are well established to be requi-

suite to the earning of brokerage. In this case the refusal of the Keating estate to approve the sale of the land had put an end to the deal between the parties, and it is an admitted fact that any tender made by Downing on his own or his principal's behalf would have been absolutely fruitless of results.

For the reasons which we have stated, we think that the court was in error in part, in that the jury should have been allowed to find for the plaintiff as against defendant Marsh in the sum of \$2,500; this without interest, because Downing had refused to accept the money at the different times it was offered to him.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

PEOPLE v. PARASKEVOPOLIS. (Cr. 469.)

(District Court of Appeal, Third District, California. July 22, 1919.)

1. CRIMINAL LAW §1134(3)—REFUSAL TO SET ASIDE CONVICTION ON PLEA OF GUILTY NOT REVIEWABLE.

Upon an appeal from an order denying a motion to set aside a judgment of sentence for murder entered upon defendant's plea of guilty, the decision of the superior court upon the question of accused's entering his plea upon misapprehension or in ignorance of the scope or effect of such plea or of his rights will not be reviewed.

2. CRIMINAL LAW §980(2)—COURT ON PLEA OF GUILTY MUST DETERMINE DEGREE OF CRIME.

Pen. Code, § 1192, providing that, "upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree," is mandatory, and where the court fails to determine the degree in a murder case, in which defendant has pleaded guilty, any attempted sentence is illegal and invalid.

3. HOMICIDE §189—INDICTMENT MUST COVER BOTH DEGREES AND MANSLAUGHTER.

An indictment or information for murder must cover, not only both degrees thereof, but also the crime of manslaughter.

4. CRIMINAL LAW §980(2)—ON PLEA OF GUILTY OF MURDER EVIDENCE NECESSARY TO DETERMINE DEGREE.

A voluntary statement or plea by one accused of murder would be sufficient to uphold a determination by the court of the degree, as required by Pen. Code, § 1192; but, in order to pronounce judgment, under Pen. Code, § 190, the court should have before it evidence both to determine the degree and to enable a sound and just exercise of the power of de-

termining whether the punishment for first degree murder shall be death or life imprisonment.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Michael Paraskevopolis pleaded guilty to an indictment for murder and was sentenced to life imprisonment. From an order denying his motion to set aside the purported judgment of sentence, he appeals. Order reversed, with directions.

A. W. Brouillet, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant on the 31st day of October, 1917, in the superior court of Napa county, entered a plea of guilty to an indictment charging him with the crime of murder, and was thereupon sentenced to imprisonment in the state prison at San Quentin for the term of his natural life. On the 21st day of October, 1918, the defendant, through his attorney, made a motion to set aside the purported judgment of sentence on the ground, among others, that the trial court, before the pronouncement of sentence, failed to take evidence upon and find and determine the degree of murder of which the defendant was guilty. The motion was denied, and the appeal here is from the order denying said motion.

The record here shows that the defendant, upon his original arraignment under the indictment, pleaded not guilty thereto, but that subsequently he asked and was granted permission to withdraw said plea, and thereupon entered a plea of guilty to the charge. The minutes of the trial court show that the defendant entered a plea of guilty of murder of the "first degree," and that thereupon "the clerk was directed to enter the plea of guilty of murder of the first degree." The court then postponed the time for the passing of sentence until the hour of 2 p. m. of the said 31st day of October, and at that hour pronounced judgment of sentence as above shown, without previously determining of which of the two degrees of the crime of murder the defendant was guilty.

As above indicated, the motion was based upon several different and distinct grounds. Among these, in addition to the one above particularly referred to, were the following: That the defendant, being a foreigner, was ignorant of the consequences of his act in changing his plea to the indictment, and that he was induced to take that course through the erroneous advice of counsel then representing him; that before receiving his plea of guilty, and before pronouncing sentence, the court did not inform the accused of his rights, as required by the statute; that the

court, having pronounced judgment of sentence on the same day on which the plea of guilty was entered, did so in violation of section 1191 of the Penal Code, which provides, *inter alia*, that after a plea or verdict of guilty, etc., the court must appoint a time for pronouncing judgment, "which must not be less than two nor more than five days after the verdict or plea of guilty," etc.

[1] Some points are also made as to the proceedings upon the motion which is now before us on the appeal from the order denying the same. With these, however, we shall not concern ourselves, nor will we attempt a review of the action of the court in denying the motion to set aside the judgment on the ground that the accused entered his plea of guilty under a misapprehension or in ignorance of the scope or effect of such plea or of his rights; for the decision of the court upon that proposition is conclusive upon us, notwithstanding that there was no countershowning made by the people to the showing made by the defendant in the form of an affidavit in support of those grounds of the motion. It is made to appear that the judge who received the plea of the accused and upon said plea purported to sentence him to the penitentiary presided at the hearing of the proceeding involved in this appeal, and we think there can be no doubt that, under such circumstances, it was within the legitimate province of the court, as most likely it did, in determining whether the defendant had pleaded guilty under a misapprehension as to his rights, to consider all the facts properly attending the act of the defendant in pleading guilty and the act of the court in sentencing him. We have, however, reached the conclusion that the judgment of sentence was invalid for reasons hereinafter to be stated, and that it will therefore be necessary to rearraign the accused for sentence upon his plea of guilty. We shall assume that, upon rearraignment for sentence, the court below will observe all the statutory requirements as to the matter of the pronouncement of judgment in criminal cases.

[2] The single question, then, with which we shall here concern ourselves, is whether the court below, before pronouncing judgment of sentence upon the accused, observed the requirements of section 1192 of the Penal Code. Said section reads as follows:

"Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree."

It is to be noted that the language of the foregoing section is upon its face peremptory and we doubt not that the Legislature so intended it. Indeed, the section has been so construed by the Supreme Court.

In the case of *People v. Jefferson*, 52 Cal. 452, it was held that the language of the above section was mandatory, and that, where an accused pleads guilty to an indict-

ment charging an offense which is divided into degrees, the trial court before passing sentence, must ascertain and determine the degree.

In *People v. Chew Lan Ong*, 141 Cal. 550, 75 Pac. 188, 99 Am. St. Rep. 88, it was also held that, in a case where a crime divided into degrees is charged and the defendant pleads guilty, the court must first determine the degree of the crime of which the accused is guilty before pronouncing judgment of sentence. In that case the court further said that the proper way to proceed in such a case is to take evidence upon which the court may predicate its decision as to the question of the degree of the crime.

In the very recent case of *People v. Bellon*, 182 Pac. 420, the Supreme Court, through the Chief Justice, says:

"Under our practice it is essential to a proper pronouncement of judgment in the event of a plea of guilty of a crime distinguished or divided into degrees [*italics ours*], such as murder or burglary, that the court first determine the degree"—citing Penal Code, section 1192, and *People v. Jefferson*, *supra*.

It is not necessary to say anything further on the question in hand than what is said in the above cases. As above stated, the language of the section is mandatory, and in the very nature of the circumstances should be, since the degree of the crime of which an accused is guilty in those cases where the crime charged is divided into degrees is essentially one of fact, to be found by the jury, of course, upon the evidence adduced before them, where there has been no plea of guilty, and necessarily by the court where there is entered by the defendant such a plea.

We do not understand, though, that the proposition that section 1192 is mandatory is disputed. The position of the Attorney General is, however, not that the plea of guilty by the defendant to murder of the first degree is equivalent to an adjudication or determination of the question as to the degree of the crime of which he is guilty, but that, as here, a plea by a defendant of guilty of murder of the first degree leaves nothing for the court to do but to accept that plea and act upon it, as it would in any other case where a simple plea of guilty would necessarily embrace within its scope every essential element or fact involved in the crime; or the contention might be that, having pleaded guilty, not only to the crime of murder, but also to the first degree thereof, the defendant thereby waived the right to have determined by the court, before passing sentence, of which of the two degrees of murder he was guilty.

We are of the opinion, however, after a careful consideration of section 1192, that it is essential in any event, in every case where the crime charged is divided into degrees, and a plea of guilty has been interposed to

such charge by the accused, that the court, as a prerequisite to the pronouncement of judgment of sentence, should first determine the degree and that in the absence of such determination in such a case, any attempted sentence is illegal and invalid.

[3] An indictment or an information, under our system, in charging the crime of murder, must cover, not only both degrees thereof, but the crime of manslaughter as well. While, where the facts and circumstances justify it, an indictment or an information may charge manslaughter only, it must, when charging murder, do so without any specification of the degree thereof. The degree of the crime, whatever it may be, is necessarily included within the mere charge of murder, and it is a question of fact for the jury, where the case is tried, to find upon and determine the degree and necessarily for the court to do likewise where a plea of guilty is entered by the accused. If the jury should return a verdict of guilty of murder, without finding and specifying the degree thereof, of which the defendant was guilty, the court would be compelled to refuse to accept the verdict as being so incomplete as to make it impossible for it to pass a proper sentence, and the jury in such case would be required to return a complete or proper verdict. *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776. So, where there is a plea of guilty in such a case, there must first be some foundation for the exercise by the court of its judgment, as to the punishment which should be inflicted, the penalty for the two degrees of murder or of burglary (also divided into degrees) being different. The only legal way such foundation can be laid is, as section 1192 plainly and peremptorily points out, for the court to ascertain and determine the degree, and this can be done properly only by taking evidence addressed to that fact; and if in any case of a plea of guilty to a crime divided into degrees that has not been done—that is, that such determination has not been made in an appropriate legal way—then the judgment of sentence has not been legally pronounced.

[4] We are not, however, to be understood as holding that the voluntary admission by the defendant, whether in the form of a mere statement or in that of a plea to the charge, that he is guilty of a particular degree of a crime divided into degrees, will not constitute a sufficient evidentiary predicate for the determination by the court of the question of degree, notwithstanding that such statement may not be, or such plea is not, given under oath. To the contrary, we think a voluntary statement or plea by the accused would be sufficient to uphold the determination by the court of the degree. But, even in such case, there must nevertheless be a determination by the court of the degree. In brief, there must be such a determination regardless of the character or nature of the evidence by which the fact is ascertained.

We may, with perfect propriety, add by way of suggestion, that, in cases of murder, the proper course to pursue where an accused has pleaded guilty to a charge of murder is to take evidence upon the question of the degree of said crime of which he is guilty, and this should be done for a twofold reason, viz.: (1) To ascertain and determine the degree of the crime. (2) Where the accused pleads guilty of murder, for the just and proper exercise by the court of its judgment or discretion as to whether the penalty shall be that of death or imprisonment for life. Pen. Code, § 190. Indeed, that section makes it the duty of the court, (as it is the right of the jury to determine that question where there is a trial) to determine, in cases where the accused pleads guilty to the crime of murder, whether the penalty should be death or imprisonment for life. The vesting of that power in the jury or the court was undoubtedly intended to authorize the jury or the court, as the case may be, in any case of homicide committed under circumstances which, when measured according to the strict words of the law, make it murder of the first degree, or the taking of human life deliberately and with malice aforethought, to apply to a practical or substantial purpose any mollifying circumstances connected with the commission of the homicide which might be shown to exist and which would justify the infliction of a punishment less severe than that of the extreme penalty of death. The discretion vested in the jury or the judge in that particular by section 190 is not one to be arbitrarily exercised, but must be governed, as is true in all instances of vested judicial discretion, soundly and according to the circumstances of particular cases. Hence, as above suggested, it is necessary, in the case of a plea of guilty to murder, that the court should have before it evidence not only for the purpose of determining the degree, but also, where on such plea it is found that the murder is of the first degree, for the purpose of a sound and just exercise of the power of determining whether the punishment shall be death or only life imprisonment. See *People v. Welch*, 49 Cal. 174, 178 et seq.

But, however that all may be or should be, it is manifest upon the record before us that the purported judgment of sentence in this case is not a legal judgment, and while the motion from which the order here appealed from arises was for the "setting aside" of the "judgment of sentence," we think the record on this appeal is nevertheless such as to warrant us in reversing the said order because of the failure of the court to determine the degree. Accordingly, the order, so far as it involves the question as to the passing of sentence without a previous determination by the trial court of the degree of the crime to which the accused pleaded guilty, is reversed, with direction to the court below to cause, by a proper proceeding and process, the defend-

ant to be brought before it, and thereupon, and upon the arraignment of the accused upon his plea of guilty heretofore entered, and upon the said plea, to render and pronounce judgment of sentence in accordance with the views herein expressed.

We concur: CHIPMAN, P. J.; BURNETT, J.

KURTZ v. DE JOHNSON et al. (Civ. 2654.)

(District Court of Appeal, Second District, Division 1, California. July 15, 1919. Rehearing Denied Aug. 12, 1919; Denied by Supreme Court Sept. 11, 1918.)

1. SPECIFIC PERFORMANCE §86 — CONTRACT TO DEVISE—ENFORCEABILITY.

A contract to devise will be specifically enforced only where it is in all respects just, fair, and reasonable in its mutual compensations, and certain in its terms, and where the promise resulted in such changed conditions as to promisee that refusal to enforce promise would permit a fraud to be perpetrated against promisee.

2. SPECIFIC PERFORMANCE §86 — CONTRACT TO DEVISE—ESSENTIALS.

A decedent's parol contract to devise will be strictly construed, closely scrutinized, and weighed with a careful balance, when specific performance is sought, and it must be such as, attended by all the attributes of frankness, fairness, and honesty, will appeal to the conscience of the chancellor.

3. SPECIFIC PERFORMANCE §28(1) — CONTRACT TO DEVISE—CERTAINTY.

A parol contract by an aunt to devise 1,000 acres of land to her niece in consideration of an agreement by the niece that she would live with the aunt until niece's marriage, held too uncertain and unfair to be specifically enforced where niece was of marriageable age at time of contract, and married 3 years thereafter while aunt lived 15 years.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Ysidora Scott Kurtz against Dolores B. De Johnson and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

A. W. Ashburn, W. I. Gilbert, and J. W. McKinley, Jr., all of Los Angeles, for appellant.

J. Wiseman Macdonald, O'Melveny, Stevens & Millikin, Hunsaker & Britt, Joseph L. Lewinsohn, and Henry J. Angell, all of Los Angeles, for respondents.

JAMES, J. In the superior court demurrers of respondents to the third amended

complaint of the plaintiff were sustained without leave to amend. Judgment of dismissal followed, from which plaintiff has appealed.

By this action plaintiff sought, in effect, to have specifically performed an alleged oral agreement made by Arcadia B. De Baker during her lifetime. It was alleged that Mrs. De Baker agreed to devise to the plaintiff a certain tract of land embracing 1,000 acres, more or less, the return consideration being, as alleged, that the plaintiff should reside with Mrs. De Baker. The particular character of this consideration will be treated in detail in what follows. It will be necessary to make quite a full statement of the facts as they are alleged in the amended complaint. In doing this we shall quote liberally the language of the pleader in the statement of the alleged cause of action. It appears, first, from the complaint, that in the year 1894 the plaintiff was 18 years of age and had prior thereto resided at San Diego with her parents, and that her father was a university graduate, a well-known and highly respected citizen of San Diego. The complaint proceeds with these allegations:

"That the parents of plaintiff stood high in military circles and associated with the best society and people of San Diego, where plaintiff had formed many acquaintances and close friendships. Plaintiff had three sisters and four brothers, all living with her parents in 1894 at the time of the making of the contract hereinafter referred to. That plaintiff at said time and for a long time prior thereto had been attending a private school in San Diego, where she was being educated, including instructions in music and art. That plaintiff was fond of tennis playing and horseback riding, both of which sports she indulged in at San Diego with her friends, and at the time of the contract hereinafter mentioned was a member of a tennis club composed of what was known as the younger society set, members of the best families in San Diego and close friends of plaintiff. The said Arcadia B. De Baker, at the time of making the contract hereinafter referred to, was residing in apartments in the Baker Block at Los Angeles, Cal., and was about 68 years of age, the widow of Col. R. S. Baker and one of the richest women in the state of California. worth, as plaintiff is informed and believes, many millions of dollars, and had many thousands of acres of land in the state of California, including the Laguna Ranch, which consisted of many thousands of acres. The maiden name of said Arcadia B. De Baker was Arcadia Bandini. Plaintiff was a grandniece of the said Arcadia B. De Baker. That for many years prior to the making of the contract hereinafter referred to the said Arcadia B. De Baker would upon occasions visit the parents of plaintiff at San Diego, and upon those occasions from the time that plaintiff was a little girl the said Arcadia B. De Baker would see plaintiff upon such visits, and plaintiff became very well acquainted with the said Arcadia B. De Baker, and the

latter upon many occasions expressed great love and affection for plaintiff, and said upon many occasions that she would like to have plaintiff as her own daughter. These endearing expressions upon the part of the said Arcadia B. De Baker continued, and the said Arcadia B. De Baker continued to show deep and apparent lasting affection for plaintiff. That plaintiff also upon occasions would pay short visits to the said Arcadia B. De Baker in Los Angeles and upon said occasions the said Arcadia B. De Baker showed much affection for plaintiff. That plaintiff, at the time of making the contract hereinafter referred to and for a long time prior thereto, was deeply attached by ties of affection to her parents, brothers, and sisters, and also her many friends in San Diego. That in 1894 the said Arcadia B. De Baker, who was a grandaunt of plaintiff, and a widow without children, residing alone, except for a certain servant, in her apartments in the Baker Block in the said city of Los Angeles, invited the plaintiff, who at the said time resided in the city of San Diego, to visit her for a short period of time in the said Baker Block, and thereupon the said plaintiff complied with said invitation and remained with the said Arcadia B. De Baker for a period of about two months, and after which, on or about the 24th day of November, 1894, at which time the said plaintiff was 18 years of age, plaintiff much desired to return home, and informed the said Arcadia B. De Baker that she would soon return to her parents in the city of San Diego, whereupon the said Arcadia B. De Baker, *with much show of affection, informed plaintiff that she had found her company and companionship quite necessary to her in her old age, and that she would like to have plaintiff reside with her until plaintiff's marriage, and informed plaintiff that if she would do so she would leave to the said plaintiff, at the time of the death of the said Arcadia B. De Baker, a part of the said Laguna Ranch, and that she would some time thereafter point out the boundaries of the said land to the said plaintiff. Thereupon the plaintiff informed the said Arcadia B. De Baker that she would be pleased to accept her kindly offer and reside with her until her marriage.* Said plaintiff thereafter, and in compliance with said promise, resided with the said Arcadia B. De Baker until her said marriage which occurred on the 8th day of December, 1897. That during said period of time between the said 24th day of November, 1894, and the marriage of the said plaintiff, the said Arcadia B. De Baker always treated the said plaintiff as a daughter, and showed her during said period of time the greatest of affection, and the said Arcadia B. De Baker often informed the said plaintiff that her company, companionship, and affection meant a great deal to her, and that plaintiff's presence with her gave her much pleasure and happiness, and that she would not be willing to give plaintiff up to any person except her husband at the time of her marriage. That during said time plaintiff and her said grandaunt were almost constantly together, even occupying the same room and the same bed, which the said grandaunt insisted upon, because she declared her affection was so deep for plaintiff that she always wanted her with her. And

the said plaintiff upon her part acted toward and treated the said Arcadia B. De Baker as her own mother and the ties and bonds of affection between them became great by reason of their close association together. That shortly after said promise was made to plaintiff the said Arcadia B. De Baker took plaintiff and the agent of the said Arcadia B. De Baker, Charles H. Forbes, to the said Laguna Ranch and pointed out to plaintiff the land that she had promised to leave the said plaintiff and the boundaries thereof, which was the land hereinafter described. That some time thereafter the said Arcadia B. De Baker had the said property surveyed and a map thereof made by one Capt. C. T. Healy, and through him gave to the said plaintiff a map of the said property and upon which map the said Arcadia B. De Baker pointed out to the said plaintiff the said land and the boundaries thereof. That the said land so promised, pointed out, and described to the said plaintiff by the said Arcadia B. De Baker, is situated in the county of Los Angeles, state of California, and more particularly described as follows, to wit: * * * That to comply with said promise the said plaintiff was required to and did give up her family life, friends, and associates in San Diego, all of which she missed deeply, and by reason of said fact it would be impossible to place the said plaintiff in statu quo, and if the said promise herein made to plaintiff on the part of the said Arcadia B. De Baker is not specifically enforced in a court of equity, it will work a fraud upon plaintiff which cannot be compensated for in any other manner except by the specific performance of said promise. * * * That after said promise was made by the said Arcadia B. De Baker to plaintiff, as plaintiff is informed and believes, the said Arcadia B. De Baker did make a will in which she left the plaintiff in said will the land above described, but the plaintiff has, since the death of said Arcadia B. De Baker hereinafter mentioned, made much inquiry and search for the said will, but has been unable to find one in existence, and has been informed during her extended inquiries and search for said will that the said will had been destroyed prior to the death of the said Arcadia B. De Baker. And the said Arcadia B. De Baker died, as plaintiff is informed and believes, without fulfilling and keeping her said promise under said agreement to this plaintiff. Plaintiff alleges that if the said promise hereinbefore referred to made by the said Arcadia B. De Baker to the said plaintiff on or about the said 24th day of November, 1894, had not been so made to the plaintiff by her said grandaunt, and made in the kindly and affectionate manner in which it was made, she the said plaintiff would not have accepted the said promise and offer upon the part of the said Arcadia B. De Baker and would not have remained and lived with the said Arcadia B. De Baker up until the marriage of the said plaintiff, but would have returned to her home and to her parents and brothers and sisters and friends in San Diego; but it was by reason of the said promise upon the part of the said Arcadia B. De Baker to this plaintiff and made in the affectionate manner in which it was made, which caused plaintiff to accept the said prom-

ise and remain with the said Arcadia B. De Baker up to plaintiff's said marriage. * * * That Col. Baker," husband of Arcadia B. De Baker, "died on the 26th day of May, 1894. That, at the time the said contract hereinbefore referred to was entered into between the plaintiff and the said Arcadia B. De Baker, the said Arcadia B. De Baker was suffering keenly from the recent death of her said husband, and that on or about the date of making said contract the said Arcadia B. De Baker informed the said plaintiff that it was her wish and desire to have plaintiff with her and near her to love, particularly at that time, as she, the said Arcadia B. De Baker, found her life very lonesome and void after the death of her said husband, and that she had no relative living with her upon whom she could bestow her affections, and that plaintiff's society and affection would in a measure atone for the loss she had suffered in her late bereavement. That during the time that said plaintiff resided with said Arcadia B. De Baker in the fulfillment of the said contract and agreement, the said Arcadia B. De Baker often told plaintiff that because of her great love for plaintiff that she had never been more happy than during the time that plaintiff was residing with her."

Upon information and belief the plaintiff alleged further that the land was, at the time of the making of the alleged promise, of the value of \$25,000. It was further alleged that after the marriage of the plaintiff she and her husband took apartments in the Baker Block, being the same building occupied by Arcadia B. De Baker, and remained there for a period of about nine years, "during all of which time the affectionate relation between plaintiff and the said Arcadia B. De Baker continued."

Respondents urge a number of contentions against the validity of the alleged contract, and as showing that the same was not of such a nature as would be enforced by a court of equity. Among other grounds, it was asserted that the contract was obnoxious to the statute of frauds, and that plaintiff was barred of the remedy sought by laches. The principal contentions, however, are comprehended in a statement, made in the brief, that "the alleged contract is not founded on adequate consideration and is harsh and unjust. The alleged contract is vague and uncertain."

[1, 2] It is well settled that in order to entitle a party, claiming under a contract such as that here alleged, to the specific relief afforded in equity, it must appear that the contract is in all respects just, fair, and reasonable in its mutual compensations; that it must be certain in its terms, and a case must be presented that will show such changed conditions on the part of the plaintiff to have been worked by reason of the promise alleged as would result in a fraud being permitted to be perpetrated against the plaintiff should

the relief be denied. Preliminarily it may be said that such a contract, resting in parol and sought to be enforced at a time when the voice of the opposite contracting party may not be heard in opposition thereof, will be strictly construed, closely scrutinized and weighed with a careful balance. It must be such as, attended by all the attributes of frankness, fairness, and honesty, will appeal to the conscience of the chancellor. That such is the uniform rule, has been often announced; its substance is declared in *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

[3] Examining the alleged contract, as set forth in plaintiff's amended complaint, by this standard and measure, we reach the same conclusion as did the trial judge, and affirm that the plaintiff has not presented such a state of facts as should call into action the unusual power of a court of equity in determining that, as against the administrator and heirs of Arcadia B. De Baker, a trust has been impressed upon the land referred to in favor of the plaintiff. The contract appears to be uncertain and unfair in its terms. Its unfairness, in part, is illustrated by the uncertainty. It will be noted that Mrs. Baker agreed to "leave to the plaintiff," at the time of the former's death, large acreage of land, then of great value, in return for what? That the plaintiff would "reside with her until the plaintiff's marriage." Generally it may be gathered from the allegations quoted that the companionship of the plaintiff was sought by Mrs. Baker and that that companionship was mutually agreeable to both parties. But how long under the agreement made was the return consideration to be rendered by the plaintiff to continue? Plaintiff alleged that it was to continue until her (the plaintiff's) marriage. At the time of the making of the agreement the plaintiff was 18 years of age and capable of entering into the matrimonial state at the next moment thereafter. In so far as the agreement bound her to continue to render any service to Mrs. Baker, the continuance of such service was in effect optional—that is, until plaintiff received and concluded to accept an offer of marriage. As a matter of fact she did marry 3 years after the making of the alleged agreement, while Mrs. Baker continued to live for an additional term of about 15 years, during which latter time, by reason of the condition of the contract, plaintiff was not bound to live with or see or visit her benefactor.

We say that the contract was uncertain, because the termination of the period of service of the plaintiff was altogether a matter of her own option. The contract must be construed with reference to the obligations which its terms imposed, rather than any statement of fact (which the complaint gives illustration of) as having represented the ac-

tual occurrences which followed. It is immaterial that plaintiff and her husband did reside in the same building with Mrs. Baker subsequent to the plaintiff's marriage; plaintiff was under no obligation so to do, and her act in so doing was not in any wise, when legally considered, in execution of her agreement. She terminated her obligation when she married. The case is very different from some to which our attention has been called, where the party seeking to enforce a contract of this general kind agreed to and did render service up to the date of the death of the other person. It cannot be said, we think, that, where the plaintiff had the privilege of terminating her residence with Mrs. Baker at any time after the making of the agreement by selecting a husband, she contracted to render adequate consideration in return for the tract of land.

Were we to sweep aside these objections, which we deem insuperable to the enforcement of the contract, we would still have to consider as to whether the plaintiff, by reason of the making of the agreement, so changed her situation that to deny her relief would work a fraud upon her. She had reached the age of maturity and was a member of a large household, there being seven children besides herself. She was in the habit of visiting Mrs. Baker, who was a wealthy woman and from whom, we can infer from the allegations of the complaint, she received every care, attention, and consideration. In fact, it appears by express allegation that the attachment after the relations were commenced under the contract was mutual. There is nothing shown from which we can infer that plaintiff was denied the right to visit her family or to have the members thereof visit her. It is stated that she was a member of some social organizations composed of "the best" people in the city of San Diego, and that such associations were interrupted; but we are inclined to the view that the latter consideration alone would not be sufficient to justify the conclusion that the change made was to her great injury. If we were permitted to speculate at all, we might fairly infer the contrary. See *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756, which case, together with cases cited therein, is very much in point upon the propositions hereinbefore discussed. *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008, is clearly distinguishable from this case upon its facts.

The questions discussed are determinative against the right of the plaintiff to recover in this action, and it seems to us unnecessary to enter upon a discussion of any other phases of the argument as presented in the briefs.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

KIRKMAN NURSERIES v. SARGENT. (Civ. 2934.)

(District Court of Appeal, First District, Division 1, California. July 19, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. FIXTURES ¶4—INTENT IN MAKING ANNEXATION.

Whether fig cuttings, planted on land of another under an agreement, became annexed to the real estate, so as to pass with it, depends on the parties' intention.

2. FIXTURES ¶5—CUTTINGS PLANTED UNDER AGREEMENT.

Under agreement whereby plaintiff delivered fig cuttings to another, to be raised on the latter's land and redelivered to plaintiff, as they developed into trees of a certain size and condition, at a certain price per thousand, the cuttings remained plaintiff's personal property.

3. FIXTURES ¶27(3)—PLANTED CUTTINGS.

A purchaser with knowledge of contract between his grantor and plaintiff, under which his grantor was raising cuttings on the land for plaintiff, had no greater rights as to the cuttings than his grantor had.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Kirkman Nurseries against J. J. Sargent. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts & Ewing, M. G. Gallaher, H. A. Savage, and Savage & Lovejoy, all of Fresno, for appellant.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment in favor of the plaintiff in an action of claim and delivery to recover the possession of a quantity of growing nursery stock.

The plaintiff and one B. F. Rose, on February 15, 1915, entered into a written contract, by the terms of which the plaintiff was to deliver to Rose 100,000 fig cuttings of assorted varieties free of charge, which Rose was to plant and raise upon his land, and during the winter of 1915-16, and again in the winter of 1916-17, deliver to plaintiff such of said cuttings as should have developed into young fig trees, three feet in height, and which were free from pests or injury of any kind, at the price of \$30 per thousand f. o. b. a designated point. In the month of July following the execution of this contract, Rose, having obtained the permission of the plaintiff, transferred to the defendant his interest in the land in which the fig cuttings were planted, who, as the evidence shows,

was at that time fully advised of the nature of the transaction between plaintiff and Rose, recognized the contract, and proceeded to act under it for a time, when, for some reason not disclosed by the record, he repudiated it and refused to make further deliveries of the young trees.

[1-3] The appellant contends that the transaction between the plaintiff and Rose amounted to no more than a contract by the plaintiff to purchase from Rose certain nursery stock at an agreed price, and that by his acquisition from Rose of the land upon which such stock was growing he became the owner thereof, and consequently that the plaintiff's action in claim and delivery cannot be sustained.

The question as to whether the cuttings, when planted, became annexed to the real estate, so as to pass with it, turns upon the intention of the parties. 19 Cyc. 1048; Henry v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Western U. Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 Pac. 190, 9 Ann. Cas. 1190. From the terms of the contract under consideration we think it must be held that title to the cuttings, and to the nursery stock into which they developed, remained in the plaintiff, and we also think that the evidence is clear that the defendant purchased the land in which they were planted with notice of the contract and of plaintiff's rights. The contract, as already mentioned, provided that the cuttings were to be delivered to Rose by the plaintiff free of expense of any kind, and were to be planted in the land described in the complaint, cultivated, and cared for, and for such of them as at specified times became merchantable nursery stock the plaintiff was to pay an agreed price per thousand. That Rose's compensation for the use of his land and for his work in caring for the cuttings and delivering them, when in suitable condition, at the price designated, should have been fixed in this manner, affords no reasonable inference that the cuttings and the young trees into which they developed were his property; and the defendant, taking a conveyance from Rose of the land in which they were growing with notice of the plaintiff's rights, stands in the shoes of Rose. That the defendant recognized that the plaintiff retained title to the cuttings after they were planted is shown by the testimony of witnesses, who related conversations with him. When thereafter he refused to make further deliveries to the plaintiff, the plaintiff was justified in regarding the trees as its property and taking action accordingly. The court in so holding correctly construed the contract herein involved.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

WATTERSON v. HILLSIDE WATER CO.
et al. (Civ. 2649.)

(District Court of Appeal, Second District, Division 1, California. July 23, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. DISMISSAL AND NONSUIT § 60(1) — FOR WANT OF PROSECUTION—STATUTORY PROVISIONS.

Code Civ. Proc. § 583, providing for dismissal of action for want of prosecution on defendant's motion, when plaintiff has for two years after answer failed to bring such action to trial, and section 581a, providing that an action shall be dismissed, unless summons shall have been issued within one year, and service and return made within three years, after its commencement, merely fix a limit beyond which the court's discretion ceases, and do not prevent the court from dismissing earlier.

2. DISMISSAL AND NONSUIT § 60(3)—FAILURE TO PROSECUTE.

Where notices of motions to dismiss as to each defendant were made more than two years after commencement, and as to one defendant before summons had been served, and as to the other approximately one month after service, and after demurrer, but before answer, *held*, that it was not an abuse of the court's discretion to dismiss, although plaintiff's affidavits showed plaintiff had delayed because desiring advice of decision in a different case, and that one of his attorneys had died, and that he had acted under belief that Code Civ. Proc. § 581a, allowed three years from date of filing complaint within which to serve summons.

Appeal from Superior Court, Inyo County; Wm. D. Deby, Judge.

Action by T. G. Watterson against the Hillside Water Company and another. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Richard S. Miner and P. W. Forbes, of Independence, for appellant.

John R. Dixon, of Denver, Colo., Isaac B. Potter and Newman Jones, both of Riverside, Wm. J. Clark, of Los Angeles, and L. C. Hall, of Bishop, for respondents.

JAMES, J. This action was by the superior court ordered to be dismissed. The judgment of dismissal was entered upon motions made respectively and separately by defendant Hillside Water Company and the Owens River Canal Company. The ground of the motions in each case was that the plaintiff had failed to prosecute his action with reasonable diligence. In the case of the Owens River Canal Company the motion was made before summons had been served, while in the case of the Hillside Water Company the motion was made approximately one month after the service of summons, and after demurrer had been filed by that defendant, but before answer. The action was commenced

(183 P.)

on February 10, 1913. The notice of motion to dismiss was given by the Canal Company on March 15, 1915. The notice of motion was given by the Hillside Water Company on April 24, 1915. So it will be noted that in each case more than two years had elapsed from the date of the commencement of the action before the notices to dismiss were served.

[1] Appellant first urges that the court had no discretionary power to grant the motions. He suggests that, unless such authority is found in the statute, it does not exist; but, in view of the decided cases which are to the contrary, we do not think that we are expected to take this argument seriously. The real point of the argument of appellant is that, because of provisions contained in sections 581a and 583 of the Code of Civil Procedure, the discretionary power of the court to dismiss an action for want of prosecution has been limited. Section 583 provides in part as follows:

"The court may, in its discretion, dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer to bring such action to trial. * * *

Section 581a in substance provides that, unless summons shall have been issued within one year and service and return made within three years after commencement of the action, the action shall be dismissed. In the case of the Canal Company the motion was made, as noted, before service of summons had been had. No appearance had been made on the part of that defendant. Section 583 provides that after answer filed discretion is vested in the superior court to dismiss an action within two years for failure of the plaintiff to bring his cause on for trial. It has been held that, where the motion is made under the latter section, two years must have elapsed after the filing of the answer before the court is vested with authority to dismiss. In *Romero v. Snyder*, 167 Cal. 216, at page 219, 138 Pac. 1002, at page 1003, the court says:

"We think the language of section 583 supports the theory of the plaintiff that, in cases where an answer has been filed, the court should not dismiss the action for want of prosecution, unless the plaintiff has delayed for two years thereafter to bring the action on to trial. The declaration that the court, in its discretion, may dismiss the case because of such inaction for two years, implies that inaction of that kind for a shorter period will not suffice."

The court further in that decision declares that the general power of courts of general jurisdiction to dismiss for failure to prosecute an action with reasonable diligence is not to be disputed, and cites many decisions of the Supreme Court of the state to that effect, but declares that the general doctrine is inapplicable where the motion comes after answer filed under the provisions of section

583, Code of Civil Procedure. The decision reaffirms the general rule, and admits the authority of the court to so dismiss an action, where the motion is made prior to answer filed, or where it is made because of failure to serve summons prior to the lapse of time mentioned in section 581a. Under the latter head, after citing prior decisions of the court, it is said:

"These decisions declare that the provision in question merely fixes a limit beyond which the court's discretion ceases, and a dismissal becomes mandatory upon motion of the opposite party, and further that it gives the court the additional power to dismiss an action in such a case of its own motion. No minimum time is specified in that section, or anything to indicate that a period of delay less than that which makes a dismissal mandatory would be sufficient, if the court, in its sound discretion, thinks otherwise. There is no apparent purpose therein to regulate the exercise of the court's power, except to make it imperative that in the specified contingency the action shall be dismissed."

It is further held in that decision that the court's power is unaffected by the limitation mentioned in section 583, Code of Civil Procedure, even though demurrer may have been filed. In *Overaa v. Keeney*, 169 Cal. 628, 147 Pac. 466, the statutory limit of time within which summons must be served and filed had not expired. Dismissal of the action upon motion made after such service was sustained. In *Mori v. Mori*, 171 Cal. 79, 151 Pac. 1136, the court said:

"It is well settled that the trial court has power to dismiss for undue delay in issuing or serving summons, even though the delay has been for a shorter period than that which, under the terms of section 581a of the Code of Civil Procedure, gives the defendant an absolute right to a dismissal"—citing *Witter v. Phelps*, 163 Cal. 655, 126 Pac. 593.

In *Bernard v. Parmelee*, 6 Cal. App. 537, 92 Pac. 658, it was held, under the facts of that case, that the neglect to serve summons for a period of more than four months was good ground for the granting of a motion to dismiss. It follows that the principal law questions argued as against the judgment must be resolved adversely to the appellant.

[2] There remains only the single question as to whether the court, under the facts shown in the affidavits presented at the hearing of the motions, abused its discretion in determining the matter against the plaintiff. The principal affidavit in opposition to the motions was made by one of the attorneys for appellant. In that affidavit it was set forth that in 1909 another action had been commenced by this plaintiff against the Owens River Canal Company, that that action had been tried and a decision finally rendered on appeal, and that plaintiff had delayed serving the summons and bringing this action on for hearing, because he desired to have the advice of the decision on appeal in the other case, and—

"in order to ascertain the points of law which would be decided by said Supreme Court upon said appeals, and thus both said plaintiff and affiant would be, and also said defendants, the better prepared to try said action No. 1388, in this court."

He sets forth further that in January, 1913, which was before this action was commenced, one of the attorneys of the plaintiff in the other action had died and plaintiff had been deprived of advice and counsel by reason thereof. Further, that the plaintiff had been of the opinion that the law as expressed in section 581a, Code of Civil Procedure, allowed him three years from the date of filing his complaint within which to serve summons in the action.

We are unable to conclude that any of these matters to which reference has been made afforded any proper defense to the motions to dismiss. The defendants were entitled to have the action prosecuted with diligence, regardless of the wish of the plaintiff that he might, by reason of decision to be rendered on appeal in the other case, obtain advice upon propositions involved which would be useful to him. (The Owens River Canal Company was not even a defendant in the other action mentioned.) The fact that one of the plaintiff's attorneys had died before the commencement of this action certainly could afford no excuse for failing to serve the summons with reasonable promptness. There is no showing but that many other attorneys were accessible to the plaintiff all of the time while the action was pending, or that he was in any way prevented from securing competent and sufficient legal advice.

Plaintiff's mistake as to his rights under section 581a of the Code of Civil Procedure affords no ground whatsoever to excuse him from the effect of the delay in prosecuting his action. The case of *Romero v. Snyder*, supra, which is quite illuminating on the question, was decided in February, 1914, and even after that decision had been rendered plaintiff took no action to have the summons served until another year had elapsed. We can find no reason at all to conclude that the trial court was in error.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

WARD v. SOUTHERN PAC. CO. (Civ. 1934.)
(District Court of Appeal, Third District, California. July 11, 1919. On Rehearing, Aug. 9, 1919. Rehearing Denied by Supreme Court Sept. 8, 1919.)

1. MASTER AND SERVANT ⇨279(4)—INJURY TO FOREMAN—NEGLIGENCE OF OTHER EMPLOYÉ—EVIDENCE.

Evidence in action for death of foreman, killed in the taking down of a railroad snow-

shed, held to show negligence of another employé in prying off one end of a timber while the other end was attached to the structure, directly contributing to the accident.

2. MASTER AND SERVANT ⇨265(14)—INJURY — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

The burden of proof as to contributory negligence is on the master, sued for death of servant.

3. MASTER AND SERVANT ⇨265(14)—INJURY — CONTRIBUTORY NEGLIGENCE — PRESUMPTION.

Relative to contributory negligence of foreman, killed by falling timber in the taking down of railroad snowsheds, the presumption is that he had a justifiable reason for changing his position, as the timber descended in an irregular manner.

4. MASTER AND SERVANT ⇨281(1)—INJURY — CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence in action for death of foreman from the falling of timber in taking down a railroad snowshed held to sustain verdict against defense of contributory negligence, based on deceased's change of position as timber descended.

5. DEATH ⇨52—COMPLAINT—AVERMENT OF PECUNIARY LOSS.

Allegation of complaint for death, that plaintiff has been damaged through negligence of defendant and by death of her husband in the sum of \$50,000, is a sufficient averment that she had suffered pecuniary loss by his death in that sum.

6. APPEAL AND ERROR ⇨1039(4)—HARMLESS ERROR—COMPLAINT—CURE OF DEFECT.

That complaint for death made only an imperfect allegation that plaintiff suffered pecuniary loss therefrom, not having been objected to at the trial, but the answer having denied the suffering of any damage by the death, and evidence having been introduced on the theory of the fact being properly in issue, was not prejudicial.

On Rehearing.

7. MASTER AND SERVANT ⇨218(6)—INJURY TO FOREMAN—RISK OF OTHER EMPLOYÉ'S NEGLIGENCE.

A foreman does not assume the risk of another employé doing a thing negligently and contrary to instructions.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Ethel Julia Ward, administratrix of Joseph G. Ward, sometimes known as J. G. Ward, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Devlin & Devlin, of Sacramento, for appellant.

H. W. Zagoren, A. M. Seymour, and Downey, Pullen & Downey, all of Sacramento, for respondent.

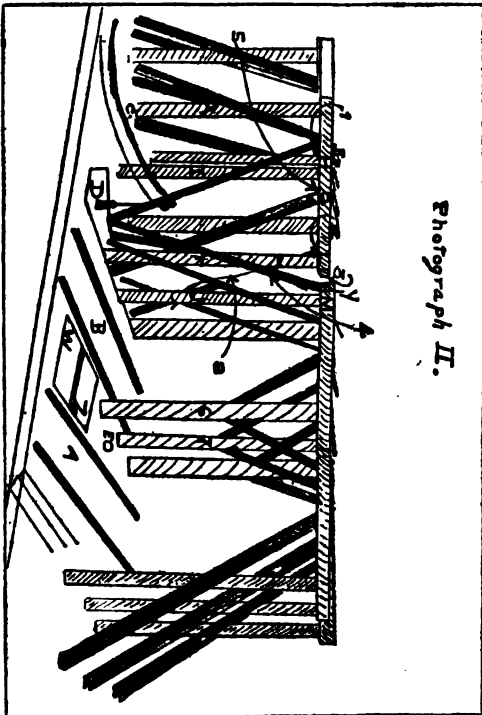
BURNETT, J. The action was for damages for the death of Joseph G. Ward, the husband of plaintiff, and the jury found a verdict in her favor for the sum of \$4,500. The particular acts of negligence on the part of defendant upon which the action was based are set out in the complaint as follows:

"That on and prior to the 19th day of May, 1916, the said defendant was engaged in the business of interstate commerce as a common carrier of freight and passengers in the county of Placer, state of California; that at said time said defendant was engaged in tearing down and removing certain snowsheds along its railroad line near Immigrant Gap in said county; that on said day and immediately prior thereto said Joseph G. Ward, deceased, was employed by said defendant as foreman of certain other employes of said defendant who were engaged in said work upon said snowsheds; that on said day there were two other employes of said defendant, whose true and correct names are unknown to this plaintiff, and are therefore styled as John Doe and Richard Roe, who were engaged in throwing certain pieces of timber from the top of said snowsheds to the ground after removing them from said snowsheds; that, while engaged in throwing said timber from the snowsheds to the ground as aforesaid, the said employes, John Doe and Richard Roe, so carelessly and negligently conducted themselves as to cause said timber which they were throwing to the ground to fall in an opposite direction from that to which they had been directed to throw it, thereby causing said timber to fall against an upright post, a portion of said snowsheds, causing said upright post to be broken away and knocked loose from the supports which maintained said upright post in an upright position; that immediately prior thereto the said Joseph G. Ward, deceased, had caused a rope to be tied to the upright post last above referred to, and had caused said rope to be wound loosely around another upright post, situate about 20 feet, more or less, north of the upright post first hereinabove mentioned; that at the said time last mentioned the said Joseph G. Ward, deceased, instructed and directed another employe of said defendant, whose true and correct name is unknown to the plaintiff and who is therefore styled as Peter Smith, to manage and hold the other end of said rope in such manner as to control the falling of the upright post to a point designated by the said Joseph G. Ward, deceased; that at the time said upright post was broken away and knocked loose from its supports, through the carelessness and negligence of the said John Doe and Richard Roe, as above mentioned, the said Peter Smith so carelessly and negligently conducted himself as to cause said upright post first above mentioned to fall upon the said Joseph G. Ward, deceased, whereby the skull of the said Joseph G. Ward was fractured, and death ensued therefrom almost immediately thereafter."

The claim is thus apparent that two acts of negligence concurred in producing the unfortunate result; one being the careless removal of the timber from the top of the snow-

shed, and the other the improper use of the rope attached to the upright, which fell against the deceased and caused his death.

The following diagram and reference points will tend to elucidate the situation:



Reference Points on Photograph.

- A—Main line track.
- B—Siding track.
- C—Turntable track.
- D—Switch.
- E—Where Ward ran to when timber started to fall.
- F—Upright which fell.
- G—Cross-beam which De Neef and Clark rolled off.
- H—End of cross-beam where De Neef was working.
- I—Upright supporting north end of cross-beam G.
- J—Upright to which Marsh tied rope.
- K—Joist upon which De Neef was sitting while rolling off cross-beam G.
- L—End of cross-beam where Clark was working.
- M—Where plate broke when upright F fell.
- O—Where Ward was struck by post.
- W—Point where Ward and Marsh were when Ward gave orders to Marsh and Smith.
- X—Post around which Smith had taken turn with rope & attached to upright I.
- Y—Plate that broke when cross-beam G was rolled off.
- Z—Where Ward stood before timber fell.
- 1—End of plate 5 where sawed off flush with cross-beam G.
- 2—End of plate Y where sawed off flush with cross-beam G.
- 3—Joist upon which Clark was sitting while rolling off cross-beam G.
- 4—Brace struck by cross-beam G in falling.
- 5—Plate.
- 6—Upright.
- 7—Upright.
- 8—Rope tied by Marsh.

Of the undisputed facts, we may state that the two employes engaged in removing the

timber from the top of the snowshed, named Clark and De Neef, at the time of the accident, were using crowbars to detach a beam, 16 feet in length and weighing 700 pounds, from the top of two uprights 22 feet from the ground and each upright weighing about 400 pounds. These uprights and the beam were standing on a north and south line. Clark, seated on a support near the top of the southern upright, was working at the south end of the beam, and De Neef, similarly situated, was engaged at the north end of the beam.

[1] The case of plaintiff, as to the first instance of negligence, really hinges upon the conduct of De Neef in prying off the northern end of the beam while the southern end was still attached to the southern upright. That this condition existed appears from the testimony of De Neef himself, and of one Thomas J. Smith. As to the testimony of the former the record shows the following:

"Q. Describe to the jury how the beam was removed in this particular case—how it fell to the ground, if it did. A. My end of the beam seemed to go down a little ahead of the other end. Q. Describe what happened after that. A. I believe that—although I am not certain—that it struck the brace, started to strike the brace which is attached to the post, and in that way started the post to fall in Ward's direction, or across the track. Q. I understand you to say that your end of the beam was pried off before the other end; is that correct? A. That was evident."

Mr. Smith testified:

"The end Mr. De Neef was working on came off at the plate before the other end had—dropped in kind of a diagonal. Here it struck on this brace, this small end of that about where the braces were fastened to the posts, somewhere in that neighborhood."

It may be added that he and other witnesses illustrated their testimony, and no doubt made it plainer to the jury by reference to a model of the snowshed, which model was used at the trial and also at the oral argument in this court.

The beam was fastened to the plates and uprights by spikes, and it is a reasonable, if not necessary, inference that De Neef pried off his end of the beam before Clark had loosened his from the plate to which it was spiked. Of course, this was a very important matter. They were engaged in a very dangerous business at best; but the danger to themselves and others would be greatly increased by casting one end of the beam from the uprights while the other was still attached. This would be manifest to the average juror, as indeed to any one familiar with the fundamental laws of physics and such a simple mechanical contrivance as the snowshed. No doubt Clark and De Neef knew that the safer course—indeed, the only proper course—was to project both ends of the beam from

the uprights at practically the same time. In fact, De Neef testified that Ward told him "to roll them off to lay flatly on the ground." The direction was intended, and was so understood, to mean that the beam was to be rolled off, so as to fall in horizontal position as nearly as possible. In order to accomplish this, Clark and De Neef should have been careful to see that the spikes were removed, or at least, that they were so loosened from both ends that the beam would fall properly. These workmen were only 16 feet apart, and both could easily ascertain the conditions at the other end of the beam. It also appears from the testimony of De Neef that the beam could have been turned over upon the plates before it was thrown down. Indeed, he testified that it was so turned over; but this is manifestly inaccurate, as the evidence shows that it was still fastened at Clark's end when De Neef threw it off. We think it cannot be said to be an irrational inference from all the circumstances that said workmen were chargeable with the want of due care, either in failing to remove the spikes or in turning the beam to ascertain whether it was clear, before hurling it to the ground. We may not be able to say just why it fell as it did. Probably the jury had no decided opinion as to that, but it was and is a rational conclusion that it would have fallen without causing any injury, if the workmen had exercised the ordinary precaution which the peculiar situation demanded.

That the method pursued resulted in the fall of the upright and thereby contributed directly to the death of Ward is hardly open to controversy. The beam swung in the arc of a circle and struck the brace of said upright with such force as to break the plate at the top and to precipitate the heavy timber to the ground. If the beam had been thrown in the usual and safe manner, the probability is—and, of course, these cases must be decided upon probabilities—that it would have fallen clear of the timbers, and Ward would have suffered no injury. He expected it to fall that way and had stationed himself accordingly. However, in consequence of the unusual and dangerous direction taken by the beam, it appeared to him necessary to change his position. Indeed, it is a fair inference from the testimony of Smith and De Neef that the beam started to fall toward Ward, and his action in moving away in the easterly direction would tend to confirm this inference. It is not to be supposed that he would have taken this step, unless he had reason to believe that he would thereby promote his own safety.

[2-4] Instead of escaping the danger, the result proved, however, that Ward, by changing his place, brought himself in contact with the falling timber and consequently lost his life. But it is entirely plain that the court

cannot hold him chargeable with contributory negligence because of the change in his position. As to this it must be remembered that the burden of proof was upon defendant and that the presumption was and is that he had a justifiable reason for his conduct. This presumption was confirmed by the testimony showing how the upright started to fall. Ward was watching the process, and, seeing the timber falling toward him, what more natural thing than for him to move away from it? The fact that the upright shifted its course was a matter that he could not be supposed to anticipate. In fact, as to this circumstance, we may add, there is evidence in the record justifying the inference that this change was due to an act of one Marsh, an employé of defendant, in tying the rope—marked 8 in the diagram—to the upright directly east of the one that fell. He was given direction by Ward not to tie the rope, but to take a loop around said upright and hold it loosely. The other upright starting to fall in a southerly direction, at right angles to this rope, would, of course, be subject to its restraining power, and the resultant of the two forces would be the fall of the timber in a southeasterly direction. That seems plain enough, and it constitutes another circumstance tending to justify Ward's conduct, as he had no knowledge that the rope was so tied. Moreover, if necessary, Ward's conduct could be excused by the application of the familiar principle as to the degree of care required of a person suddenly placed in a position of grave peril; but we are entirely satisfied that as to this defense the verdict of the jury is sufficiently supported, not only by the presumptions that naturally attach to the case, but also by a strong and rational inference from all the facts and circumstances revealed by the evidence.

There is, as already suggested, another theory upon which the verdict may be affirmed, regardless of the question whether Clark, or De Neef, or both, were guilty of any negligence. We may, indeed, acquit them of any want of due care in rolling the beam from the uprights, and still there is evidence to justify the conclusion that Ward would have escaped, if it had not been for the hidden danger caused by the tying of the rope; that the latter circumstance was a proximate cause of his death, and was due to the negligence of the defendant through its servant in violating the order given by the deceased.

We deem it unnecessary to dwell longer upon the evidence. We may add, however, this reflection: That we have given it anxious attention, and, while it has caused us some difficulty, yet no more so than most of this class of cases that we are called upon to consider. Indeed, it seems to us, there is less reason for a reversal here than in a

large number of damage suits wherein the judgments have been affirmed.

As to the general aspect of the case, it is not improper to suggest the significance of certain rather striking circumstances disclosed by the record. One of these is the fact that an important witness for plaintiff—and called by her probably from necessity—was under great inducement to make the circumstances appear as unfavorable as possible to her contention. In fact, one theory upon which she relied involved the charge of negligence on the part of said witness, De Neef. His natural desire for vindication was, no doubt, appreciated and properly gauged by the jury. Again, the case seems to have been tried with great care, the rulings were uniformly just, the law was given to the jury with clearness and accuracy, no complaint whatever being made by appellant of the action of the court in any of these respects, and the jury displayed great moderation in awarding only the sum of \$4,500 for the death of a strong, capable man in the prime of life.

Of course, these circumstances, of themselves, are not sufficient to justify the verdict; but, believing that it is warranted by the evidence, we refer to them as confirmatory of the statement that this case is somewhat unusually free from error.

[5, 6] The only other point made by appellant was suggested for the first time at the oral argument in this court, and that is that the complaint does not state a cause of action, for the reason that there is no positive allegation of pecuniary loss on the part of plaintiff occasioned by the death of her husband. The matter is learnedly discussed by the able counsel for appellant, and several cases are cited in support of the contention; the one chiefly relied upon being *Garrett v. Louisville & N. O. Co.*, 235 U. S. 308, 35 Sup. Ct. 32, 59 L. Ed. 242. From this decision the following quotation is made:

"Where any fact is necessary to be proved, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters [citing cases]. The plaintiff's declaration contains no positive averment of pecuniary loss. * * * Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. * * * The rights of the defendant must be given effect."

This and other citations are reviewed by respondent, and the peculiar facts in the various decisions are pointed out and distinguished; but we do not feel called upon to report the matter more specifically. It ought

to be sufficient, we think, to say that respondent alleged in her complaint:

"That the said Ethel Julia Ward has been damaged through the negligence of said defendant and by the death of her said husband in the sum of \$50,000."

If that is not equivalent to an averment that she has suffered pecuniary loss by the death of her husband in the sum of \$50,000, then we must admit that the significance of the language is not apparent to us. At any rate, it is an imperfect allegation of the fact and when we consider that no such objection was made at the trial, on the contrary, appellant denied in the answer that she suffered any damage by the death of her husband, and the evidence was introduced upon the theory that the fact was properly in issue, under numerous decisions of this and other courts, the error, if any, is absolutely without prejudice. *Slaughter v. Goldberg-Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Boyle v. Coast Imp. Company*, 27 Cal. App. 714, 151 Pac. 25.

It appears to us that the law requires us to affirm the judgment; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

PER CURIAM. [7] In its petition for rehearing, appellant emphasizes the point that Ward assumed the risk that was incident to such negligence as caused the accident. The contention is manifestly based upon the assumption that he should have anticipated that De Neef would negligently pry off his end of the beam before the other was loosened. If that is to be held as a matter of law, it seems to us it would sweep away the right of a foreman to recover for any negligence of the workman. The danger of so treating the beam was so obvious that it would not be necessary to caution the man of ordinary intelligence against such conduct, nor do we think it should be anticipated that any one would be so reckless. We may add, however, that the instruction which was given by Ward as to how the beam should fall would clearly imply that both ends of it were to be loosened before either was projected from the upright.

Appellant thinks an inconsistency appears in the opinion by reason of the statement:

"We may not be able to say just why it fell as it did. Probably the jury had no decided opinion as to that."

Of course, the statement in the first of these sentences must be true, regardless of the soundness of our opinion as to the merits of the appeal. This second sentence is susceptible of misunderstanding, as it has been misunderstood by the learned counsel. What

we had in view was the whole situation, the entire cause of the peculiar direction taken by the beam, and what was said was really in response to various speculations of appellant as to the many circumstances that may have contributed to the result. The statement is not a full and accurate expression of what was intended, clarity being somewhat sacrificed to conciseness.

We still think the jury may not have had a decided opinion as to all these circumstances. But if they believed, as they undoubtedly did, that the negligence of defendant's servants contributed to the accident, and the evidence supports a finding to that effect, it matters not about other elements, such as rusty nails or rotten uprights, that may have affected the fall of the beam.

Of course, no opinion can be written or any conclusion announced that cannot be criticized with some show of justification by astute and censorious counsel; but we have given the cause careful consideration, and our judgment is that we should not interfere with the verdict. With that we are content.

The petition for rehearing is therefore denied.

RECLAMATION DIST. 785 v. LOVDAL BROS. CO. et al. (Civ. 1979.)

(District Court of Appeal, Third District, California. July 18, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. DRAINS ~~§ 85~~—RECLAMATION DISTRICTS—ASSESSMENTS—INSTALLMENTS.

The provisions of Pol. Code, § 3466, requiring assessments against land in reclamation districts to be collected and paid in installments, is mandatory; the only discretionary power vested thereby relating to the amounts of installments and times of their payment.

2. DRAINS ~~§ 90~~—RECLAMATION DISTRICTS—ENFORCEMENT OF ASSESSMENT LIEN—PREMATURE ACTION—COMPLAINT.

A complaint by a reclamation district to foreclose an assessment lien does not state a cause of action where it shows that the landowners were not allowed their right under Pol. Code, § 3466, to pay the assessment in installments, and any action to collect the whole prior to failure to pay such an installment is premature.

3. DRAINS ~~§ 90~~—RECLAMATION DISTRICTS—LIS PENDENS.

Although Pol. Code, § 3466, relating to reclamation district assessments, provided for filing a lis pendens with the county recorder in actions to collect delinquent installments, section 3493½ authorizing actions to validate assessments contained no such provision; and since Code Civ. Proc. § 409, requiring such notice, relates entirely to actions involving title

or possession of real property, an action to validate a reclamation assessment, which became a lien on the land, under Pol. Code, § 3468, did not require filing of lis pendens.

4. DRAINS ⇐90—ACTION TO VALIDATE RECLAMATION DISTRICT ASSESSMENT—SUFFICIENCY OF SUMMONS AND RETURN.

In an action by a reclamation district under Pol. Code, § 3493½, to validate assessments, which requires defendants to answer the complaint within 10 days when served with summons within the state, where the summons required defendant to so answer, "if served within the said county," and "within 30 days" "if served elsewhere," and the return showed service within the county, the service must be *held* to be in compliance with the statute, in view of the liberal construction required by Code Civ. Proc. § 4.

5. VENDOR AND PURCHASER ⇐229(6, 7)—VALIDITY OF RECLAMATION ASSESSMENT LIEN—JUDGMENT VALIDATING LIEN ON NOTICE.

One purchasing land after a judgment validating a reclamation district assessment thereon is charged with notice of the lien imparted by such judgment.

6. JUDGMENT ⇐682(1)—PERSONS CONCLUDED—RECLAMATION DISTRICT ASSESSMENT—VALIDATING JUDGMENT CONCLUDING SUBSEQUENT PURCHASER.

An action by a reclamation district to validate an assessment lien is one in rem, and is binding upon the lands assessed, and therefore concludes all subsequent purchasers.

7. JUDGMENT ⇐746—RECLAMATION DISTRICT ASSESSMENTS—ENFORCEMENT—WAIVER OF ESTOPPEL CREATED BY FORMER JUDGMENT.

Plaintiff, in an action to foreclose a reclamation district assessment lien, does not waive the estoppel created by a judgment validating the assessment lien by introducing evidence in support of the issues raised in that action.

8. JUDGMENT ⇐518—VALIDATING RECLAMATION DISTRICT ASSESSMENT—COLLATERAL ATTACK.

In an action by a reclamation district to foreclose assessment liens already validated by a judgment, an objection that the assessment for levees was greater than that embraced in the plans and estimates, *held* a collateral attack on the warrants issued in payment of the levies, the validity of which, having been settled by the former judgment, could not be so challenged.

9. JUDGMENT ⇐518—COLLATERAL ATTACK—ACTION TO ENFORCE ASSESSMENT PREVIOUSLY ADJUDGED VALID.

In an action by a reclamation district to collect an assessment which had previously been judicially declared valid, objection to the legality of the action by the trustees, in purchasing for the district their own lands, constitutes a collateral attack upon the validating judgment, in which all presumptions are in favor of the judgment and proceeding leading thereto, and, there being no presumption of unfairness, illegality, or fraud, the legality of such transaction must be *held* res adjudicata.

10. DRAINS ⇐90—RECLAMATION DISTRICT—COLLECTION OF ASSESSMENTS—MISAPPROPRIATION BY TRUSTEES.

That the trustees of a reclamation district misappropriated funds is no defense to an action to collect an assessment validated previous to such misappropriation, and a judgment against the trustees for the amount alleged to have been misappropriated, to which the district was not a party, is inadmissible in evidence.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Reclamation District 785, by Theo. Blauth and others, trustees, against Lovdal Bros. Company and others. Judgment for plaintiff, and defendants appeal. Judgment reversed.

Chauncy H. Dunn, of Sacramento, and Arthur C. Huston, of Woodland, for appellants.

Philip S. Driver, of Sacramento, for respondent.

HART, J. The action was brought to foreclose an assessment lien. It is stated in respondent's brief:

"The respondent district is situated in the county of Yolo, state of California, and was organized as a reclamation district on the 29th day of May, 1908. On the 6th day of July, 1908, respondent levied an assessment of \$132,000 over all the lands in the district. Shortly thereafter an action was brought by said respondent under section 3493½ of the Political Code of this state to validate said assessment, and on the 5th day of October, 1908, a judgment was entered in the validation suit in respondent's favor.

"At the time of the organization of the respondent district, and until after the judgment in the validation suit Lovdal Bros. Company, a corporation, one of the defendants in this action, was the owner of the lands upon which this action was brought to foreclose a lien. Thereafter said Lovdal Bros. Company, a corporation, sold said land to W. E. Lovdal. While W. E. Lovdal was the owner of said lands, and in 1914, the respondent district brought this action to foreclose the assessment lien upon said land, amounting to the sum of \$17,601.07, together with interest on said sum. Thereafter said W. E. Lovdal died, and the defendants, Ovedia A. White, Emma T. L. Beardslee, and Katherine B. Fisk, executrices of the last will and testament of said W. E. Lovdal, deceased, were duly substituted by the trial court as defendants.

"The complaint in this action to foreclose the lien sets forth the statutory requirements of such a complaint. Appellants (executrices) in their answer denied that the assessment was valid, that the assessment was due or payable or that a call of the assessment had ever been made, and alleged as a separate defense that part of the moneys of said assessment was paid out for purposes other than reclamation, to wit, to pay for a judgment obtained against the trustees individually and for their individual negligence,

and to pay for the purchase of the front levee owned by the trustees themselves."

The cause was tried by the court, findings and judgment were in favor of plaintiff, and the appellants, executrices, prosecute this appeal from the judgment.

[1] 1. It is first urged by appellants that the court erred in overruling their demurrer to the complaint, and in denying their motion for a nonsuit at the close of plaintiff's testimony, on the ground that the complaint showed upon its face, and that plaintiff's evidence showed, "that the trustees had never called in said assessment in separate and distinct installments, but had attempted to call in the entire assessment at one time."

Section 3486 of the Political Code, at the time of the levy of the assessment in question, read, in part, as follows:

"At the end of thirty days, the treasurer must return the list to the board of trustees of the district, and all unpaid assessments shall bear legal interest from the date of the return of the list to said board, and shall thereafter be collected and paid in separate installments, of such amounts, and at such times, respectively, as the board, from time to time, in its discretion, may, by order entered in its minutes, direct; and a cause of action for the collection of any such installment shall accrue at the expiration of twenty days from the date of the order directing its payment: Provided, that if any such installment shall remain unpaid at the expiration of said twenty days, then the whole of the assessment against the land owned by the person failing to pay such installment shall become due and payable at once, and may, in the discretion of the board, be collected immediately, in one and the same action. The board of trustees of the district must commence actions for the collection of such delinquent installments and delinquent assessments," etc. Stats. 1891, p. 288.

The respondent contends that the provision of the said section requiring the assessments to be collected and paid in installments is merely directory, or, in other words, that it rests in the discretion of the board of trustees of reclamation districts to order the collection and payment of the assessments either as a whole or in installments. We cannot give our assent to that contention.

Prior to its amendment by the Legislature of 1891 (Stats. 1891, p. 288) the section made no provision for the collection and payment of assessments in separate installments. "This law," said the Supreme Court, in *Swamp Land Dist. No. 307 v. Glide*, 112 Cal. 85, 44 Pac. 451, speaking of the section as it existed before its amendment in 1891, "was found to be inconvenient, as it required the whole assessment to be paid at once, when the money could only be used from time to time," and the court proceeded to say that it was to remedy this difficulty that the Legislature of 1891 so amended the section as to require the collection and payment of assessments to be

made in separate installments. Of course, it is to be understood from this language that the inconvenience following from the enforcement of the section as it formerly read was that suffered by the landowners in the reclamation districts, and not by the districts themselves or their officers; for it was undoubtedly found to be true that large bodies of land embraced within the reclamation districts of the state were, in many cases, owned by single individuals in severalty, and that it imposed upon such landowners a very onerous burden to require them to pay the whole of large assessments at one time. Indeed, it is generally known that, in many instances, assessments for reclamation purposes often call for the payment of such large sums of money that landowners often find it exceedingly inconvenient, if not impossible, to pay the whole amount of the assessments at one time. By these considerations the Legislature was unquestionably prompted in so amending the law that the work of reclamation might be facilitated in reclamation districts formed and organized under the laws of the state with as little inconvenience to the landowners upon whom the burden in such cases was thrown as possible. The theory and the purpose of the provision are the same as those at the bottom of the law authorizing the collection of county taxes in two separate installments, each at a different time of the year, viz. for the convenience of the taxpayers. It would not for a moment be contended that the board of supervisors could require the collection of county taxes, or that the tax collector could enforce their collection in whole, at one time or in one installment. That is a substantial right of which the taxpayers cannot be legally deprived against their consent, and so here. The provision requiring or authorizing the assessments to be collected and paid in separate installments involves the granting or giving to the landowners of a substantial right, and, while undoubtedly they themselves may waive it and pay the assessments levied against their lands in full at one time, they are, nevertheless, entitled to claim and invoke it. We cannot, therefore, agree with respondent that the language of the section as to the collection and payment of the assessment in separate installments is merely directory, and is justly subject to the interpretation that the trustees of the district are thereby given the discretion to determine whether the entire assessment shall be made collectable and payable at one time or in separate installments. Indeed, the language of the section in that particular is strictly mandatory. The only discretionary power vested by the section in that connection relates to the amounts of the installments and the times of their payment.

A law authorizing the assessment of land for reclamation purposes in duly formed and organized reclamation districts authorizes

the exercise of the taxing power. The assessment of lands for that purpose is a species of taxation, and the rule that all laws authorizing the taxation of the property for public purposes are in invitum, and their provisions, therefore, to be strictly construed and pursued, or at least substantially so, is no less applicable to a case of an assessment of lands in reclamation districts for reclamation purposes than to laws authorizing the taxation of property for general governmental purposes. Where, therefore, the provisions of a law by authority of which districts are formed for the purpose of reclaiming lands situated therein specify the manner or the method of assessing such lands for the purpose of raising funds with which to carry out the purposes of the district, such manner or method of proceeding must be observed with substantial strictness. A substantial departure from the method specifically pointed out by the statute for raising the money for the purposes of the district will render the assessment abortive. These are elementary propositions, which apply in the construction of the powers, duties, and obligations of all public or quasi public instrumentalities or agencies established for the purpose of carrying out, within certain limited subdivisions of the state, certain designated policies of the state, or of exercising certain governmental functions.

The right of the owners of lands within reclamation districts to have the assessments levied against such lands for the purposes of such districts made collectable and payable in separate installments is, as above declared, a substantial one, expressly given to them by the Legislature for their benefit and convenience, and the courts would be guilty of resorting to the very extreme of judicial legislation under the guise of construction should they hold that the trustees of reclamation districts are at liberty to disregard that right whenever they see fit to do so, and so require the landowners to pay the entire assessments at one time.

We have carefully read and considered the briefs of respondent. We find no fault with the rules of statutory construction to which they therein refer, and which they invoke as supporting their view of the section of the Political Code in question. But, as must be manifest from the views we have already expressed respecting the language of said section, we cannot support them in their insistence upon the application to the present case of the rules of construction invoked by them or the cases they rely upon. They argue that, as there is no language in the section expressly forbidding the trustees from calling in the entire assessment at one time, therefore the Legislature must have intended that they should be vested with the discretion of collecting the entire assessment at any time if, in their judgment, the requirements of the district justify it. This proposition we have

already answered. While it is true that the section does not say to the board, "You shall not call in the entire assessment at one time," it does say, as we have shown, that the collection and payment of the assessments *shall* be in separate installments, and this is tantamount to the declaration that the collection of the entire assessment shall not be compelled by the trustees at one time. The language necessarily excludes any other manner of collecting the assessments.

[2] Nor is there any force in the argument of respondent that, inasmuch as the landowners must pay the entire assessment at some time, they can suffer no prejudice because the suit, to foreclose or to enforce payment of the assessment is upon or for the entire assessment. Prejudice to the party so wronged must always follow from an act resulting in the invasion of any substantial right to which he is entitled under the law. In contracts neither party has the right to forfeit the agreement before the time for the doing of the thing thereby agreed to be done has matured. No action will lie to recover on a promissory note until the debt of which it is evidence is due. If a purchaser agrees to pay for personal property by installments payable at stated intervals of time, his rights under the agreement cannot be forfeited until he has violated the conditions of payment or some other vital covenant. The same principle applies here. The district was without authority to sue for the entire assessment until there was default in the landowner to pay one of the installments for a certain specified period; but the vital proposition involved is the landowner's right to have the assessment made payable in separate installments so that it will be the more convenient for him to pay the assessment. For aught that can be said to the contrary, the defendants here might have willingly paid the assessments had they been made payable according to law. We have no right to assume that they would not have done so if the amount had been ordered payable in installments. But be that as it may, we are fully persuaded that, for the reasons above given, the complaint fails to state a cause of action against the defendants—that is to say, that the action was premature or brought before a cause therefor could have accrued—and that the demurrer thereto should, therefore, have been sustained. From this it follows, of course, that the demurrer having been overruled and the cause tried, and the evidence at the trial showing that the trustees failed to order the assessment involved herein to be collected and paid in separate installments, the motion of defendants for a nonsuit should have been granted.

While the conclusion thus arrived at is decisive of the case, there are some other points to which attention should be given, in view of possible litigation arising in the future with respect to this assessment.

2. Appellants claim that the court erred in admitting in evidence the judgment roll in the validation suit, over the objection of defendants, that (1) no notice of the pendency of said action was offered in evidence; (2) that the court had no jurisdiction to render a judgment validating said assessment against the then owner of said lands, Lovdal Bros. Company, a corporation; (3) conceding the validating judgment to be binding upon these defendants, still the plaintiff waived the estoppel that would otherwise have been created by the judgment by introducing evidence in support of each allegation of the complaint necessary to establish the regularity and validity of the assessment.

[3] While section 3466 of the Political Code as it read at the time the assessment in question was levied provided that a lis pendens should be filed in the office of the county recorder in all actions for the collection or enforcement of the payment of delinquent installments of the assessment, there was no provision, in section 3493½ of said Code, authorizing actions to determine the validity of the assessments, which required that notice of the pendency of such actions should be filed. Nor was such a notice required to be filed in such actions by section 409 of the Code of Civil Procedure, which relates entirely to actions involving the title or the right of possession to real property. The validation action did not involve the title or the right of possession of real property, but merely the question of the validity of an assessment which, under section 3463 of the Political Code, as it then read, became a lien upon the property assessed from and after the filing with the county treasurer by the assessment commissioners of a list of the charges assessed against the land and prior to the time at which the validation suit could be brought. From these considerations it follows that it was not necessary to file a notice of the pendency of the action to establish the validity of the assessment.

[4] The objection that the court had no jurisdiction to adjudicate the validity of the assessment as against Lovedal Bros. Company, the then owner of the lands in question, is based upon the contention that the summons required by the statute is not in the form of language prescribed thereby. This objection is highly technical and without substantial merit. Section 3493½ provided that in such an action the summons shall require the defendant or defendants "to answer the complaint within ten days after the service of the summons, if served within the state." The summons served on Lovdal Bros. Company was in the usual form of such processes, and required the defendant to "answer the complaint within ten days, exclusive of the day of service, after service on you of this summons, if served within the said county—if served elsewhere, within thirty days." Thus it will be observed that the

summons served did not direct or require the defendant to answer the complaint within ten days, "if served within the state," and it is upon this omission that the objection to the summons is founded. By the summons the said defendant was informed that, if served within the county in which the action was brought, it was required to answer the complaint within ten days after such service. The certificate attached to the summons by the party making service on Lovdal Bros. Company sets forth that the summons was served on said company in Yolo county. Thus the said defendant was given, substantially as the statute required, notice of the commencement of the action, and thus the only purpose that a summons is designed to achieve was as effectually and fully accomplished as if the process had contained the precise language of section 3493½. The rule of the Code is that its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice (Code Civ. Proc. § 4), and this rule obviously applies as well to the provisions as to a summons as to those relating to other proceedings and processes authorized by the Codes. See *Bewick v. Muir*, 83 Cal. 370, 23 Pac. 389.

[5] In this connection we should notice another point made by appellants, which is that neither W. E. Lovdal, the grantee of the corporation of the lands involved herein, nor his executrices, ever received notice of the validation suit, and that the court below, therefore, never acquired jurisdiction to enter judgment in said action as against them. The contention is without force. The deceased, Lovdal, purchased the property after judgment in the validation suit was rendered and entered, and, inasmuch as the effect of the judgment was to confirm or establish the validity of the lien which, ipso facto attached to all the lands in the district upon the filing of the list of the charges with the county treasurer, the judgment imparted notice of such lien, and all purchasers of property in the district subject to the assessment were charged with such notice. See *Carpenter v. Lewis*, 119 Cal. 18, 22, 50 Pac. 925.

[6] At any rate, the action in the validation suit was one in rem, and it was binding upon the lands assessed, and therefore concluded all subsequent purchasers. *Peterson v. Weissbein*, 80 Cal. 38, 22 Pac. 56; *Riverside Land Co. v. Jensen*, 108 Cal. 146, 41 Pac. 40; 39 Cyc. 1710.

[7] The claim that the plaintiff waived the estoppel created by the judgment in the validation suit by introducing evidence here in support of the issues raised in that suit requires no elaborate notice here, since, if it were true that such an objection is good as against the right to invoke an estoppel by judgment, the same would probably be obviated at the trial of any action which might be brought in the future to enforce the pay-

ment of this assessment. It may be suggested, however, that the case of *Megerle v. Ashe*, 33 Cal. 74, cited by the respondent as supporting the objection referred to, has been expressly overruled, so far as that proposition is concerned, by *Harding v. Harding*, 148 Cal. 397, 83 Pac. 434, in which it is said:

"But whatever construction may be put upon *Megerle v. Ashe*, 33 Cal. 74, and the later case of *Hicks v. Lovell*, 64 Cal. 14, 22, 27 Pac. 942, 49 Am. Rep. 679, where something is said that might be construed as an approval of the statement quoted from the former case, we are satisfied that, under our system, a defendant does not waive his rights under a judgment pleaded in bar, by the mere act of also contesting the claim of the plaintiff upon the merits."

[8] 3. The plans and estimates of P. N. Ashley, engineer of the district, dated July 6, 1908, as reported to the trustees of the district, stated that the estimated cost of raising old front levees which were to be used as a part of the reclamation plan was six cents per cubic yard. The trustees of the district at that time were Messrs. H. J. Goethe, Theo. Blauth, and C. F. Silva, each of whom was the owner of a portion of the front levee. Defendants attempted to prove by the witness P. S. Driver, secretary and attorney for the plaintiff district, that those parties were paid ten cents per cubic yard for such levees. An objection by plaintiff that this was a collateral attack upon the warrants issued in payment for said levees was sustained, and appellants urge that the ruling was erroneous.

The ruling was proper. Before the assessment could be levied under the law it was requisite that a statement or report should have been made to the supervisors by the trustees, showing the plan of the proposed reclamation work and estimates of the costs thereof. This report or statement was a necessary prerequisite to the levying of the assessment, and the assessment was, in turn a necessary prerequisite to a validation suit. It follows, therefore, that the statement or report of the plan and estimated costs of the work to be done was necessarily one of the issues to be adjudicated in the validation suit. The judgment in that action is res adjudicata as to all matters contained in the statement. The time for the urging of any objections to the statement or any other matter connected with the assessment was at the trial of that action. The Lovdal Bros. Company, although duly notified of the action, defaulted or made no appearance therein. The attempt here to impeach the validity of the warrants in question involved an attempt to attack the judgment in that action collaterally. Of course, this cannot be done, even if it be true that the warrants called for larger amounts than the estimated price of the land, as shown by the report, justified. Indeed, the question of the price per cubic yard of the land was one of fact, and that

question having been determined by the trustees of the district and the supervisors of the county by finding that ten cents, rather than six cents (the estimated price per cubic yard), was the proper price, and the warrants having been drawn for that amount, the validity or correctness of the warrants themselves cannot be collaterally challenged. *Rec. Dist. v. Clark*, 155 Cal. 350, 100 Pac. 1091; *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475; *County of Santa Cruz v. McPherson*, 133 Cal. 282, 65 Pac. 574; *Victors v. Kelsey*, 31 Cal. App. 801, 161 Pac. 1006; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577.

[9] The appellants undertake to differentiate the above-named cases from the present case in that the question involved in those cases was one of fact, while the question presented here is one of law, the contention being that the act of the trustees in purchasing their own property for the purposes of the district was illegal. But however that may be, the question whether the act of the trustees in the matter was or was not legal was, as we have pointed out, necessarily a direct issue in the validation suit and was therein adjudicated. Indeed, the sole question to be determined in that action was whether the assessment was or was not in all respects valid.

The cases of *Reclamation Dist. v. Turner*, 104 Cal. 334, 87 Pac. 1088; *Reclamation Dist. v. McCullah*, 124 Cal. 175, 56 Pac. 887, and *Reclamation Dist. v. Birks*, 159 Cal. 233, 113 Pac. 170, cited by the appellants as supporting their position that the assessment was void because of the fact that the trustees, as owners thereof, sold to the district the levee banks referred to, were direct appeals from the judgments. The first named was an action to collect an assessment and the defendant appealed from the judgment entered against him. At the time that the action in that case was brought in the superior court there was no statute or law authorizing the validation of such assessments by a suit for that purpose in the superior court, section 3493½ of the Political Code not then being in existence. The attack upon the judgment in the *Turner* Case was therefore direct. The other two cases involved actions to validate the assessments, and the defendants therein appealed directly from the judgments declaring the assessments to be valid. The case at bar involves an action to collect an assessment which had, prior to the commencement of this action, been judicially declared to be valid upon evidence presumptively sufficient to support the judgment. If it be said that there is some evidence here showing the fact of the purchase of the land referred to by the trustees, the answer is that, since all presumptions are in a collateral attack to be indulged in favor of the judgment and the regularity of the proceedings leading thereto, it is to be presumed that in the validation suit there was evidence disclosing that the sale and

transfer of the levee banks to the district was not only necessary and to the best interests of the district in its work of reclamation, but that the transaction was conducted in such manner as to remove from it any aspect of illegality. There is no presumption arising from the mere fact of the transaction itself, unexplained by the circumstances by which it was initiated and consummated, that it was unfair or illegal or characterized by fraud. *Rec. Dist. v. McCullah*, 124 Cal. 175, 56 Pac. 887; *Morawetz on Corporations*, § 527.

4. It is lastly claimed that a sum amounting to nearly fifteen thousand dollars, included in the assessment of \$132,000 was misappropriated and could not possibly benefit the lands of defendants.

[10] It was alleged in the answer that the trustees of the district, in 1908, caused the front levee of the district on the bank of the Sacramento river to be cut through in order to take a dredger into the district, and that they so negligently and carelessly closed the opening made by them that, in the spring of 1909, the water of the river broke through the levee and damaged the lands of one Calvin Perkins lying adjacent to the district; that said Perkins brought suit and recovered judgment against said trustees for the sum of \$9,360 and costs, which judgment and costs, together with attorney's fees, were paid out of the assessment for \$132,000.

The action above referred to of *Perkins v. Blauth et al.* is reported in 163 Cal. 782, 127 Pac. 50. It appears by reference thereto that while the dredging company and the engineer of the district were joined as defendants (the district itself was not so joined) the judgment was against the trustees of the district individually. It is the claim of appellants, that, as the judgment in the validating action was entered October 5, 1908, and the acts of the trustees resulting in the Perkins judgment occurred thereafter, in no event could the amount of said judgment be properly paid out of the assessment under consideration.

At the trial defendants offered in evidence the judgment roll in *Perkins v. Blauth et al.*, and also attempted to prove the above facts by the introduction of testimony. The court sustained objections to the introduction of said evidence, which ruling is specified as error.

The ruling was correct. We cannot conceive of a more obvious proposition in connection with a case of this character than that the misappropriation of the funds of the district by the trustees thereof cannot have the effect of invalidating the assessment by which such funds were raised. If the trustees have misused the funds of the district by paying them out for some purpose wholly foreign to the objects of the district, they are, of course,

personally liable for the repayment of the moneys so used; but the act of those officials in the misappropriation of the moneys of the district has absolutely nothing to do with the matter of levying the assessment, and can in no way affect the proceedings involving that duty.

For the reason first hereinabove given, the judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

CAMERON v. CITY OF RICHMOND et al. (Civ. 2798.)

(District Court of Appeal, First District, Division 2, California. July 17, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. PLEADING \S 198—JOINT DEMURRER—COMPLAINT GOOD AGAINST SOME.

A joint demurrer by all the defendants must be overruled, if the complaint is good against any of them.

2. PARTIES \S 92(4)—DEMURRER—MISJOINDER OF DEFENDANTS.

Complaint is not subject to demurrer for misjoinder of defendants; it not appearing from the face of the complaint that any defendant is improperly joined.

3. MUNICIPAL CORPORATIONS \S 124(6) — COUNCILMEN—ACTING AS BOARD OF EQUALIZATION—INCREASING COMPENSATION DURING TERM—CONSTITUTIONALITY.

Under the charter of Richmond, providing that no member of the council shall hold any other municipal office, that the council shall act as a board of tax equalization, and that the councilmen shall receive \$5 per day while performing that duty, but no other compensation, unless provided by ordinance, they perform the duty of equalization as members of the council, so that an ordinance providing a salary for them increases their compensation, within Const. art. 11, § 9, providing that this shall not be done during their term of office.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by David Cameron against the City of Richmond and others. From an adverse judgment, plaintiff appeals. Reversed, with directions.

David Cameron and C. S. Hannum, of San Francisco, for appellant.

M. R. Jones, of San Francisco, and D. J. Hall, of Richmond, for respondents.

HAVEN, J. This is an appeal from a judgment of the superior court in and for the county of Contra Costa in favor of the defendants. The plaintiff sued as a taxpayer

of the city of Richmond, a municipal corporation, to obtain a judgment for \$13,950 in favor of the city against all of the defendants, except the city of Richmond, which is impleaded as a party defendant, upon an alleged cause of action for money illegally expended and paid to the members of the council of the city of Richmond in monthly payments of \$50 each as salary in addition to the compensation they were entitled to receive at the time of their election. Judgment was entered upon an order sustaining a demurrer to the amended complaint after plaintiff had elected to stand upon his pleading. The mayor of Richmond, its nine councilmen, the city clerk, auditor, and treasurer, together with two ex-members of the council, were joined with the city of Richmond as defendants. In substance, it is alleged that the present city officers since July 1, 1917, have joined in issuing, auditing, and paying demands on the city treasury for salaries of hold-over councilmen, and that the former officers, prior to July 1, 1917, and subsequent to August 1, 1915, joined in similarly paying corresponding demands to those who were members of the council during that period, namely, the hold-over councilmen and the two ex-members of the council joined as defendants. The payments were made pursuant to an ordinance adopted by the council July 19, 1915, which it is claimed was invalid, or at least inapplicable to the salaries of those who were in office at the time of its adoption, as constituting an increase of compensation of municipal officers during the terms for which they were elected, in violation of section 9 of article 11 of the Constitution of California.

[1, 2] All the defendants joined in a single demurrer. It was general and special. The grounds of special demurrer were misjoinder of parties defendant, and ambiguity, uncertainty, and unintelligibility, in that it cannot be ascertained from the complaint whether or not the plaintiff claims that the compensation of \$5 per day alleged to have been paid to defendants was paid to them as members of the board of equalization or as members of the council. This last matter is hereinafter discussed in considering the ruling of the trial court with reference to the general demurrer. In the matter of misjoinder, it was stated that E. J. Gerard is improperly joined as a party defendant with each and every of the other defendants in said action. In separately lettered paragraphs, the same statement was made as to each of seven other of the individual defendants, among whom were the city clerk and auditor and the two ex-councilmen. On behalf of the respondents it is argued the demurrer was properly sustained, for the reason that there is no cause of action stated against the city clerk, and he was therefore an improper party. "A joint demurrer by all the defendants

must be overruled if the complaint is good against either of them." *Asevado v. Orr*, 100 Cal. 300, 34 Pac. 779; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899; *Hirshfeld v. Weill*, 121 Cal. 13, 53 Pac. 402. Furthermore, it does not appear on the face of the complaint that the city clerk is not a proper party, nor, indeed, that any of the defendants is improperly joined.

[3] The remaining question necessary for determination is as to whether the ordinance in question is inoperative as to the councilmen who were members of the council at the time of its passage, which is dependent upon whether or not said ordinance increased their compensation after their election and during their term of office, and this question, in turn, is dependent upon whether or not the compensation of \$5 per day to the councilmen while sitting as a board of equalization was paid to them as councilmen.

Section 4, article III, of the Charter of the City of Richmond, reads as follows:

"The councilmen shall each receive the sum of five dollars for each day while sitting as a board of equalization; but no other compensation shall be paid unless the electors, by ordinance proposed and adopted in accordance with section two of article VIII shall otherwise provide."

Section 9 of article 11 of the Constitution of this state reads as follows:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office."

The argument presented by respondents is that the ordinance passed by the council on July 19, 1915, did not violate the above-re-cited constitutional provision as to the salaries of incumbent councilmen, because such councilmen were not receiving any salary at the time; that the provision for compensation was compensation to be paid them only while acting in another capacity, i. e., as a board of equalization; and that, as no salary was provided for councilmen as such, a salary could be provided without violating the constitutional provision. Reliance is placed upon the case of *Gwynn v. McKinley*, 30 Cal. App. 381, 158 Pac. 1059. We cannot agree that the present case comes within the rule announced in that case. The charter provides that:

"The council shall by ordinance provide for the assessment, levy and collection of taxes, and shall act as a board of equalization in equalizing the value of property listed upon the assessment roll."

It further provides that the councilmen shall receive \$5 per day while performing that duty. The councilmen perform the duties of a board of equalization as members of the council. Indeed, if this were not true, and the two offices were independent

and distinct, then under section 4 of article IX of the charter, the councilmen could not perform the functions of a board of equalization, because said section of the charter provides that no member of the council shall hold any other municipal office, or hold any other office or employment, the compensation for which is paid out of the municipal money. In the case of *Santa Barbara v. Rucker et al.*, 35 Cal. App. 676, 170 Pac. 860, the court said that the duties performed by supervisors as road commissioners were duties imposed upon them by virtue of their status as supervisors, and that an amendment allowing larger compensation for services rendered as road commissioners increased their compensation while in office. So, in the present case, we think the duties performed by the members of the council in equalizing the value of property listed on the assessment rolls are duties imposed upon them by virtue of their status as councilmen, and that the salary provided to be paid to them while acting as a board of equalization was a salary paid to them as councilmen, and, consequently, the ordinance providing a salary of \$50 per month to be paid to them as councilmen increased their salaries during their terms of office, and is therefore void as to them. The complaint, therefore, was good as against the general demurrer.

There are certain other matters presented in the briefs, but our conclusions as herein expressed render a discussion of such matters unnecessary.

The judgment is reversed, with directions to the trial court to overrule the demurrer of the defendants.

We concur: LANGDON, P. J.; BRITAIN, J.

**CRANE v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
(Civ. 3064.)

(District Court of Appeal, Second District, Division 1, California. July 19, 1919.)

**1. EXECUTORS AND ADMINISTRATORS §=315(4)
—GROUNDS FOR VACATING SETTLEMENT INSUFFICIENT.**

To prevent annulling on certiorari of orders vacating orders, duly and regularly made, settling the account, decreeing distribution of decedent's estate and discharging administratrix, the record must show mistake, inadvertence, surprise, or excusable neglect, authorizing the vacation under Code Civ. Proc. § 473; and mere statement in the vacating orders that the vacated orders were made inadvertently is not enough.

**2. EXECUTORS AND ADMINISTRATORS §=315(4)
—VACATING ORDER OF DISTRIBUTION FOR FAILURE OF PROOF UNAUTHORIZED.**

Vacation of orders for distribution of estate and discharge of administratrix is not authorized under Code Civ. Proc. § 473, because the court changes its conclusion that the proof on which they were made was sufficient, or because they were based on false representations of administratrix.

**3. EXECUTORS AND ADMINISTRATORS §=315(4)
—GROUNDS FOR VACATING ORDER OF DISTRIBUTION STATED.**

The court has no power to vacate its orders, duly and regularly made, for distribution of estate and discharge of administratrix, save and except under Code Civ. Proc. § 473, authorizing relief from orders made through a party's mistake, inadvertence, surprise, or excusable neglect.

In the matter of the settlement of final account of Lida S. Crane, administratrix of James E. Crane, deceased. Orders for distribution of estate and discharge of administratrix were vacated, and Lida S. Crane brings certiorari against the Superior Court of Los Angeles County and James C. Rives, Judge thereof. Orders annulled.

Thomas K. Case, of Los Angeles for petitioner.

Robert L. Hubbard, of Los Angeles, for respondents.

SHAW, J. By this application petitioner asks that upon a writ of certiorari we set aside and annul the action of the court in vacating orders made for the distribution of the estate of a deceased person and discharge of the administratrix. The facts upon which the action of the court was based are as follows:

The petitioner, Lida S. Crane, was administratrix of the estate of James E. Crane, deceased, and up to July 8, 1918, Robert L. Hubbard and N. B. Bachtell represented her as attorneys. On said date Thomas K. Case was, subject to the right of Hubbard & Bachtell to an allowance of attorney's fees for services rendered, substituted as attorney, and as such thereafter appeared for the administratrix. On July 30, 1918, the administratrix filed her first and final account, accompanied by a petition for an order distributing the estate to herself as sole heir, the hearing of which, after due notice given, was had on August 13, 1918, at which time an order was made settling the account and the estate ordered distributed to petitioner. On August 29, 1918, Hubbard & Bachtell filed with the clerk of the court an application to have their fees as attorneys for the administratrix fixed and allowed by the court. Thereafter, and without any receipt having been filed showing the estate had been distributed,

the court on August 31st made an order discharging the administratrix. No hearing of the application to fix and allow the fees of Hubbard & Bachtell was had. Thereafter, on October 21, 1918, the court, upon motion of Hubbard & Bachtell, entered an order vacating the order discharging the administratrix; and on February 3, 1919, Hubbard & Bachtell served upon the administratrix a notice of motion for orders vacating the orders approving the final account and decree of distribution. Said motion was made on February 10, 1919, and the hearing continued from said date to February 20, 1919, at which time it was heard, and on May 6, 1919, the court made findings to the effect that said orders settling the final account and decreeing distribution of the estate were inadvertently made and under a misapprehension of the court that all claims against the estate had been paid, for which reason it was ordered that said orders and each of them be vacated, annulled, and set aside.

[1, 2] It appears from the record presented that the orders settling the account, decreeing distribution of the estate and discharging the administratrix were all duly and regularly made after due notice to all parties interested of the time fixed for the hearing of the application for the orders. The order vacating the order discharging the administratrix was in response to a motion therefor made by Hubbard & Bachtell; but the record is wholly silent as to the ground or reasons assigned in support of the motion, in the absence of which it appears that the court acted upon a mere request of these attorneys, who, appearing for respondents, now insist upon the authority of *Wiggin v. Superior Court*, 68 Cal. 398, 9 Pac. 646, that the court in so doing acted within its jurisdiction. Conceding the language of this case as reported justifies the contention, we are not inclined to follow it as so interpreted, for the reason that it is inconsistent with the decision of a like question decided by this court in *Nason v. Superior Court*, 179 Pac. 454, in which an application for a transfer was denied by the Supreme Court on March 24, 1919.

As to the orders made, vacating the order settling the account and distributing the estate, they were in response to a motion, based upon the files and records of the case, made on February 10, 1919, pursuant to notice theretofore served, the ground therefor, as stated in the notice, being that said orders were improvidently made, in that the action of the court in approving the final account was procured by false representations made by the administratrix to the effect that all obligations of the estate had been fully discharged, and that at said time a motion was pending in said court to have it fix and determine the fees of said

Hubbard & Bachtell. The application was made and heard within six months from the making of the orders, and therefore was within the time fixed therefor by section 473, Code of Civil Procedure. The record shows that the order settling the final account and distributing the estate was made on August 13th, and likewise shows that the application to have the court fix attorney's fees was not filed with the clerk until the 29th of August. Hence there is no foundation for the contention that at the time of the making of the order a motion was pending to have the court fix attorney's fees. Nor is there any affidavit or showing that the orders were inadvertently made, so as to bring the case within the provisions of said section 473. That a court may, in a proper case and upon a proper showing, acting under the provisions of this section, afford relief to a party, provided the application therefor be made within six months from the action complained of, we have no doubt. But there must be some showing of mistake, inadvertence, surprise, or fraud. *De Pedrena v. Superior Court*, 80 Cal. 144, 22 Pac. 71. In the *Nason Case* this court said:

"In the case at bar, the fact that the decree of discharge was inadvertently made was not presented as one of the grounds of the motion to set aside that decree. No fact appeared in the record from which inadvertence of the court may be inferred. The order itself, now under review, while it states that the decree of discharge was made inadvertently and *ex parte*, does not indicate any particular in which the court had acted improvidently or inadvertently. Under such circumstances we cannot, from the mere assertion contained in the order, indulge in a presumption that the judge knew of some inadvertence which would justify the order."

Since the court makes a like finding, the language is applicable to the vacating orders made in this case. There is no showing whatsoever of any facts which would constitute inadvertence. All that is made to appear is that, after regularly acting upon evidence adduced which the court at the time deemed sufficient, it afterwards concluded the proof made was insufficient and thereupon vacated the orders. The law does not authorize such action. *Robson v. Superior Court*, 171 Cal. 588, 154 Pac. 8. There were no extrinsic matters which affected the decision of the court in making the original orders, and the fact that they were based upon false representations or testimony of the administratrix, who furnished the evidence upon which the court acted, constituted no ground for vacating the orders so regularly made. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159.

[3] We may repeat that we adhere to what was said in the opinion in the *Nason Case*, the language of which we deem de-

terminative of this, viz. that the court had no power to set aside and vacate the orders, save and except under the provisions of section 473, Code of Civil Procedure, authorizing relief from orders made through a party's mistake, inadvertence, surprise, or excusable neglect, as to which there is no showing.

The orders made, vacating and setting aside the orders settling the final account, decreeing distribution, and discharging the administratrix, are annulled.

We concur: CONREY, P. J.; JAMES, J.

**N. S. SHERMAN MACHINE & IRON
WORKS v. ELZO et al. (No. 7648.)**

(Supreme Court of Oklahoma. Nov. 21, 1916.
Rehearing Denied May 15, 1917.)

(Syllabus by Editorial Staff.)

1. JUSTICES OF THE PEACE §128(1) — DEFAULT JUDGMENT—DEFENSE—NEW TRIAL.

A court of equity may interfere to order a new trial after judgment by default before a justice of the peace, when it is made to appear that the prevailing party in said action at law obtained said judgment in advance of the time when it otherwise should have been rendered by violating a stipulation for continuance, and that defendant had a good defense to said action.

2. JUSTICES OF THE PEACE §128(3)—CONTINUANCE—VIOLATION OF AGREEMENT—EVIDENCE.

Evidence carefully examined, and held that there was no violation of any agreement for continuance.

Commissioners' Opinion, Division No. 4.
Error from Superior Court, Pottawatomie County; Leander G. Pittman, Judge.

Action by N. S. Sherman Machine & Iron Works against Sam Elzo and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Oliver C. Black, of Oklahoma City, and I. C. Saunders, of Shawnee, for plaintiff in error.

Baldwin & Carlton, of Shawnee, for defendants in error.

EDWARDS, C. This action is brought by plaintiff in error, hereinafter styled plaintiff, against the defendants in error, hereinafter styled defendants, to enjoin the collection of a judgment rendered in the court of the defendant D. P. Sparks, justice of the peace, of Pottawatomie county, Okl., on the 21st day of May, 1915. A temporary injunction

was issued upon the verified petition, and after issue joined a trial was had to the court without the intervention of a jury, and judgment rendered in favor of the defendant, dissolving the temporary injunction, from which judgment appeal was duly prosecuted to this court. The material facts are as follows: The plaintiff delivered to its attorney, Oliver C. Black, for collection by suit, an account against the defendant Sam Elzo. This account was mailed by the said Black to H. H. Smith, an attorney, of Shawnee, Okl., who, being unable to give the same attention, delivered it to I. C. Saunders, an attorney, of Shawnee, Okl., who instituted suit upon the said account in the justice court of Pottawatomie county, the bill of particulars being signed by Oliver C. Black, attorney for plaintiff. Baldwin & Carlton, attorneys, of Shawnee, represented the defendant Elzo. The case was set for trial on May 8th, and on about the 5th or 6th of May the attorneys for defendant Elzo had a conversation with Mr. Saunders, requesting and agreeing to a continuance of said cause until the 21st of May, and at that time informed Saunders that they desired to file for defendant a cross-bill of particulars, and would do so on the 17th. Notice of such continuance to the 21st was given by the said Saunders to Oliver C. Black, by letter, on May 10th. On the 15th day of May Mr. Saunders, having become ill, went to the hospital for treatment, and on the 18th of May the said attorneys for defendant also wrote said Black of the continuance until the 21st, advising him that the defendant had filed his counterclaim, and inclosing a copy of the same therewith, also further advising the said Black that Saunders was confined to the hospital, and that if said Black was unable to try the case at the time mentioned, to notify them so that the defendant and witnesses need not attend court on the 21st. Black replied to this letter on the afternoon of the 20th, and stated that if it would suit just as well that he would like to have the case go until Saunders could get back to his office to take care of it, as the amount involved was too small to justify the time and expense of his going there and attending to it in person, and asked to be advised by return mail if such arrangement would be satisfactory. This letter was not received by Baldwin & Carlton until about 9 o'clock on the morning of the 21st. On the afternoon of the 20th the said attorneys for defendant Elzo, not having received a reply to their communication of the 18th, attempted to call the said Black by telephone at his expense, but his office not approving the call, they were unable to do so. The defendant and his witnesses appeared on the 21st, the day to which said cause had been continued, and, the plaintiff failing to appear, judgment was ren-

dered for the defendant upon his bill of particulars. After the rendition of the judgment in the justice court no further action was taken by attorneys for plaintiff until about the 19th day of June, and until the defendant was attempting to enforce collection of the judgment.

[1] The plaintiff in the present action invokes the equity powers of the court to relieve against the judgment obtained against it, on the ground of fraud, on the theory that the attorneys for the defendant failed to keep an agreement with the attorneys of plaintiff as to a continuance of said cause, and have cited various authorities holding that a court of equity may in certain cases set aside a judgment of a justice of the peace with leave to retry the case. We think this contention is sustained by authorities where the facts bring the case within the rules. *Bohart v. Anderson*, 26 Okl. 782, 110 Pac. 760; *Splawn v. Perry*, 40 Okl. 371, 138 Pac. 788; *Southern Ry. Co. v. Planters' Fertilizer Co.*, 34 Ga. 527, 68 S. E. 95; *Gulf, Colo. & Santa Fé Ry. Co. v. Stephenson et al.* (Tex. Civ. App.) 26 S. W. 236; *Sanderson et al. v. Voelcker*, 51 Mo. App. 328; *Cadwallader v. McClay*, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496; 23 Cyc. 920.

[2] But do the facts of this case bring it within the doctrine announced? We think not. The only attorney appearing of record for the plaintiff in the justice court was Oliver C. Black. The attorneys for the defendant advised him of the illness of Mr. Saunders, and furnished him with a copy of defendant's bill of particulars. At the same time they notified him of the continuance of the case until May 21st, and tendered to him a further continuance on condition that he answer immediately upon receipt of their letter, so that they would not be at the expense of having their client and witnesses attend. They had certainly up to this time acted with due courtesy and in conformity to legal ethics. If the attorney for plaintiff upon receipt of this letter did not expect to go to trial on the 21st he should have accepted immediately the tender of a continuance made. But instead of so doing he delayed until the afternoon of the 20th, and then answered with a counter proposition calling for a reply. The attorneys for defendant, further, on the afternoon of the 20th not having received an answer from their letter of the 18th to Mr. Black, called him by telephone, and the call, not being approved by his office, was not completed. In this state of the record we think there was no fraud nor breach of ethics in taking a default judgment on the 21st, the date to which said case had been continued.

The judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS, I. M. & SO. RY. CO. v. EVANS.
(No. 8724.)

(Supreme Court of Oklahoma. July 8, 1910.
Rehearing Denied Sept. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1172(3)—CARRIERS \S 218(10)—INTERSTATE AND INTRASTATE SHIPMENTS OF LIVE STOCK—NOTICE OF INJURY—RIGHT OF ACTION—VERDICT.

Judgment in favor of the plaintiff on his first and second causes of action reversed and rendered, upon the authority of *A., T. & S. F. Ry. Co. v. Cooper*, 175 Pac. 539, C., R. I. & P. Ry. Co. v. Gray, 165 Pac. 157, and *St. L. & S. F. Ry. Co. v. Ladd*, 178 Pac. 125. Judgment in favor of the plaintiff on his third cause of action reversed and remanded for a new trial, for the reason stated in the opinion.

Error from District Court, Wagoner County; Chas. H. Watts, Judge.

Action by M. P. Evans against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

W. L. Curtis, of Sallisaw, and Henry M. Brown, of Muskogee, for plaintiff in error.
Robert F. Blair, of Tulsa, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, for the purpose of recovering damages for the unreasonable delay of three shipments of cattle. The petition was in three paragraphs; the first and second paragraphs alleging damages to interstate shipments, and the third paragraph alleging damages to an intrastate shipment. One of the defenses alleged in the answer was that the plaintiff failed to comply with the clause of the contract under which the cattle were shipped, which provides:

"That, as a condition precedent to the recovery of any damages for any loss or injury to live stock covered by this contract for any cause including delays, the second party will give notice in writing of the claim therefor, to some general officer or to the nearest station agent of the first party, or to the agent at destination or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims, and to any suit or action brought thereon."

Upon trial to a jury there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

It is admitted by counsel for defendant in error, in his brief, that the foregoing clause of the shipping contract was not complied with; but he says:

"But I deny that defendant had any right to make or enforce the contract set up and relied upon in its answer in this case as a bar to plaintiff's cause of action, for the reason (1) that the provision in said contract respecting the giving of written notice by plaintiff to defendant, under the facts and circumstances of this case, was unreasonable and impossible of performance by plaintiff; (2) that the notice was unnecessary, for the reason that the injury occurred while the cattle were in the exclusive possession and control of defendant, and it had all the knowledge of the injury to the cattle before the notice which it would have had after the notice; (3) that with full knowledge of all the facts in the case it waived the notice, which was for its benefit, and through its attorneys of record agreed to settle the claim of the plaintiff."

We are unable to concur with counsel in any of these contentions. The first two were considered and decided adversely to him by this court in *A. T. & S. F. Ry. Co. v. Cooper*, 175 Pac. 539, recently handed down, where the authorities are collected and discussed at considerable length. See, also, *C. R. I. & P. Ry. Co. v. Gray*, 165 Pac. 157, and *St. L. & S. F. Ry. Co. v. Ladd*, 178 Pac. 125, which approve the rule laid down in the *Cooper Case* and also hold that—

"A stipulation limiting the liability of the carrier, or fixing the time or manner of giving notice or presenting claims, being a condition precedent to a right of action by the shipper, cannot be waived."

As we are unable to distinguish the case at bar from these cases, it follows that the judgment for the plaintiff on the first two causes of action must be reversed, with directions to dismiss the same.

The verdict of the jury in favor of the plaintiff being for a lump sum covering his three causes of action, we have no means of ascertaining what portion thereof, if any, was allowed for the third cause of action. For this reason, a new trial will be necessary on this count.

For the reasons stated, the judgment of the court below is reversed and remanded with directions to render judgment in favor of the defendant on the first and second causes of action, and to grant a new trial on the third cause of action.

OWEN, C. J., and RAINEY, JOHNSON, and HARRISON, JJ., concur.

CO-WOK-OCHEE v. CHAPMAN et al.
(No. 6055.)

(Supreme Court of Oklahoma. Jan. 18, 1919.
Rehearing Denied Sept. 16, 1919.)

(Syllabus by the Court.)

1. JUDGMENT \Leftrightarrow 306—CLERICAL MISPRISIONS AMENDED AFTER TERM.

It is now well settled that mere clerical misprisions in entering judgments are subject to amendment as well after the term as during the term; but to enable the court to correct a mistake in a judgment entry summarily, on motion, it must appear to be a mere clerical misprision, and not an error of the court.

2. CORRECTION OF CLERICAL MISTAKE.

In this jurisdiction it is provided by statute (section 5268, R. L. 1910) that the proceeding to correct a mistake or omission of the clerk or irregularity in obtaining a judgment or order shall be by motion, upon reasonable notice to the adverse party or his attorney in the action.

3. JUDGMENT \Leftrightarrow 328—REMEDY BY APPEAL ON REFUSAL OF AMENDMENT.

Where such motion is denied the remedy of the party aggrieved is not by renewing it, or asking for a rehearing of it, but by appeal.

4. JUDGMENT \Leftrightarrow 324—AMENDMENT ON EVIDENCE SATISFACTORY TO COURT.

The court wherein a judgment is entered, in furtherance of justice and for the purpose of making its records speak the truth, may proceed to correct the same on any evidence satisfactory to itself, whether oral or documentary, whether record or otherwise, and it is for the court to say what is the kind and amount of evidence requisite to show that the amendment should be made; but, where there is no record or quasi record evidence, the court should act with great care and caution.

5. APPEAL AND ERROR \Leftrightarrow 983(2)—JUDGMENT \Leftrightarrow 300—AMENDMENT IN DISCRETION OF TRIAL COURT.

The rule is that application to amend or correct the judgment is addressed to the sound discretion of the court wherein the judgment was entered, and the action will not be interfered with by an appellate court, unless an abuse of discretion is manifest.

6. JUDGMENT \Leftrightarrow 300, 324—WHEN REFUSAL TO AMEND NOT ABUSE OF DISCRETION.

Record examined, and held, that the evidence adduced at the trial in the district court was not of sufficient weight and cogency to warrant a reversal of the action of the county court, and that no abuse of discretion on the part of the county court is manifest.

7. APPEAL AND ERROR \Leftrightarrow 1094(1)—WHEN EVIDENCE IN COUNTY COURT REVIEWABLE.

Where on appeal from the county court the case is tried in the district court on a transcript of the evidence taken before the county court, and it is also presented in the Supreme Court on the same record, the latter court is in as favorable position to pass upon the weight

and cogency of the evidence as the district court, and it is its duty to do so.

Error from District Court, Seminole County; Tom D. McKeown, Judge.

Suit in ejectment and to clear title by Chotkey Wildcat, by his guardian, and others, against Co-wok-ochee and James A. Chapman. From the district court's reversal of an order of the county court, overruling a motion filed after term to correct the entry of a judgment formerly entered in the county court by a nunc pro tunc order, Co-wok-ochee brings error. Reversed, with direction to set aside the order reversing the order of the county court, and to enter an order conforming to the opinion.

See, also, 171 Pac. 50.

Lewis C. Lawson, of Holdenville, for plaintiff in error.

Harry H. Rogers, of Tulsa, and N. A. Gibson, of Muskogee, for defendants in error.

KANE, J. This was an appeal from the action of the district court of Seminole county in reversing an order of the county court of said county, overruling a motion, filed after the term, to correct the entry of a judgment formerly entered in the latter court, by a nunc pro tunc order. It seems that on the 7th day of October, 1912, the clerk of the county court entered a formal judgment in the matter of the estate of Albert Wildcat, deceased, whereby it was adjudged that said decedent left surviving him the following heirs at law and no others, to wit: "Co-wok-ochee, father; John Wildcat, brother"—and that the estate of said decedent shall be distributed as follows, to wit: "(1) To Co-wok-ochee, one-half thereof. (2) To John Wildcat, one-half thereof."

The motion, which was overruled by the county court and sustained by the district court on appeal, alleges in effect that it was found by the county court, in the matter of the estate of Albert Wildcat, deceased, that John Wildcat was the sole heir of the decedent, and that the judgment of the court was that John Wildcat was the sole heir of Albert Wildcat, deceased, but by inadvertence and mistake, when the decree of heirship was recorded by the clerk, the record of said decree of heirship was wrong in this: That beginning at line 3, page 78, of said judgment as it appears of record, instead of the words "Co-wok-ochee, father," there should have been written, according to the judgment and decree of court, the following words: "Co-wok-ochee, father, being a Seminole, he did not inherit;" and beginning at line 23 of page 78 of said record, instead of the words: "(1) To Co-wok-ochee, one-half thereof," and on line 24, page 78, instead of the words: "(2) To John Wildcat, one-half thereof"—there should have been written,

according to the judgment and decree of the court, the following words: "To John Wildcat, sole heir."

Wherefore it was prayed that an order nunc pro tunc be entered, changing and correcting said record to read as follows, beginning at line 3 on page 78 of Probate Minutes No. 4 record, instead of the words "Co-wok-ochee, father," there be inserted the following: "Co-wok-ochee, father, being a Seminole, he did not inherit;" and beginning at line 23 of page 78 of said record, instead of the words: "(1) To Co-wok-ochee, one-half thereof. (2) To John Wildcat, one-half thereof"—the following words be inserted: "To John Wildcat, sole heir."

After a full hearing in the county court, this motion was overruled, whereupon the movant appealed to the district court, where the cause was heard upon a transcript of the evidence taken in the county court, with the result hereinbefore stated.

Whilst counsel for plaintiff in error assigns many grounds for reversal, the following excerpts from his brief sufficiently indicate the only ones we deem it necessary to notice:

(1) "The object of the defendants in error, as claimed by them, was to procure a nunc pro tunc order to be entered up by said county court, whereby said order of October 7, 1912, should be so changed and modified as to deprive the plaintiff in error of all interests in the lands in controversy in this suit. Generally speaking, a court of record has inherent power to make orders nunc pro tunc; but such methods are never resorted to, to correct errors or mistakes of law and fact, but clerical errors or misprisions. On the 7th day of October, 1912, said county court actually made and entered a final judgment in the settlement of the estate of Albert Wildcat, deceased; and that judgment was entered on its minutes in Book No. 4, on pages 77 and 78 thereof, and the same may be seen on pages 3 to 5, inclusive, of the record."

It is contended:

(1) That inasmuch as the purpose of a nunc pro tunc order is simply to supply record evidence as to what the actual judgment of the court was in the first instance, where there was an omission by the clerk in this regard, and not to either vacate or modify the judgment entered, the motion overruled by the county court being in fact a motion filed after the term to modify the judgment formerly entered, the county court was without power to entertain the same, and therefore the district court was also without jurisdiction on appeal.

(2) "Assuming the county court had jurisdiction, and that its action in overruling the motion was an appealable order, it is contended that the evidence adduced at the trial was not of that satisfactory character which would warrant the district court in reversing the action of the county court; there being no abuse of discretion shown."

[1] The early common-law rule was that a judgment could be amended or corrected only at the term during which it had been entered. *Hardy v. Cathcart*, 1 Marsh. (Eng.) 180; *Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70. Statutes, however, and adjudications thereunder, have supplied this defect in the law, and it is now well settled that mere clerical misprisions in entering judgments are subject to amendment as well after the term as during the term. Section 5267, R. L. 1910, made applicable to all courts of record by section 5275; *Jones v. Gallagher*, 166 Pac. 204. But to enable the court to correct a mistake in a judgment entry summarily, on motion, it must appear to be a mere clerical misprision, and not an error of the court.

[2, 3] In this jurisdiction it is provided by statute (section 5268, R. L. 1910) that the proceeding to correct a mistake or omission of the clerk, or irregularity in obtaining a judgment or order, shall be by motion upon reasonable notice to the adverse party or his attorney in the action. It also seems to be well settled that, if the motion is denied, the remedy of the party aggrieved is not by renewing it or asking for a rehearing of it, but by appeal. 23 Cyc. 881.

Having reached the conclusion that the county court had jurisdiction to entertain the motion presented to it, and that its ruling thereon was reviewable by appeal, the question now arises as to the sufficiency of the evidence contained in the record to support the action of the district court in reversing the county court.

[4] The cases are in conflict on the question whether evidence dehors the record is admissible to prove and correct a clerical mistake or misprision of the clerk in the entry of a judgment. This court, however, although formerly holding to the contrary (*Bank of Kingfisher v. Smith*, 2 Okl. 6, 35 Pac. 955), is now committed to what is called the more liberal rule, that the court, in furtherance of justice and for the purpose of making its records speak the truth, may proceed, on any evidence satisfactory to itself, whether oral or documentary, whether record or otherwise, and it is for the court to say what is the kind and amount of evidence requisite to show that the amendment should be made. *Clark et al. v. Bank of Hennessey*, 14 Okl. 572, 79 Pac. 217, 2 Ann. Cas. 219; *Jones v. Gallagher*, supra. The rule, however, is subject to the limitation that, where there is no record or quasi record evidence, the court should act with great care and caution. *Jones v. Gallagher*, supra.

The evidence adduced in the case at bar consisted of the oral statements of the trial judge, the clerk of his court, and of several other witnesses, and a certain document, referred to as "Exhibit A," which upon its

face purported to be a certified copy of the judgment rendered by the court as it appeared of record, but which in fact was not such certified copy, but contained the substance of the judgment which the movant contends was actually rendered by the court.

The court which rendered the judgment refused to disturb it as it appeared of record, upon the ground, no doubt, that this evidence was not of sufficient weight and cogency to satisfy the court that the judgment which appeared regularly of record was not the judgment rendered by the court. In this conclusion we unhesitatingly concur. To allow this exhibit, which was neither a record nor a quasi record of the court, to overcome the verity of a formal entry of judgment, regular in all respects upon its face, seems to us to be without precedent. In these circumstances "Exhibit A," if admissible at all, was in our judgment entitled to very little weight. That this exhibit was given undue weight by the district court is quite apparent from the record.

The judge who rendered the judgment, after examining the record entry thereof, testified:

"I will say that I have no independent recollection of the matter from the order itself."

After examining "Exhibit A," and comparing it with the judgment as it appeared of record, the following question and answer appears in the record:

"Q. I will ask you to state to the court which one of these two instruments sets forth correctly and clearly the decision made by the court in rendering the final order of distribution in the *Albert Wildcat* case, No. 1355, in the county court. A. I think the order as set forth in the certified copy was the judgment of the court at the time, though my recollection of the matter is hazy, and I state what recollection I have about it."

The judge then proceeds to state his recollection of the matter at considerable length. After a careful examination of this statement, we are convinced that the judge was right in stating that "my independent recollection of the matter is hazy." And the oral evidence of the other witnesses seems to us to be no more satisfactory or convincing than "Exhibit A," and not the formal entry upon the record of the court, was the true judgment rendered.

Where the district court probably fell into error was in considering the case on appeal as if the sole question presented for consideration was whether the ruling of the trial court was reasonably supported by the evidence.

[5-7] The rule is that the application to amend or correct a judgment is addressed to the sound discretion of the court wherein the judgment was rendered, and its action will

not be interfered with by an appellate court, unless an abuse of discretion is manifest. 23 Cyc. 882. It must not be forgotten that, even in jurisdictions where the liberal rule as to the admission of evidence prevails, the evidence in the first instance must be satisfactory to the court rendering the judgment, and to which the application must be presented.

As stated before, the case was heard in the district court on a transcript of the evidence taken in the county court, and as it is presented here upon the same record, we are in as favorable position to pass upon its sufficiency as the district court. After a careful examination of this record, we are convinced that the county court was right in declining to disturb the judgment formerly entered upon the evidence offered by the moving parties, and certainly there is nothing in the record tending to show any abuse of discretion on its part.

For the reasons stated, the judgment of the district court is reversed, with directions to set aside the order reversing the judgment of the county court, and to enter one in conformity with the views herein expressed.

All the Justices concur, except MILEY, J., not participating.

WILSON v. STATE. (No. A-3412.)

(Criminal Court of Appeals of Oklahoma.
Sept. 8, 1919.)

(Syllabus by the Court.)

1. JURY §118—CHALLENGE TO PANEL—SPECIFICATION OF OBJECTION.

A challenge to a panel of jurors, summoned upon an open venire, on the ground "of a material departure from the forms prescribed by law in respect to the selection, drawing, and return of said panel, from which the defendant has suffered material prejudice, and that said panel of jurors is not a fair and impartial panel," was properly denied, because it did not specify the facts, if any, showing how or in what manner the panel was not summoned as prescribed by law.

2. CHALLENGE TO PANEL—STATUTORY FORM.

Under section 5843, Rev. Laws 1910, a challenge to the panel must be taken before the jury is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the grounds of challenge.

3. CHALLENGE TO PANEL—BIAS OF OFFICER.

Under section 5848, Rev. Laws 1910, a challenge to a panel of jurors summoned upon an open venire, on account of any bias of the officer who summoned them, must be made in the same form and determined in the same manner as if made to a juror.

4. CRIMINAL LAW §516—"CONFESSION."

In criminal law a confession is a voluntary statement made by a person charged with the commission of a crime, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act, or the share and participation which he had in it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confession.]

5. CRIMINAL LAW §516—"CONFESSION"—SCOPE.

A "confession," in a legal sense, is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred.

6. CRIMINAL LAW §406(3), 413(2), 516—"CONFESSION"—VOLUNTARY CONFESSION—ADMISSIBILITY.

A statement, declaration, or admission made by one accused of crime, explaining suspicious circumstances for his own defense, from which the jury may or may not infer guilt, is not a confession, and does not come within the rule that confessions must be voluntary to be admissible.

7. CRIMINAL LAW §413(2)—WITNESSES §404—EXPLANATION OF INCRIMINATING CIRCUMSTANCES—CONTRADICTION.

Statements of a person accused of murder, in giving an account of himself, or of the homicide, which tend to explain incriminating circumstances brought against him, are admissible, and may be proved false by the prosecution after it has proved that accused made them.

8. CRIMINAL LAW §1186(4)—REVERSIBLE ERROR—STATUTE.

Under Code of Criminal Procedure (section 6005, Rev. Laws 1910), providing that no judgment shall be set aside or new trial granted on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to errors in any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right, this court is necessarily vested with a large discretion in determining the effect of errors, and each case must depend upon its own circumstances, since it is the opinion of the court, upon a full consideration of the particular record, including the evidence, that is to control upon the question whether the error complained of has resulted in a miscarriage of justice.

9. CRIMINAL LAW §1166½(12)—IMPROPER REMARK BY COURT—REVERSIBLE ERROR.

An improper remark by the court, while ruling on an objection to the testimony of a witness for defendant, which was in effect a comment on the weight of the evidence, is not ground for reversal where the court subsequently instructs the jury to disregard the same, and where this court, from an examination of the

whole case, finds that the proof of defendant's guilt is practically undisputed.

10. CRIMINAL LAW \S 1186(4)—**HARMLESS ERROR—RULINGS OF TRIAL COURT.**

Conceding that some of the rulings of the trial court were erroneous, they affect no substantial right of the defendant, and under section 6005, Code of Criminal Procedure (Rev. Laws 1910), they must be regarded as technical, and insufficient to warrant a reversal of the judgment of conviction.

11. HOMICIDE \S 250, 314, 347—**SUFFICIENCY OF EVIDENCE—SENTENCE.**

The evidence in a homicide case examined, and held sufficient to warrant a verdict convicting the defendant of murder, but insufficient to warrant the extreme penalty of the law, and the judgment and sentence is modified to imprisonment for life at hard labor.

(Additional Syllabus by Editorial Staff.)

12. CRIMINAL LAW \S 598(2)—**CONTINUANCE—ABSENCE OF WITNESS—DILIGENCE.**

Where sheriff's return, filed May 9th, stated that he could not find a witness subpoenaed by defendant within his county, and affidavit filed when case came on for trial May 20th alleged that defendant's attorney examined return and continued to think that witness had been duly served until he did not appear when witnesses were called, the motion for a continuance for absence of such alleged material witness was properly denied for want of diligence.

13. CRIMINAL LAW \S 822(1), 1165(1)—**INSTRUCTIONS—SUFFICIENCY.**

It is sufficient if the instructions taken as a whole substantially present the law of the case fairly, and a defendant cannot complain of an error that cannot operate to his prejudice.

14. CRIMINAL LAW \S 992—**VERDICT—SENTENCE.**

In view of Rev. Laws 1910, \S 2319, permitting the jury in their discretion to award a death penalty or life imprisonment on a conviction of murder, the trial court cannot render judgment and sentence, except in accordance with the verdict, when the death penalty is assessed.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Jim Wilson was convicted of murder and appeals. Modified and affirmed.

John L. Hodge, of Ardmore, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. This is an appeal from a conviction of murder and judgment and sentence of death. The information charged that Jim Wilson did, in Carter county, on or about the 2d day of April, 1918, kill and murder one Oscar Kyle by striking and beating him on the head with an iron bolt, thereby inflicting a mortal wound. On May 24,

1918, in pursuance of the verdict of the jury, he was sentenced to suffer death by electrocution as provided by law.

On behalf of plaintiff in error it is argued that the evidence does not justify the verdict rendered, and that errors were committed upon the trial which require a reversal of the judgment and the ordering of a new trial.

The foundation of the case against defendant rests in his admissions to certain persons and his so-called "confession," testified to by the arresting officers as having been made to them within 24 hours of the homicide.

Defendant did not testify in the presence of the jury, as a witness in his own behalf, but offered testimony relative to threats against him made by the deceased, and testimony showing the finding of a knife and stick on the scene of the homicide the following morning, and submitted his case on the theory of self-defense.

[12] The first alleged error is in overruling defendant's motion for a continuance.

The case came on for trial on May 20th, and defendant filed his verified motion for a continuance on the ground of the absence of Oscar Vestal, a material witness. In defendant's affidavit he states:

"The said Oscar Vestal, if present, would swear that the deceased, Oscar Kyle, tried to get him, the said Vestal, to decoy the defendant, Jim Wilson, off to what is commonly called the 'Reservation,' the same being a resort for the purpose of prostitution in and near the city of Ardmore, and give him, the said Kyle, an opportunity to kill said defendant; that he conveyed this intelligence to said defendant; that affiant believes said evidence to be true, and that the same cannot be furnished by no other witness; that on the 6th day of May he caused a subpoena to issue for Oscar Vestal; a copy of the subpoena, with the return thereon, is attached to, and made a part of, the application. The return is as follows: 'Received this writ this 6th day of May. I cannot find the within-named Oscar Vestal within my county. Hugh Brown, Sheriff.' The subpoena and return was filed with the court clerk on the 9th day of May. Affiant further states that his attorney examined said return after the same was filed, and thought the said Oscar Vestal had been duly served, and continued so to think until the witnesses in the case were called and the said Oscar Vestal did not appear."

The motion for continuance was properly denied on the showing made, for want of due diligence.

The second assignment of error is that the court erred in overruling defendant's challenge to the jury panel.

The record shows that after the jury had been selected, but before being sworn to try the case, the defendant filed a challenge as follows:

"Comes now Jim Wilson, defendant in the above-entitled cause, and presents this his challenge to the panel of the jury for material de-

parture of the forms prescribed by law in respect to the selection, drawing, and returning of said panel, from which defendant has suffered material prejudice, and alleges that, although the court directed the sheriff to summon talesmen from the body of the county, the talesmen actually summoned and returned for said panel were nearly all from the city of Ardmore; that, of the panel of sixty-two jurors who appeared for examination touching their qualifications to sit in said cause, fifty-one of the number actually resided in the city of Ardmore, the very scene of the alleged murder. Wherefore defendant charges that said panel of jurors is not a fair and impartial panel, which the law guarantees in such cases; and therefore prays the court that his challenge to said panel be allowed, and said jury be discharged as to this case.

"The Court: I presume there will be no dispute on the venire summoned of the proportion that reside in Ardmore.

"The County Attorney: The court will presume that the sheriff made no discrimination and summoned these talesmen from the citizenship of the county as he found them. In addition to this, the court has carefully excused every man summoned in this case who admitted that he had any kind of impression touching the guilt or innocence of this defendant.

"The Court: The challenge is overruled."

[1, 2] Our Code of Criminal Procedure provides that a challenge to the panel can be founded only on a material departure from the forms prescribed by law, from which the defendant has suffered material prejudice. Section 5842, Rev. Laws.

And that "a challenge to the panel must be taken before a jury is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the ground of challenge." Section 5843, Rev. Laws.

So far as the record shows, the procedure in impaneling the jury was in the manner prescribed by law, and there is nothing to show that defendant exhausted his peremptory challenges, or that an objectionable juror was forced upon him.

Our Code further provides:

"When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner as if made to a juror." Section 5848, Rev. Laws.

The record discloses that the challenge to the panel was not founded on the bias of the officer who summoned them. The challenge was properly denied because it stated a mere conclusion, and no fact showing how or in what manner the venire was illegally selected. The mere unsupported assertion that the panel of jurors is not fair and impartial was not sufficient to warrant the court in discharging the jury.

The fourth assignment is that the court erred in admitting, over the objections of de-

fendant, irrelevant, incompetent, and immaterial testimony, all of which was prejudicial to the rights of this defendant.

It appears that numerous objections were made, and exceptions taken, during the course of the trial to the admission of evidence bearing upon the issues in the case.

[4-7] Several errors are assigned on the admission of defendant's alleged confessions and admissions, on the ground that the same were not voluntarily made.

It appears from the record that sufficient proof of the corpus delicti was made to justify the admission of a confession.

It appears from the evidence that Oscar Kyle, the deceased, and defendant, Wilson, were both laboring men, and resided in the city of Ardmore. Defendant had been employed as car inspector for about a year in the Santa Fé yards of said city. The deceased had a family, consisting of a wife and three small children. Defendant was a single man, boarding and rooming at the time with the deceased and his family. About 9 o'clock on the night of April 2, 1918, the deceased was found between the depot and the roundhouse of the Ringling Railroad lying between the main track and the North siding, near "H" street, in the city of Ardmore, in an unconscious and dying condition. He had several wounds about the head and face, and remained unconscious until his death, five or six hours later. Harvey Lee and defendant, Wilson, were arrested the next morning, and both stated to the officers that they were out to Whittington Park with two women from 8 until 11 o'clock the evening before. The last time the deceased was seen before the assault was about 8 o'clock that evening, when he was seen talking with defendant near the Santa Fé station.

L. T. Evans testified:

That he was car inspector for the Santa Fé Railway, working with defendant; that the morning following the homicide they were working together, "and I said, 'Jim, what in the world you reckon that fellow was doing out there last night to get killed with a train?' He says, 'The train didn't kill him.' I says, 'What the devil done it then?' He says, 'Somebody beat him to death, somebody hit him all about the head, the back of the head, the front of the head, and in the mouth with a bolt with the head on it.' I asked him how he knew they hit him with a bolt with the head on it. He said, 'There was the print of it.' Pretty soon he looked up and saw an automobile coming, and says, 'There comes the law; I believe they are after me.'"

Sheriff Garrett, Policeman Chancellor, and another man were in the automobile. They stopped and arrested him.

The alleged confession of the defendant was made to the sheriff, Buck Garrett. Sheriff Garrett testified:

"I was looking for defendant, and went through the Santa Fé yards, met him, and said,

'Jim, I will have to hold you for an investigation for this killing.' He replied, 'All right, Buck, I can prove where I was last night.' We went to the county attorney's office, and there he stated, in the presence of Jim Chancellor and Jim Dustin, that he was at Whittington Park the night before from 8 until 11 o'clock; that Harvey Lee and a couple of girls were with him, and he left them and came to town to get some tobacco; that one of the women was Mrs. Ruby Rutledge. I locked him up in the jail, and talked with Harvey Lee, and then went and talked with Mrs. Ruby Rutledge and Mrs. Britton. Then I went back to the jail, and again talked with Harvey Lee. I then had a talk with defendant, and told him what Mrs. Britton and Mrs. Rutledge had said. The defendant's statement to me was voluntary, absolutely. I said, 'Jim, somebody has lied about this; you might as well tell me about it.' He said, 'If I tell you about it you will go on the witness stand and swear it.' I says, 'Sure I would, whether it was for or against you; I would have to do that.' He said he had gotten with Harvey Lee and went to Oscar Kyle's house, and they came up to the Penington grocery, and stopped there a while, and went up to the Santa Fé station; that Lee told him that he had an appointment with some girls in South Ardmore; that he went up Main street and met Oscar Kyle up there. That Oscar asked him, 'What are you doing?' and he said, 'Loafing around,' and Oscar said, 'I got a date with a couple of girls out in West Ardmore; come and go with me.' He told him, 'All right;' and they started, and he described the place where Kyle was found. He said he asked Kyle, 'Where are those girls?' and Kyle said, 'Do you know where the tank is beyond the roundhouse?' and he said, 'Yes;'; and Kyle said, 'They are there.' He said, 'I am not going out there,' and Kyle says, 'The hell you ain't; what is the matter with you?' and Kyle made at him with something bright in one hand and a stick in the other, and Kyle hit him, and he struck Kyle about three times. I asked him, 'Jim, what did you hit Kyle with?' He said, 'An iron bolt; I can't tell you, but I can show you.' Then with Jim Chancellor, and defendant, I drove out there, and defendant got out of the car, looked around, and picked up an iron bolt and said, 'Here it is.' That he examined it, and there was blood on one corner of the bolt, and some hair was on the end of the tap. Witness produced a bolt fifteen inches long and one inch in diameter.

"Cross-Examination: Q. I will ask you if you didn't tell him at that time, 'You had just as well sit down and tell me, maybe I can help you out.' A. I did not. I says, 'Jim, you had better tell me about this.' He says, 'If I do, you will go on the stand and swear it.' I says, 'Certainly I would, whether it is for or against you.' Q. Didn't you tell him at that time that you would be a help to him? A. No; I didn't at that time. After the conversation was over I says, 'Jim, I am sorry for you; I hope I can do something for you.' Q. Have you in your possession the knife and stick found near the scene of the homicide? A. I have a knife and stick that is said to have been found there. Q. Who turned them over? A. Mr. Price, a policeman for the Ringling Company, gave them to me."

Jim Chancellor testified that there was no promise made nor threat used to extort the confession, and defendant's going to the scene of the tragedy was at his own request and a voluntary act on his part.

On request of counsel for defendant the court directed the jury to retire. Thereupon defendant, as a witness in his own behalf, testified, in substance, as follows:

"When the sheriff arrested me he told me he was holding me pending an investigation of this killing. The county attorney, Jim Dustin, and Jim Chancellor were present. Harvey Lee was arrested also, Sheriff Garrett put me in the south room, upstairs. A little later he came in there and said, 'Somebody had lied about it in the statements that Harvey Lee and I had made and these women.' He said, 'Harvey Lee had changed his statement, and I might as well tell the truth; that it looked like that it was a framed-up piece of business.' I told him that I would like to have my uncle from Ft. Worth, who is a lawyer, and one from McKinney phoned for. He said he would put in a telegram for him, and I might as well go ahead and tell the truth about it at that time; that he would keep the telegram in and get my uncle." He was then asked: "What caused you to make any statement? A. I thought from what he said and everything that he was a friend of mine and would help me as he said he would. He had favored me in the case before. Q. Did you up to that time want to make any statement at all? A. No, sir; I did not want to make any statement at all until I had seen an attorney. Q. You were placed in jail before that as the result of an Indian being killed down here on the track? (Objection sustained,)"

The admissibility of a confession, where it is challenged, is a question for the trial court. The court must decide, in the first instance, whether the evidence of the corpus delicti is prima facie sufficient to permit evidence of a confession to go to the jury, and it is for the trial court to determine whether the confession was voluntarily made and is therefore admissible as evidence.

In *Berry v. State*, 4 Okl. Cr. 202, 111 Pac. 676, 31 L. R. A. (N. S.) 849, it is said:

"Primarily there are two facts which render a confession inadmissible: First, that it was obtained under any form of compulsion, so that to receive it in evidence would violate the defendant's constitutional privilege against self-incrimination; and, second, that it was made under such circumstances of hope or fear as to create a fair probability of its testimonial untrustworthiness; and while the greater number of cases hold the contrary, yet we think the proper rule is that, in the absence of a statute governing the matter, prima facie any confession is admissible in evidence; and, where its admissibility is challenged by the defendant, the burden is on him to show that it was procured by such means or under such circumstances as to bring it within one or the other of the conditions stated, unless there is something in the confession itself or the other evidence on the part of the state which shows that it is inadmissible."

And Prof. Wigmore says that this is the practical and natural rule, "for, if there is any reason to object to the confession, no one can know it better than the defendant." He says further:

"Looking at the general principles of admissibility and the comparative rarity of untrustworthy confessions, as well as the contingent nature of the dangers supposed to flow from improper inducements, the more practical rule would be to receive confessions without question, unless they are shown to have been improperly induced, especially since a contrary rule may involve the difficulty of proving a negative." Wigmore on Evidence, vol. 1, § 360.

In *Anderson v. State*, 8 Okl. Cr. 90, 126 Pac. 840, Ann. Cas. 1914C, 314, it is held:

"The fact that a prisoner may be under arrest and in jail, and was not warned that any statement made by him might be used against him, will not in any manner affect the admissibility of any voluntary statement made by him which would otherwise be competent."

His counsel contends that defendant's statements as made to the officers were confessions induced by some hope or promise of a benefit, and were therefore not voluntary.

Upon a careful examination, we think it sufficiently appears that defendant's admissions and declarations were properly admitted. The mere fact that defendant testified that he made the statements because he thought that the sheriff was his friend and would help him did not overcome the prima facie case and the testimony of the officers. All safeguards thrown around confessions by the law are to insure the truth, and it is not disputed that defendant's alleged confession was true, and he did not offer himself as a witness, or any other testimony before the jury to show that his statements had been obtained by duress, inducement, or undue persuasion. We are inclined to think, also, that the admissibility of defendant's statements does not depend upon the fact that they were voluntary. Strictly construed, instead of being confessions of guilt of the crime charged, they are explanations of incriminating circumstances against defendant.

In criminal law a confession is a voluntary statement made by a person charged with the commission of a crime, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act, or the share and participation which he had in it. See Black, Law Dict.

In the case of *State v. Reinhart*, 26 Or. 466, 38 Pac. 822, it was said:

"A 'confession,' in a legal sense, is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred."

In *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203, it was said:

"Voluntary statements of fact made by a defendant in a criminal action, which do not tend to establish his guilt, but which are exculpatory in their nature, are competent evidence against him as admissions of a party."

Abbott in his Criminal Trial Brief, § 481, says:

"A declaration made by one accused of crime, denying any criminal act, and explaining suspicious circumstances for his own defense, is not a confession, and does not come within the rule that confessions must be voluntary to be admissible."

And again (section 513) the author says:

"Evidence of falsehood on the part of the accused in giving an account of himself, or of the transaction, or his relation to it, is competent as affording legitimate presumption of guilt. For this purpose the prosecution may prove such declarations of the accused, and then prove their falsity."

In *State v. Royce*, 38 Wash. 111, 80 Pac. 268, 3 Ann. Cas. 351, it was said:

"In a criminal prosecution statements made by the accused to police officers before he had been charged with any crime, and not resulting from threats made or inducements held out by the officers, are admissible in evidence."

A statement, declaration, or admission made by one accused of crime, explaining suspicious circumstances, for his own defense, from which the jury may or may not infer guilt, is not a confession, and does not come within the rule that confessions must be voluntary to be admissible. It would appear that defendant's purpose in all his statements was not to inculcate himself, but exculpate himself. He made the statements, not for the purpose of conceding that he was guilty of murder, or with any view to confess his guilt, but in the line of a denial of guilt—not an express, but an implied, denial. His statements constituted the basis of the defense made.

Several witnesses testified that the deceased had made threats against defendant's life. The only evidence tending to show an overt act on the part of the deceased is defendant's statements. Without this evidence the testimony tending to show that the deceased had made threats against the defendant's life was inadmissible.

It follows that defendant's statements to the officers were properly admitted.

Objection was taken to a question and the answer of Mrs. Kyle, the first witness for the state, upon her redirect examination. On her cross-examination she was asked and against the objections of the county attorney testified that her husband often abused her, and that defendant at such times would in-

terfere to prevent it, and for this reason her husband had several times threatened to kill him, and at one time assaulted him with a knife; that on April 2d, after supper, she heard her husband say that he would kill some one who said something about his questionnaire, and from what he said she knew he meant Jim Wilson.

Her redirect examination was as follows:

"Q. You say this trouble was over Mr. Kyle's questionnaire? A. Yes, sir.

"Q. Isn't it a fact that at the time your husband had a controversy with this defendant in your presence and accused this defendant of going before the board and putting him in class 1? A. My husband said that Mr. Wilson had tried to get him in class 1.

"Q. Isn't it a fact when this defendant was away from here if you and him didn't have long-distance phone calls? A. No, sir; I didn't. Two parties told me about that, and it was a falsehood.

"Q. At the time you heard about this long-distance call where was the defendant? A. At McAlester, I reckon.

"Q. What was he doing? A. In the penitentiary, I suppose.

"Mr. Hodge, Counsel for the Defendant: We object to that.

"The Court: That is not a part of the proof in this case; gentlemen of the jury, you will disregard it. You cannot assail the character of the defendant until he puts it in issue; you will disregard all that."

The testimony having been invited by improper cross-examination, and having been properly withdrawn, it affords no grounds for a new trial.

The next serious contention is that certain remarks of the court during the progress of the trial and in the presence of the jury prevented a fair and impartial trial.

It appears that when L. T. Price, a witness for the defendant, was on the stand the following proceedings were had:

"Q. State whether there upon the scene of the homicide any weapons were found.

"The County Attorney: Objected to as incompetent, irrelevant, and immaterial.

"The Court: What time was this—how long after the homicide?

"The County Attorney: From 10 o'clock one evening until 10 the next morning.

"The Court: Other witnesses have testified about going upon the scene and making an investigation. The objection is sustained.

"Mr. Hodge: Save our exception. Does the court rule that we can't show that weapons were found there at the time this man visited the scene of the homicide, 10 o'clock the next day?

"The Court: I withdraw the ruling so far as finding weapons are concerned.

"A. Well, there was a piece of broomstick there and a knife.

"The Court: Did you find that stuff then?

"A. Well; no, sir.

"The County Attorney: We object and ask that his testimony be excluded.

"By Mr. Hodge: Did you see that weapon picked up there?

"A. Well, now, I can't tell you.

"The Court: That is 9 o'clock the next day, after several have testified about going on the ground. I am going to sustain the objection. Several witnesses have testified about going on the ground where these things were supposed to have been found, and failed to find anything before this man was there.

"Mr. Hodge: We save an exception to the ruling and the remarks of the court relative to what other witnesses have testified concerning any searches made.

"The Court: The jury are the sole judges of the testimony; if there is such testimony, you know whether there is or not."

Pender Standfield, a witness for the defendant, testified he was upon the scene of the homicide about 10 o'clock the next day, and was asked:

"Q. Did you see any weapons picked up there on the scene of the homicide at the time?

"The County Attorney: Same objection.

"The Court: Is that the weapons you were asking about a while ago?

"Mr. Hodge: Yes, sir.

"The Court: The objection is sustained.

"Mr. Hodge: Save us an exception.

"The Court: I am going to withdraw that ruling, and let the testimony in, and give the defendant the benefit of the doubt."

Thereupon the witness Price was recalled, and asked to state if he saw these weapons picked up:

"The Court: I think I should explain to the jury when this question was asked a while ago the court sustained the objection of the state; after a further consideration of the matter, the court withdraws his ruling, and now permits this testimony."

Witness Price then testified that when he was there a negro told him that he had picked up the knife and stick.

Witness Standfield, recalled, testified that he was present when Tom McKinney picked up a knife and a stick there.

Tom McKinney testified that the next morning about 10 o'clock he picked up the knife and the stick about 80 feet from where the killing occurred.

[8] Obviously, the first objection interposed was properly sustained. However, the remarks of the court were wholly improper and uncalled for. It was for the court to pass upon the admissibility of testimony, but it was exclusively the province of the jury to pass upon the credibility of the evidence adduced, uninfluenced by the trial court as to its weight or credibility. The remark of the court that "several witnesses have testified about going on the ground where these things were supposed to have been found, and failed to find anything, before this man was there," was clearly a comment on the weight of the evidence. The court attempted to correct the error by observing, "The jury are the sole judges of the testimony; if there is such testimony,

you know whether there is or not;" and by giving the following instruction, "You are the sole judges of the facts proven, the weight and value of the evidence, and of the credibility of the witnesses." There is no question about the fact that defendant killed the deceased, and the evidence abundantly sustains the verdict finding defendant guilty of murder. This being so, ought we to set aside the judgment and grant a new trial merely for this remark? Our Code of Procedure Criminal (section 6005, Rev. Laws) provides no judgment shall be set aside or new trial granted on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

By this provision this court is forbidden to reverse a judgment of conviction for error, unless, after an examination of the entire record, it is of the opinion that the error has probably resulted in a miscarriage of justice. It thus makes it the duty of this court in considering the questions of law presented to examine the entire record, including the evidence. It follows that this court is necessarily vested with a large discretion in determining the effect of errors, and each case must depend upon its own circumstances, since it is the opinion of the court, upon a full consideration of the particular record, including the evidence, that is to control upon the question whether the error complained of has resulted in a miscarriage of justice.

There is no question about the fact that defendant killed the deceased, and the evidence of deliberation and premeditation, independently of the undisputed facts and circumstances, shows that on the evening of the tragedy defendant met witness Crowley near the Busy-Bee restaurant, and said to him, "I know where we can get a hundred dollars by killing a son of a bitch," and Crowley said, "Couldn't we get the money any other way;" and defendant said, "No, I would not undertake it any other way without killing him." Crowley said, "Who is it?" Defendant said, "I won't call any names; he is a working son of a bitch who always carries a hundred."

That the killing was deliberate is established by the evidence beyond a doubt, and, upon the evidence, it seems to us that the conviction was at all events inevitable. After a most careful examination of the record we are satisfied that the remarks of the judge did not constitute error requiring a reversal of the case.

Another assignment is that the court erred in the instructions given. The charge of the court submitted the issues of murder and of manslaughter in the first degree and the law of self-defense. The instructions of the court, while not strictly correct, when considered as a whole were as favorable to defendant as he had any right to demand.

The ninth instruction, which was excepted to, is as follows:

"Evidence has been admitted to prove that on various and sundry occasions prior to the killing the deceased had made threats upon the life of the defendant herein. In this connection you are told that bare threats made by the deceased, either communicated or uncommunicated, will not mitigate a homicide; and such proof cannot be considered by you as justifying the killing on the part of the defendant, unless the threats themselves were accompanied by some overt act or demonstration on the part of the deceased which furnished the defendant reasonable cause to believe that he was in danger of being killed or of receiving great bodily injury at the hands of the deceased."

It is objected to this instruction that by it the jury are told that the act or demonstration must have furnished defendant reasonable grounds to apprehend danger, thereby depriving him of the benefit of the circumstances as they reasonably appeared to him, and that the jury likely got the idea from the language used that a threat without an act was not to be considered. The instruction, to be technically correct, should have read, "unless at the time of the homicide there was some overt act or demonstration."

[13] This court has often held it is sufficient if the instructions, taken as a whole, substantially present the law of the case fairly. Absolute correctness of proceeding cannot be obtained, even in our very best courts, and a defendant cannot be heard to complain if an error is committed that cannot operate to his prejudice.

[8] Another assignment is that the prosecuting attorney in his argument to the jury made use of inflammatory language while referring to the defendant and which was entirely unwarranted by the evidence.

The alleged objectionable remarks are not properly shown by the record. However, it appears that counsel for defendant in the course of the opening argument interposed an objection. The prosecuting attorney replied:

"If the court please, I want this in the record to show the state's theory of this case, of how this occurred, that this is the most cruel murder I ever asked twelve men to pass upon. These are my remarks."

The remarks of counsel must be considered and construed in reference to the evidence, and we think the remarks complained of are not of such character to raise the pre-

sumption that defendant was prejudiced in any decree.

[10, 11] Upon a very careful examination, both as to the law and the evidence, we have failed to discover anything that would warrant a reversal of the case.

There only remains the question as to whether the judgment should be modified by this court.

One of the grounds in the motion for a new trial and assigned as error is: "The penalty assessed by the verdict of the jury, in its severity, is not justified by the evidence and the law."

[14] Under the following provision of the Penal Code the punishment to be inflicted for the crime of murder is left to the determination of the jury:

"Any person convicted of murder may suffer death, or imprisonment at hard labor in the state penitentiary for life, at the discretion of the jury." Section 2319, Rev. Laws.

When the death penalty is assessed the trial court is without power or authority to render judgment and sentence except in accordance with the verdict. *Owen v. State*, 13 Okl. Cr. 195, 163 Pac. 548.

It is provided in the Code of Criminal Procedure that "the appellate court may reverse, affirm or modify the judgment appealed from." Section 6003, Rev. Laws.

By this provision it seems to have been the intention of the Legislature to vest this court with power to modify the judgment, when such a course would be in furtherance of justice and conduce to the humane administration of the law. In a capital case it is the duty of this court to examine, with the greatest care, the whole record in favor of life, and review the case upon the merits to determine whether justice requires a modification of the judgment to imprisonment for life.

In this case the fact that the open venire was summoned by an officer who was one of the main witnesses in the case should be considered, although no proper objection was made or exception taken.

In *Koontz v. State*, 10 Okl. Cr. 553, 139 Pac. 842, Ann. Cas. 1916A, 639, it is said:

"It is essential to the fair and impartial administration of justice that an open or special venire should be summoned by an officer who is not disqualified by reason of interest, bias, or prejudice."

And while there is nothing to show that defendant exhausted his peremptory challenges, or that an objectionable juror was forced upon him, yet we are unable to disabuse our minds of the conviction that, all the circumstances being considered, defendant may have been seriously prejudiced. We are also inclined to think that the evidence

is insufficient to warrant the extreme penalty of the law. For these reasons we are of opinion that justice requires a modification of the judgment and sentence of death to that of imprisonment at hard labor in the penitentiary for life.

The judgment of the district court of Carter county herein is so modified; as thus modified, the judgment is affirmed.

ARMSTRONG and MATSON, JJ., concur.

BOYER v. STATE. (No. A-2964.)

(Criminal Court of Appeals of Oklahoma. Sept. 16, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 1151—DENIAL OF CONTINUANCE—ABUSE OF DISCRETION—REVIEW.

In order to cause a reversal of a conviction on account of the overruling of a motion for continuance, it must be clearly shown that the court in so doing abused its discretion.

2. CRIMINAL LAW — 655(3) — REMARKS OF COURT.

It is not proper for a court, when passing upon a motion for continuance, in the presence of attending jurors from whom a jury is to be selected to try the case in which the motion is made, to express his opinion that "the motion is simply a ruse to pass the case over."

3. HOMICIDE — 135(1, 4), 136—INFORMATION—MANNER OF KILLING—DEMURRER.

An information charging, in substance, that a homicide was committed by means of a certain dangerous weapon, to wit, a neck yoke of a wagon, about three feet long, which they and each of them then and there held in their hands, then and thereby inflicting upon the body of the deceased mortal wounds, charges the length of the neck yoke and not the length of the wagon, and that the defendants held the neck yoke and not the wagon in their hands when they struck the deceased said fatal blows, and a demurrer to such information on the ground that it does not charge an offense, because it does not allege "the manner of use, the size of the neck yoke, and the place upon the body of the deceased which was beaten and wounded," was properly overruled.

4. HOMICIDE — 136 — INFORMATION — LOCATION OF WOUND.

Where a homicide is committed by blows inflicted upon the body of the deceased with a neck yoke of a wagon, it is not necessary to charge, in an information for such homicide, the particular parts of the body of the deceased upon which said blows were inflicted.

5. HOMICIDE — 300(3) — SELF-DEFENSE — INSTRUCTIONS.

The instruction given the jury in the instant case as to what facts would deny the du-

defendant the right to avail himself of the defense of self-defense carefully considered, and held not to correctly state the law.

6. CRIMINAL LAW §657—CONDUCT OF TRIAL COURT—REPRIMANDING THE DEFENDANT'S COUNSEL.

Where the trial court, without just grounds therefor, in the presence of the jury severely reprimands the defendant's counsel, assesses heavy fines against him, and orders that he be committed until said fines are paid, said action and conduct clearly tending to prejudice the defense before the jury, is held reversible error in this case.

(Additional Syllabus by Editorial Staff.)

7. WITNESSES §349 — EXCLUSION OF EVIDENCE—DISCRETION OF TRIAL COURT.

On trial for homicide, exclusion of questions to deceased's wife, a witness for the state, as to character of place at which she had registered under an assumed name, as to whether she had occupied a room there with a named man the night before the trial, offered to show her want of virtue, was not an abuse of court's discretion.

8. WITNESSES §372(2) — ADMISSIBILITY OF EVIDENCE—BIAS OF WITNESS.

On such trial for murder, her cross-examination as to whether she had executed a power of attorney of her interest in the prosecution, and as to whether she had endeavored to settle it for a money consideration, and failed, was improperly excluded, as it bore on the weight and bias of her testimony and as to her feeling against defendant.

9. HOMICIDE §332(3)—SUFFICIENCY OF EVIDENCE—REVIEW.

Where there was evidence, though conflicting, to sustain a conviction of manslaughter in the first degree, the Criminal Court of Appeals would not disturb the verdict, as the weight of the evidence was for the jury.

Appeal from District Court, Tulsa County; George C. Crump, Judge.

D. B. Boyer was convicted of manslaughter in the first degree, and appeals. Reversed and remanded.

Woodson E. Norvell, of Tulsa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, D. B. Boyer, hereinafter called the defendant, was informed against jointly with Bill McGinnis for the murder of Claud Rima, tried separately, convicted of manslaughter in the first degree, and sentenced to imprisonment in the penitentiary at McAlester at hard labor for a term of five years. To reverse the judgment rendered, he prosecutes this appeal.

The defendant filed a verified motion for a

continuance supported by an affidavit of his attorney's physician, on the ground that his said attorney was physically unfit to undertake the trial of the defendant. The court, in the presence of the attending jurors, remarked:

"That he anticipated that this action would be taken two or three days ago, before this case was called, that Mr. Norvell was in the courtroom two days previous to the calling of the case, in the court's chambers, and the court took judicial notice that when the case was called he got sick all at once, and from the conduct of the attorney just before the case was called, the court is of the opinion that this is simply a ruse to pass the case over. While the court is not a physician, the attorney representing the defendant was in the courtroom all day and in the court's chambers and talked with him, and when the case was called for trial began to complain of feeling bad. It may be the excitement of this case that has unnerved him. This court gave the defendant from last Saturday until to-day to procure other counsel, and if the defendant didn't procure counsel, it is his fault."

The affidavit of the physician filed in support of said motion in substance was: That said attorney—Mr. Norvell—was at the bedside of his wife when a serious operation was performed on her, and for the succeeding 48 hours was almost in constant attendance upon her at the hospital; that anxiety, loss of sleep and strain upon Mr. Norvell had greatly and seriously exhausted his vitality, and in consequence he was not at this time able to undergo any prolonged strain upon his mind, body, or nerves; that any continued draft upon his decreased vitality might, and probably would, result in complete nervous exhaustion and total collapse.

An exhaustive examination of the defendant developed that the defendant had employed Mr. Norvell as his attorney from the first of the case, and frequently conferred with him, that he had paid him \$1,500 on account of his fee, and that he was unable to employ another attorney by reason of the fact that he had only \$2.50 in his pocket and about \$25 owing him, and had no other property except two horses, and that he had made no effort to get other counsel since last Saturday.

Mr. Norvell being absent from the courthouse, the court appointed two attorneys to represent the defendant, overruled the motion for a continuance, to which the defendant excepted, and the selection of the jury began. Thereupon Mr. Norvell appeared in the courtroom and requested that the stenographer read the list of jurors that had been excused and the peremptory challenges, to which the court replied, "The record shows." Mr. Norvell said he could not read the stenographer's notes, to which the court replied:

"You can read the long hand made by the clerk. I have had a few cases myself and know how they run. If attorneys play fair with the court, the court will play fair with the attorneys."

Thereupon Mr. Norvell said:

"I do not understand what your honor means by that. Your honor, I have sat on that very seat myself and tried men for murder, and no member of the bar excels me in respect for the court."

The court then said:

"Well, I don't know the bar very well. Call the jury."

Thereupon the selection of the jury was completed and the trial proceeded, with Mr. Norvell acting as attorney for the defendant.

The charging part of the information is as follows:

"D. B. Boyer and Bill McGinnis, on the 22d day of September, A. D. 1915, in Tulsa county, state of Oklahoma, and within the jurisdiction of this court, did commit the crime of murder in manner and form as follows, to wit: The said D. B. Boyer and Bill McGinnis, while acting together and in concert with each other, then and there willfully, unlawfully, feloniously, and maliciously, and without authority of law, and with a premeditated design then and there upon the part of the said defendants and each of them to effect the death of one Claud Rima, strike, beat and wound the said Claud Rima with a certain dangerous weapon, to wit, a neck yoke of a wagon, about three feet long, which they and each of them then and there held in their hands, then and there and thereby inflicting upon the body of the said Claud Rima mortal wounds, from which he, the said Claud Rima, then and there languished and died, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Oklahoma."

The defendant demurred to the information upon the ground among other grounds, that the information fails to state facts sufficient to constitute a public offense. The court overruled the demurrer, and the defendant excepted.

The uncontradicted material evidence is: That a teamster driving a wagon loaded with whisky drove into Phillips Lake, lost his load of whisky, broke his coupling from his wagon, and himself and horses attached to said wagon were drowned; that, the water receding, the bodies of the horses drifted ashore near a road along said lake; that the owner of the said horses came to where the bodies of the said horses were, to arrange for their burial; that the deceased, in a wagon accompanied by his wife and others, stopped near said dead horses, and was employed to and did aid in burying said horses; that a quantity of whisky was found on the lake shore, and that while preparation for said burial was in progress the defendant in a

partly intoxicated condition came to the scene of the burial, having in a sack bottles of whisky, was in an angry mood and expressed a desire to fight, threw his hat on the ground, and said he could whip any son of a bitch that got on it; that the deceased and defendant drank whisky together, became involved in heated arguments and indulged in profanity towards each other which resulted in a fight; that while said fight was in progress the wife of the deceased struck the defendant; that upon becoming separated the defendant went a short distance, secured a "neck yoke of a wagon," immediately returned to where the deceased was, and struck deceased on his forehead and across his ear, from which blows the deceased died the same day he was struck.

The evidence was in sharp conflict as to whether or not the deceased at the time he was struck by the defendant was armed with a piece of wagon coupling about three feet long and endeavoring to strike the defendant, and as to what the wife of the deceased struck the defendant with, and there was evidence that at the time that the defendant struck the deceased the blows that caused his death that the deceased was down, without anything in his hands and unarmed, and in a helpless condition from intoxication.

The wife of the deceased, a witness for the state, upon cross-examination, having testified that on September 13, 1916, she had registered at the "Mistletoe Rooms" in Tulsa under the assumed name of Stella Wright, and that she knew a Mr. Maddox, was asked the following questions by the defendant, viz.:

"That is a bawdyhouse, isn't it? Was Mr. Maddox registered at the Mistletoe Rooms on the night you registered under the name of Stella Wright? What room did you have?"

To each of said questions an objection was interposed by the state, and sustained by the court, and separate exceptions saved to said action of the court.

A general power of attorney executed by said witness to Charles Hann having been put in evidence, she was asked by the defendant the following questions, viz.:

"What business was it you wanted Mr. Hann to transact for you? Did the execution of this power of attorney have anything to do with the prosecution of this lawsuit? Where were you married? When were you married?"

To each of said questions an objection was interposed by the state and sustained by the court, and to said action of the court separate exceptions saved. The defendant then offered to show by this witness that the business which she authorized Charles Hann to transact under the said power of attorney was the collection of money for a settlement of this prosecution, which offer the court re-

fused to permit the defendant to perform, and the defendant excepted.

The court, addressing the defendant's attorney, said, "Hadh't you better sit down so the jury can see the witness?" to which Mr. Norvell replied that the ruling of one of the federal courts is to require counsel to stand. The court then said, "You may stand if you don't be spectacular."

The defendant then asked the witness, "Didn't you and Mr. Maddox return from Sand Springs and go to the Mistletoe Rooms and occupy the same room? The court sustained an objection to this said question, and said: "If you ask any more questions about that I am going to fine you. If that does not stop you, I am going to stop you some other way."

Thereupon the following proceedings were had: Mr. Norvell, attorney for the defendant, was ordered to proceed with the case, to which he replied, "I am proceeding with it, and am offering to make an offer," to which the court replied, "The offer will be denied." Mr. Norvell then said, "I offer it anyhow, your honor cannot—" The court then asked if Mr. Norvell had any more questions, and Mr. Norvell replied, "Your honor cannot refuse to make a record." Thereupon the court directed the clerk to enter a fine of \$50 against Mr. Norvell, and that Mr. Norvell stand committed until said fine is paid.

Among other instructions, the court gave the following instruction, to which the defendant excepted;

"No. 19. The plea of self-defense is given to a citizen for his protection, and cannot be pleaded as a defense to homicide by one who is the aggressor or voluntarily enters into a difficulty; and in this connection you are instructed that if you believe from the evidence that the defendant sought, brought on, or voluntarily entered into the fatal difficulty in which the deceased lost his life, the defendant cannot avail himself of the right of self-defense, for the plea of self-defense is a defense growing out of necessity to take human life; the party taking life must be without fault."

The following occurred during the argument of Mr. Wallace, assistant county attorney, to the jury:

"Mr. Norvell: I challenge the statements of the county attorney. He knows the evidence wasn't anything like that.

"The Court: Mr. Norvell, for that statement you are fined \$25, and you will be committed to the sheriff of this county until that fine is paid. The sheriff will so receive him as such, and I don't want to hear any more of it. This is a civilized country where God rules, and men's lives ought to be protected and their liberties ought to be protected. You have acted in this case all the way through by sitting on the table, by slamming doors, by your reprehensible conduct, in a way, Mr. Norvell, that you ought not to do."

The defendant excepted to the said remarks of the court in the presence of the jury.

The defendant timely moved for a new trial, which was overruled and exception saved.

There are very many errors assigned, other than alleged errors herein stated, which, from the view we take of the case, we deem unnecessary to state.

[1, 2] The defendant first contends that, as the grounds set up in the verified motion for a continuance were not denied by the state, the court committed reversible error in overruling said motion. We are unable to say that the court abused its discretion in overruling said motion, and think the fact that prior to the completion of the jury Mr. Norvell appeared in the courtroom, took charge of and most actively conducted the defense to the conclusion of the trial shows that the court did not err in overruling said motion. But we do not approve the remarks of the court made in open court and in the presence of the jurors assembled from which a jury to try the case was to be selected, in connection with said motion, that "the court took judicial knowledge that when the case was called he (Mr. Norvell) got sick all at once, and from the conduct of the attorney just before the case was called that this [the motion] is simply a ruse to pass the case over," but we do not think that in making said remarks the court committed such error as alone should cause a reversal of this case.

[3, 4] The defendant also contends that the court committed reversible error in overruling the demurrer to the information because "it is not averred therein the manner of use, the size of neck yoke, and the place upon the body of deceased which was beaten and wounded, as the averment in the information 'about three feet long' is descriptive of the size of the wagon, and not descriptive of the size of the wagon yoke, and that it is averred that the defendants held the wagon and not the wagon yoke in their hands." We are satisfied that the averment "three feet long" describes the size of the wagon yoke, and cannot be contorted as referring to the size of the wagon, and that the information clearly avers that the defendants held the wagon yoke in their hands, and not the wagon. It was sufficient to aver that the blows struck by the defendants with the wagon yoke caused the death of the deceased, without specifically stating upon what part of his body such blows were struck. If the blows caused the death of the deceased it was entirely immaterial upon what part of his body they were inflicted. We are of the opinion that the information is "certain and direct as to the parties charged, the offense charged, and particular circumstances of the offense charged," so far as necessary to constitute a complete offense, and is strictly within all the requirements of section 5739, Revised Laws, cited by defendant to sustain his attack upon said information. We con-

clude that the court did not err in overruling the demurrer to the information.

[7] The defendant earnestly insists that the court committed reversible error in sustaining objections to questions asked the wife of the deceased as to the character of the "Mistletoe Rooms" and as to her having occupied there a room with Mr. Maddox the night previous to this trial, and also as to the business to be transacted under the power of attorney executed by her to Charles Hann. We are of the opinion that the questions in regard to matters not connected with the facts of trial, and tending to degrade a witness by proof of her want of virtue, "should be closely guarded, and allowed only upon the exercise of sound judicial discretion, and then only to affect the credibility of the witness" (*Castleberry v. State*, 10 Okl. Cr. 504, 139 Pac. 132), and we are unable to say that in sustaining objections to the said questions seeking to elicit evidence of the want of virtue on the part of the witness that the court "wrongfully exercised his sound judicial discretion."

[8] The question as to the purpose for which said power of attorney was executed by the witness to Charles Hann was to the interest of said witness in the prosecution. If it was a fact that she had endeavored to settle this prosecution for a moneyed consideration and failed, it would be at least proper that the jury have such evidence in order to properly weigh her testimony, as it logically follows that such attempt and failure to so settle this prosecution would quicken her natural feeling against the defendant and bias her testimony, and hence the court committed error in refusing to permit the witness to explain for what purpose said power of attorney was executed by her.

[9] The defendant further complains that the evidence is insufficient to support the verdict of the jury, and with this contention we are unable to agree. It is true that the evidence is in sharp conflict as to whether or not the defendant acted in self-defense in striking the blows which caused the death of the deceased, but there was evidence that at the time the deceased received the wounds inflicted upon him by the defendant that the deceased was down, without anything in his hands and unarmed, and in a helpless condition by reason of being intoxicated. There being evidence to sustain the verdict of the jury, though the evidence be in conflict, this court, as held by an unbroken line of decisions, will not disturb the verdict.

"In a homicide case, where there is evidence supporting the theory of the state that the defendant did not act in self-defense, and also evidence supporting the theory of the defendant that he acted in self-defense, it is the exclusive province of the jury to determine which is the correct theory, and, having done so, if the instructions of the court properly present the law of the case, this court will not disturb the verdict." *McClatchey v. State*, 177 Pac. 922.

[5] The defendant complains that the court committed reversible error in giving the jury said instruction numbered 19, and this complaint we think well grounded. Said instruction does not sufficiently state what character of acts on the part of the defendant would deprive him of the right of self-defense, does not correctly define the right of self-defense, and the court committed reversible error in giving the jury said instruction.

In *Gibbons v. Territory*, 5 Okl. Cr. 212, 115 Pac. 129, it is held:

"Where in a homicide case the state endeavors to show that the defendant sought or brought on the difficulty, and the general rules of law are charged on this phase of the case, the court should define and state what character of acts on the part of the defendant would deprive him of the right of self-defense."

"(c) When the prosecution in a homicide case is based on the theory that the defendant provoked the difficulty, the character of the provocation in connection with the intent should be set out and defined in separate affirmative charges."

In *Turnbull v. State*, 8 Okl. Cr. 459, 128 Pac. 743, it is held:

"When, in the trial of a person charged with murder, it becomes necessary for the trial court to instruct the jury on the doctrine of seeking or provoking the difficulty, and the proof discloses that the accused did any act or thing which he had a right to do, which could be reasonably construed by the jury to come within the terms of the court's charge, it is necessary for the court to tell the jury what acts under the law would be justifiable, and discriminate as to acts unlawful which would deprive him of the right of self-defense, leaving to the jury to determine whether or not, under the facts and the law, the acts were lawful or otherwise. When this is not done, and instructions are given which, reasonably construed, deprived the accused of the right of self-defense, if he by any willful act of his own, lawful or unlawful, brought on the difficulty, a conviction cannot be upheld by this court."

In order to deprive a defendant of the right of self-defense "the difficulty must be prepared for, sought, and provoked for the purpose and with the intent on the part of the accused to take the life of the deceased or do him great bodily harm," and the jury should be so instructed. *Swan v. State*, 13 Okl. Cr. 556, 165 Pac. 627.

In *Foutch v. State*, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687, it is said:

"In order to make a man guilty of murder who is the 'aggressor' or 'in fault,' or who 'provokes a difficulty,' in which his adversary is killed, he must have provoked it with the intent to kill his adversary, or do him great bodily harm, or to afford him a pretext for wreaking his malice upon his adversary. * * * In order to deny to such party the right to rely on the plea of self-defense, it must appear that he was the 'aggressor' or 'in fault,' or 'provoked the difficulty' in such way and with such intent as the law contemplates in the use of these

terms. It is not every 'aggression' which produces a difficulty that is an unlawful one within the meaning of this phrase, nor is it every 'fault' which a man might commit that precludes him from defending himself when violently assaulted or menaced, nor is it every 'provocation of a difficulty' which robs him of the right of self-defense."

[6] The defendant in his motion for a new trial alleges many grounds therefor, which said grounds we deem unnecessary to set out or review in detail. Considering the entire record, we are of the opinion that at the beginning of the trial friction arose between the defendant's attorney and the court, and which continued throughout the trial, which should not have arisen, that the remarks of the court when the motion for a continuance was being considered, and the expression of the court's opinion in open court and in the presence from which the jury was to be selected, "that said motion was a ruse to pass the case over," the heavy fines assessed against the defendant's attorney during the trial of the case, notwithstanding said fines were remitted after the verdict of the jury was rendered, the several very severe reprimands administered to the defendant's attorney in the presence of the jury trying the case, without just grounds therefor, together with other acts of the court which we deem unnecessary to recite, created an atmosphere surrounding the trial which prevented the defendant having that fair and impartial trial to which he was entitled, and hence the court committed reversible error in refusing to grant the defendant a new trial.

In *McSpadden v. State*, 8 Okl. Cr. 489, 129 Pac. 72, it is held:

"Attorneys for a defendant are entitled to and must receive * * * fair treatment at the hands of a trial court, and when this is not accorded them, and the error is of such a character that it may have influenced the jury in finding a verdict, a conviction will be reversed."

In said case it is said:

"Courts have no right to humiliate and outrage lawyers for the defense for doing their duty. The effect of this necessarily creates the impression upon the minds of the jury that the counsel for the defense has been guilty of unfairness, and improper conduct, and this is calculated to excite their prejudice against the defendant. It may be accepted as a cardinal principal of criminal jurisdiction that fairness is a necessary element in the trial of criminal cases in this state. Attorneys for the defense may rely with confidence upon the protection of this court as long as they act within their legal rights. This is as much our duty as it is to condemn their conduct when they are guilty of unprofessional practice."

As the errors pointed out must cause a reversal of the judgment rendered, we deem it

unnecessary to consider any other of the many errors assigned, especially in view of the great probability that the said errors not considered will not occur in another trial of this case.

The judgment of the trial court is reversed, and the cause remanded.

DOYLE, P. J., and MATSON, J., concur.

WILHITE et al. v. STATE. (No. A-3303.)

(Criminal Court of Appeals of Oklahoma.
Sept. 20, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1182—AFFIRMANCE—RULE OF COURT.

Where there was no appearance for plaintiffs in error, nor any brief filed in their behalf, and the Criminal Court of Appeals, on examination of the pleadings and instructions, judgment, and sentence finds no prejudicial error, the judgment will be affirmed in accordance with its rule 9 (165 Pac. x).

Appeal from County Court, Kay County;
H. S. Burke, Judge.

Charles A. Wilhite and Catherine M. Wilhite were convicted of unlawfully settling on land and fined \$50 each, and each appeals. Judgments affirmed.

G. A. Chappell, of Newkirk, for plaintiffs in error.

The Attorney General, for the State.

PER CURIAM. Charles A. Wilhite and Catherine M. Wilhite were convicted in the county court of Kay county of the crime of unlawfully settling on land, and their punishment fixed as above stated.

This appeal has been pending in this court since the 29th day of March, 1918, the cause having been submitted June 6, 1919, at which time no appearance was made by any counsel representing plaintiffs in error, nor has any brief been filed in their behalf. Rule 9 of this court (165 Pac. x) provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence, and if no prejudicial error appears, will affirm the judgment."

This appeal has evidently been abandoned. An examination of the pleadings, instructions, and judgment and sentence discloses no prejudicial error, and in accordance with rule 9, *supra*, the judgment is affirmed.

FREEMAN v. STATE. (No. A-3339.)

(Criminal Court of Appeals of Oklahoma.
Sept. 22, 1919.)

(*Syllabus by Editorial Staff.*)

1. INTOXICATING LIQUORS — 238(4) — POSSESSION WITH INTENT TO SELL—QUESTION FOR JURY.

Evidence in a prosecution for possession of intoxicating liquors with intent to sell them held to make defendant's guilt a question for the jury.

2. CRIMINAL LAW — 1159(2) — APPEAL — VERDICT.

Questions of fact are to be decided by the jury, and, where the evidence reasonably supports the verdict, the judgment will be affirmed.

Appeal from County Court, Tulsa County; H. L. Standeven, Judge.

Lawrence Freeman was convicted of a violation of the prohibitory liquor law, and appeals. Affirmed.

Ed Crossland, of Tulsa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Lawrence Freeman, was convicted in the county court of Tulsa county on a charge that he did have possession of 58 pints of whisky, 11 quarts of whisky, 1 gallon of alcohol, and 2 pints of champagne, with the intent to sell the same, and in accordance with the verdict of the jury he was sentenced to be confined for 30 days and to pay a fine of \$50.

[1] The sole question presented is the sufficiency of the evidence to support the verdict.

Jim Patton testified that in serving a search warrant he saw the defendant at the Oliver Hotel, on East First street, city of Tulsa, going upstairs; that he and another officer followed him, and found the liquor described in the information in the linen room under a trap door in the floor; that he often saw the defendant there, and that his wife stayed upstairs.

T. L. Powell testified that defendant, Freeman, was running the place; that he with two or three other officers served a search warrant; that down stairs there was a long bar, cigar case, with the back room partitioned off, and a little counter in there; that he and the officers broke through the back door, and defendant turned out the lights; that they found in the floor of a clothes closet up stairs a secret door, and under this they found the whisky, alcohol, and wine described in the information; that he had been there about 15 times, and defendant was always there; that at those times defendant acted as proprietor.

The only evidence introduced by the defendant was that of his attorney, who testified that witness Powell had told him on two occasions that he did not know of his own knowledge that Lawrence Freeman owned this place.

[2] We think that upon this evidence it was purely a question of fact for the jury to determine whether the defendant had the possession of the liquors seized. Questions of fact are to be decided by the jury, and, where the evidence reasonably supports the verdict, the judgment will be affirmed.

The judgment is affirmed.

MIDDLETON v. STATE. (No. 2333.)

(Criminal Court of Appeals of Oklahoma.
Aug. 30, 1919.)

(*Syllabus by the Court.*)

1. GRAND JURY — 8 — SELECTION BY JURY COMMISSIONERS—POWER OF SUPERIOR COURT—STATUTE.

When it is required to impanel a grand jury, and there is not a sufficient number of names in the jury box of the court from which to draw such grand jury, a superior court has jurisdiction to order the jury commissioners to convene and select 30 names, to be placed in the jury box, from which to draw and select a grand jury.

2. GRAND JURY — 2—SELECTION AND IMPANELING—STATUTE.

The law of this state in regard to selecting, summoning, and impaneling a grand jury is directory, and a substantial compliance therewith is sufficient.

3. GRAND JURY — 39—PRESENCE OF UNAUTHORIZED PERSON—VALIDITY OF INDICTMENT—STATUTES.

The presence of an unauthorized person in the grand jury room while testimony is being taken, and not while the grand jury is deliberating or voting upon an indictment, will not invalidate an indictment, unless it is reasonably probable that the accused was thereby prejudiced in some substantial right.

4. GRAND JURY — 33—ACTION OF COUNTY ATTORNEY—MISCONDUCT OF JURY—VALIDITY OF INDICTMENT.

A grand jury became dissatisfied with the county attorney and his assistants, and sought to have the county attorney remove one of his assistants and appoint in his stead a designated person, and, upon the county attorney refusing so to do, made a report to the court asking its assistance to cause the county attorney to comply with their demand, which the court refused to do, and thereafter caused a complaint against the county attorney to be drafted, but which was not presented to the court, but came to the knowledge of the county attorney, and thereafter the county attorney, upon promise of re-

appointment when the grand jury adjourned sine die, secured the resignation of one of his assistants, and nominated and had appointed another person as assistant to fill the vacancy caused by said resignation, and the party so appointed as assistant county attorney took the oath of office, appeared before the grand jury, and advised them as to the findings of an indictment, and the assistant county attorney so appointed filed with the county commissioners a claim for \$500 for his said services before the grand jury, and subsequently withdrew such claim, held that said action of the grand jury and of the county attorney did not constitute such misconduct as to constitute grounds for setting aside an indictment found by such grand jury.

5. DISTRICT AND PROSECUTING ATTORNEYS ⇨
3(1)—GRAND JURY ⇨34—DE JURE ASSISTANT COUNTY ATTORNEY—VALIDITY OF APPOINTMENT—INDICTMENT.

Regardless of what pressure was brought upon the county attorney to cause him to secure the resignation of one of his assistants, and the appointment of another to fill such vacancy, the person so appointed, upon duly qualifying, is a de jure assistant county attorney, and may legally attend upon a grand jury and advise as to the finding of an indictment, and that the person appointed as such assistant county attorney filed with the county commissioners a claim for \$500 for his said services before the grand jury did not render the appointment of such assistant county attorney void, and his attendance upon and advice to the grand jury in regard to finding an indictment did not constitute legal grounds for setting aside an indictment found by such grand jury.

6. CRIMINAL LAW ⇨1033(2)—MOTION FOR CHANGE OF VENUE—ERROR.

Where two persons are jointly indicted, and before a severance, a motion for a change of venue by one of them, in which the other does not join, is not a motion on the part of the other defendant; and, where such change of venue is denied, a severance had, and the defendant who did not join in said motion is separately tried, convicted, and appeals to this court, the overruling of such motion cannot be successfully assigned as error.

7. CRIMINAL LAW ⇨302(4)—DISMISSAL OF COUNTS—LEAVE OF COURT.

Where an information or an indictment contains more than one count, the state may, before the jury is sworn, and by leave of the court, properly dismiss one or more of said counts, and try the defendant upon the remaining count or counts.

8. CRIMINAL LAW ⇨1134(3)—RULING ON DEMURRER TO COUNT — TRIAL ON ANOTHER COUNT—REVIEW.

Where an information or an indictment containing two counts is demurred to, the demurrer overruled, and thereafter the state dismisses one of said counts, it is entirely immaterial whether the court erred in overruling the demurrer to the count dismissed, and such question will not be reviewed by this court.

9. EMBEZZLEMENT ⇨26 — INDICTMENT AND INFORMATION ⇨125(40)—SINGLE OFFENSE—SUFFICIENCY.

The count of the indictment upon which the defendant was tried held to charge but one offense, and to sufficiently inform the defendant, of the particular offense he was called upon to answer.

10. JURY ⇨133—CHALLENGE FOR CAUSE—DOUBT—RULING.

Upon the examination of a juror as to his qualifications when challenged for cause by the defendant, the court should resolve all doubts arising under the evidence in favor of the defendant as to the competency of the juror; and if, upon so doing, it appears that the juror challenged for cause would not be an impartial juror as required by the Constitution and defined by the decisions of this court, such challenge should be sustained.

11. CRIMINAL LAW ⇨1166½(8)—REVERSIBLE ERROR—CHALLENGE FOR CAUSE—RULING.

Where the defendant has exhausted his peremptory challenges, it is reversible error for the court to overrule a challenge for cause, when the examination of such juror, resolving all doubt in the evidence in favor of the defendant, shows that the juror is not impartial.

12. CRIMINAL LAW ⇨829(1) — REQUESTED CHARGE—GIVEN CHARGE.

Several requested instructions, which cover but one legal proposition, which is in effect given in the general charge, are properly refused.

13. EMBEZZLEMENT ⇨24—PRESENCE OF DEFENDANT—CHARGE.

A requested instruction which requires, as essential to conviction, the presence of the defendant when aiding, abetting, or advising the embezzlement charged, is properly refused.

14. CRIMINAL LAW ⇨823(16)—CHARGE—REVERSIBLE ERROR—OTHER CHARGES.

A paragraph in the general instructions which does not technically state the law correctly, authorizing conviction if D. H. Middleton was directly or indirectly concerned in the commission of the acts constituting the offense as alleged in the indictment, does not necessarily constitute reversible error, if other instructions given clearly overcome the objection complained of.

Appeal from Superior Court, Muskogee County; Farrar L. McCain, Judge.

D. H. Middleton was convicted of embezzlement and he appeals. Reversed and remanded.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, and S. M. Rutherford and W. W. Noffsinger, both of Muskogee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMullan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Plaintiff in error, D. H. Middleton, hereinafter designated defendant, was jointly indicted with W. H. Wain-

wright, a severance demanded and granted, and defendant separately tried, convicted, and sentenced to imprisonment in the penitentiary at hard labor for a term of three years, and to pay a fine of \$8,000 and costs of this prosecution. To reverse the judgment rendered he prosecutes this appeal.

On the 2d day of January, 1914, the defendant filed a motion to set aside the indictment in the case upon the following grounds:

"First. The grand jury which returned the indictment herein against this defendant was not drawn and impaneled as provided by law.

"Second. Misconduct of the grand jury which returned the indictment.

"Third. Misconduct on the part of the county attorney and grand jury to the prejudice and injury of this defendant in preferring charges herein and in returning the indictment in this case."

In support of the first ground of said motion, the defendant introduced evidence that on the 10th day of November, 1913, the court certified that a grand jury was required for the November term of the court, and, it being made to appear that an insufficient number of names were in the jury box from which to draw a grand jury, the court ordered "that the jury commissioners be summoned to meet for the purpose of selecting 30 names to be placed in the jury box according to law"; that on November 13th the court convened in due form of law, and the jury commissioners of Muskogee county having returned to the clerk of this court the names of 30 persons eligible for jury service, properly certified, it was ordered by the court that the clerk of this court remove from the jury box of this court all the names in said box, and record the names of the said 30 persons, certified by said jury commissioners, on slips of paper of uniform size and color, in the presence of the sheriff of Muskogee county, and to deposit the names as returned by said jury commissioners in said jury box, and that the clerk of this court issue a summons to the sheriff of Muskogee county to forthwith assist him in drawing the names of 24 persons from the jury box of this court for service as grand jurors on the 24th of November, 1913, and to issue a summons to each of said persons and a venire as required by law, and place the same in the hands of the sheriff of this county for service; that on the 24th day of November, 1913, the court having again convened in due form of law, the clerk presented to the court the names of 24 persons drawn and summoned to serve as grand jurors on the 24th day of November, 1913, and that 12 of the persons so drawn and summoned were selected to compose, and were sworn and impaneled as a grand jury, J. L. Harvice being appointed and sworn as foreman, and, after being instructed by the court, retire, in charge of a bailiff, to consider of their presentments,

and thereafter returned into court the indictment sought to be set aside.

In support of the second ground of said motion defendant introduced evidence tending to show that the grand jury, for the purpose of securing the advice of one Wyand, who was an attorney practicing in the city of Muskogee, had him summoned before them as a witness, and advised with him as to a legal way of securing legal advice other than by the county attorney and his assistant, and caused him to draw up a purported proceeding against the county attorney for his refusal to comply with the repeated requests of the grand jury for other legal assistance in their investigations; but which said proceeding was never filed in court, but was known to the county attorney, and introduced a special report of the grand jury made to the court setting up—

"that in order that the best interest of all the people may be served, and no injustice done any one, we are firmly convinced that it would be to the best interest of our citizens and county that our honorable county commissioners do employ additional legal service to assist us and our most worthy county attorney, W. E. Disney, in a thorough investigation of all matters that may come before us; and whereas, the county commissioners did pass a resolution appropriating \$500 to pay for such additional legal service, and did employ Bailey & Wyand, to be most effective, it would be legally necessary for the said county attorney to discharge one of his present assistants, and in his stead appoint Mr. Wyand as assistant county attorney, which the said county attorney refused to do; and whereas, the said grand jury now in session have repeatedly and do demand of the said county attorney to recognize the said resolution of our said county commissioners as passed, appropriating the said sum necessary to employ said Bailey & Wyand to assist in said legal services, and to discharge one of his assistants, and appoint J. E. Wyand in his stead during the term of our session, which the said county attorney has and does refuse to do, and prayed the court to give us the relief sought."

Upon the appearance of the grand jury in open court in connection with said report the court stated that he had exercised all the influence and power he had as an individual in endeavoring to prevail upon the county attorney to accede to their request, that he had made every argument he could make, and listened to every argument that the county attorney could advance on his side, and was still of the opinion that the request is not unreasonable; but it is a matter that the county attorney, under the laws of the state, alone can determine, and there is no power that he knows of that can take the power from him, and, if he continues of the opinion he now adheres to, he did "not see that you have any remedy," and regretted that he (the court) had not been able to render them any further assistance.

In support of the third ground of said motion the defendant introduced evidence tending to show that by reason of the pressure brought upon the county attorney, including threats of the grand jury to proceed against him, the county attorney notified the grand jury that he would appoint another assistant county attorney to attend the grand jury, and, in order to do so, he caused one of his assistants, with the understanding that when the grand jury had completed its labors that he would be reappointed, and in the interval would be paid as a clerk in the county attorney's office, to resign, and B. B. Blakeney to be appointed as one of his assistants; that the resignation of the said assistant, and the nomination of said Blakeney as an assistant, was duly filed with the county commissioners, and B. B. Blakeney, duly appointed as such assistant, took the oath of office as such, appeared before the grand jury, and advised them in regard to finding the indictment filed in this case; that said Blakeney filed with the county commissioners a claim for \$500 for his services in connection with said grand jury, and, fearing that he would thus violate the criminal law, withdrew said claim.

The defendant also introduced evidence that the county attorney and his assistants were not physically, mentally, or morally incapacitated from performing the duties devolving upon them, and were capable, willing, and ready to serve the grand jury.

The defendant also introduced in evidence the instructions given said grand jury by the court, which we deem unnecessary to recite. Attorneys for W. H. Wainwright appeared and excepted to the charge of the court to the grand jury.

The court overruled the motion to set aside the indictment, and to said action of the court the defendant excepted.

The indictment in this case originally contained two counts; but prior to the swearing of the jury the state dismissed the second count, and stood upon the first count, which, omitting caption and signature, is as follows:

"The grand jurors, duly selected, summoned, chosen, impaneled, sworn, and charged at the November term aforesaid of said superior court within and for the body of Muskogee county, state of Oklahoma, to inquire into and true presentment make of all public offenses against the state of Oklahoma committed and triable within the county of Muskogee, in said state, in the name and by the authority of the state of Oklahoma, upon their oaths present, find, and charge:

"That one W. H. Wainwright and D. H. Middleton, in the county of Muskogee, state of Oklahoma, on or about the 9th day of October, in the year of our Lord one thousand nine hundred and thirteen, and anterior to the presentment hereof, did commit the crime of embezzlement of public money in the manner and

form as follows, to wit: That the said W. H. Wainwright, in the county and state aforesaid, on or about the said 9th day of October, A. D. 1913, was duly elected, qualified, and acting county treasurer of Muskogee county, Oklahoma, and as such county treasurer of Muskogee county, Oklahoma, was charged and intrusted with the collection, receipt, safekeeping, transfer, and disbursement of public money, and other funds, property, bonds, securities, assets, and effects, all belonging to and being the property of the state of Oklahoma, and the county of Muskogee in said state, and to various precincts, cities, towns, and school districts of said county and state, and to the people thereof, and to divers other persons, firms, and corporations to the grand jurors unknown; that the said W. H. Wainwright, as such county treasurer, so acting, charged, and intrusted as aforesaid, was intrusted and charged with, and did, in the county of Muskogee and state of Oklahoma, on or about the 9th day of October, 1913, receive, have, and hold in his possession and under his control by virtue of his said office and public trust as such county treasurer of Muskogee county, Oklahoma, and for the purposes aforesaid, certain public money, and other funds, property, bonds, securities, assets, and effects by him received and collected as county treasurer from the various sources of revenue and taxation provided by law, and by him as county treasurer controlled and held for and received for the state of Oklahoma and the county of Muskogee, and the various precincts, cities, towns, and school districts thereof, and the people thereof, and divers other persons, firms, and corporations to the grand jurors unknown, in large sums, but the exact amount of said public money, funds, property, bonds, securities, assets, and effects, so received, had, and held and controlled by W. H. Wainwright as county treasurer being to the grand jurors unknown; that the said W. H. Wainwright, while then and there in Muskogee county, Oklahoma, on the 9th day of October, 1913, so acting in said office as such county treasurer, and so charged and intrusted with the control, disbursement, receipt, safekeeping, and transfer of said public money, funds, property, securities, assets, bonds, and effects aforesaid, and being in possession of the same by virtue of his office and public trust as county treasurer of Muskogee county, state of Oklahoma, did then and there unlawfully, willfully, wrongfully, resignedly, fraudulently, stealthily, corruptly, and feloniously, and without authority of law, and not in the due and lawful execution of his trust as county treasurer of Muskogee county, Oklahoma, take, steal, carry away, and embezzle, convert, and appropriate to his own use and benefit, and to a use and purpose not in the due and lawful execution of his said trust as county treasurer of Muskogee county, Oklahoma, and to the use of other persons, bodies corporate, and associates to the grand jurors unknown, a part of said public money, and other funds, property, bonds, securities, assets, and effects received, controlled, and held by and intrusted and charged to him, W. H. Wainwright, as county treasurer, and by virtue of his public office and trust as aforesaid, to wit, the sum of and to the amount of and of the value of four thousand dollars (\$4,000.00) of the pub-

lic money and other funds, property, bonds, securities, assets, and effects, collected, received, had, held, and controlled by him, the said W. H. Wainwright, by virtue of his office and public trust as county treasurer of Muskogee county, Oklahoma, a more particular description of which is to the grand jurors unknown; that the said D. H. Middleton, in Muskogee county, state of Oklahoma, on the 9th day of October, 1913, then and there before and during the commission of said fraudulent acts and embezzlement as aforesaid, did knowingly, willfully, unlawfully, wrongfully, designedly, corruptly, fraudulently, stealthily, and feloniously, and without authority of law, move, procure, aid, conceal, advise, abet, assist, and command and counsel said W. H. Wainwright to do and commit the said felony and embezzlement in the manner and form as aforesaid, and did otherwise, and in other manners to the grand jurors unknown, knowingly, willfully, unlawfully, fraudulently, and feloniously participate with the said W. H. Wainwright in said acts of embezzlement aforesaid, with the unlawful, fraudulent, and felonious intent and design then and there on the part of them, the said W. H. Wainwright and D. H. Middleton, to deprive the said state, county, and citizens aforesaid of said public money and other funds, property, bonds, securities, assets, and effects, and to convert the same to their own use and benefit, and to a use and purpose not in the due and lawful execution of the said trust as aforesaid.

"And so the grand jurors aforesaid, upon their oaths aforesaid, do present, find, and charge that W. H. Wainwright and D. H. Middleton, in Muskogee county and state of Oklahoma, did commit the crime of embezzlement of public money, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Oklahoma."

The defendant demurred to the indictment, and each count thereof, upon substantially the following grounds:

(1) That the indictment and each count thereof charges more than one offense.

(2) That the facts set forth in said indictment and in each count thereof do not constitute a public offense.

(3) That the indictment and each count thereof is so uncertain and indefinite that the defendants cannot tell with what offense they are attempted to be charged.

(4) That said indictment and each count thereof fails to state facts to charge the offense of embezzlement.

The court overruled the demurrer, and the defendant excepted.

Thereupon the defendant filed a motion for a change of judge, and a motion for a transfer of the case to the district court of Muskogee county, which said motions it is deemed unnecessary to set out. The court overruled each of said motions, and the defendant duly excepted. The defendant then demanded a severance, which was granted, and the state elected to try the defendant W. H. Wainwright first.

The trial of the defendant Middleton hav-

ing been entered upon, the following proceedings, so far as necessary to be stated in reviewing this case, in the selection of the jury, were had. W. H. Keaton on his voir dire testified that he did not know Middleton; that he knew Wainwright when he saw him; that he had read some in the papers in reference to D. H. Middleton's connection with the charge which caused him to form an opinion to some extent as to his guilt or innocence; that he thought it would take evidence to remove this impression; that he had heard the result of Wainwright's trial last week; that he could not say that he had an opinion or impression as to the guilt or innocence of Wainwright as to this charge of embezzling \$4,000; that he had no general opinion affecting any charge other than that he was tried for last week, and that he had an opinion as to that one; he thought he could go into the jury box and give both sides a fair and impartial trial as if he had not heard of that result; that he knew of no good reason why he could not go into the jury box and be a fair and impartial juror.

On cross-examination he testified that he had heard discussed and had seen notices in the newspapers concerning Wainwright's shortage in the treasurer's office, and that from what he had heard discussed he had formed an opinion in regard to his guilt or innocence, and had that opinion yet; that if it would require the same evidence in this case which it would in the other he had an opinion as to the guilt or innocence of Wainwright which would require evidence to remove, and that he would go into the jury box with that impression; that it would require evidence to clear up his mind so he could take hold of any new evidence in regard to Wainwright; that he had a general opinion in regard to the defalcation in the treasurer's office; that there is a shortage; that he did not hear the evidence in the other case, and did not know the specific item in the other case; that his opinion was that Wainwright was a defaulter in the treasurer's office, and if the evidence in this case would sustain that general opinion he would have a fixed opinion, and he would not go into the jury box free and untrammelled; that he could not remove that unless the evidence was strong enough to eradicate it.

In response to a question by the court the juror answered that he could not say he had any opinion as to the guilt or innocence of W. H. Wainwright as to any shortage in the treasurer's office other than the shortage for which he was tried.

The defendant challenged the juror for cause, the court overruled the challenge, and the defendant excepted.

W. H. Westlake on his voir dire testified that he did not know Wainwright personally; that he had known him about five years when

he saw him; that he had not from any source formed or expressed an opinion as to the guilt or innocence in this particular instance of the alleged embezzlement of \$4,000 on October 9th; that naturally he would have an opinion of W. H. Wainwright's guilt or innocence in the case that had already been tried; that he had heard about it since it has been tried; that it has not produced in his mind any impression as to his guilt or innocence in this case.

On cross-examination this juror testified that he was examined as a juror in the Wainwright case, and challenged by the defendant; that he naturally had an opinion of the guilt or innocence of Wainwright of embezzlement as to the case just tried; that he had heard about the case since it was tried; that it had not produced in his mind an impression as to the guilt or innocence of the particular charge in the indictment on trial; that he believed he could go into the jury box and give both sides a fair and impartial trial as if he had not heard of the outcome of the trial of Wainwright last week, and, if selected as a juror, would do so, and that he knew of no reason why he could not do so.

On cross-examination this juror testified that if the transaction in this and in the Wainwright case are one and the same that he would have an opinion as to the guilt or innocence of Wainwright; that he would naturally go into the jury box believing he was guilty, or they would not have found him guilty, and he supposed it would to some extent require evidence to remove that impression; that he could not say that he had an impression on his mind now as to the guilt or innocence of Wainwright; that emphatically he had an opinion as to his guilt or innocence in that one case; that it is a fixed opinion, and would require evidence to remove it.

The defendant challenged the juror for cause, the court overruled the challenge, and the defendant excepted.

Fritz Haand on his voir dire testified that he did not know D. H. Middleton; had not heard of this case before; had not formed or expressed an opinion as to his guilt or innocence of this charge; that he learned of the result of the trial of W. H. Wainwright last week; had not heard this case discussed; that he had no opinion of Wainwright's guilt before the verdict; knew nothing about what the facts were, or purported to be, about the case on call, alleging the embezzlement of \$4,000 on the 9th of October last; never heard it talked about nor saw any special reference to it in the newspapers; that he based what opinion he had on the verdict.

This juror testified that he thought he could go into the jury box and try this case free from any opinion as to whether or not Wainwright was generally guilty of the shortage that is charged against him in the treasurer's office.

On cross-examination this juror testified

that he did not read the Muskogee or his town papers; that he had heard the shortage discussed; that if Wainwright was tried for the alleged shortage that was reported, he had an opinion as to his general guilt, and that he is responsible for the shortage, that it would take evidence to remove, and that, regardless of this case or any other, he certainly had that opinion; that it is a fixed and abiding opinion that would take evidence to remove.

On redirect examination this juror testified that he did not know what case Wainwright was tried on, but knew he was tried for embezzlement of county funds; that if he was charged with embezzling the funds reported to be short and discussed by the people, that he had an opinion as to his guilt or innocence of the general shortage that was reported in the treasury office.

In response to a question by the court, the juror testified that he had no opinion as to whether or not there was any other shortage in the treasurer's office, other than the one Wainwright was tried upon.

The defendant having exhausted his peremptory challenges, W. H. Westlake, W. H. Keaton, and Fritz Haand, each of whom were challenged by the defendant for cause, and each of which challenges were overruled by the court, served upon the jury which returned the verdict of guilty in this case.

In view of the fact that the evidence in this case covers over 1,000 pages of type-written matter, and would, without accomplishing any good purpose, unnecessarily extend this opinion, we think it unnecessary to set out an abridgment of the same, and especially so since counsel have failed to comply with the rules of the court in this respect.

The defendant requested the court to give the jury the following instructions, viz.:

"(1) The court instructs the jury that, in order to constitute the defendant a party to the crime charged in the indictment, it is necessary that the defendant be concerned in the commission of the offense—that is, that he either commits it or aids in the commission—and it is not sufficient that he merely acquiesced therein."

"(3) Gentlemen of the jury, you are instructed that if you should believe from the evidence that the public moneys of Muskogee county and the several municipal townships were embezzled at the time and place and in the manner alleged in the indictment, and if you further believe that W. H. Wainwright acted as principal in committing said embezzlement, if any was committed, then I instruct you that you cannot convict the defendant D. H. Middleton unless you further believe beyond a reasonable doubt that the defendant D. H. Middleton was present and knew the unlawful intent of Wainwright, and aided and encouraged and advised him by some word or act or agreed with him to commit such embezzlement."

"(7) The court instructs the jury that a mere mental assent or acquiescence in the commission of a crime by one who did not procure or

advise its perpetration, or took no part therein, gave no counsel, or uttered no word of encouragement to the perpetrator, however wrong morally, does not in law constitute such person a party to the crime.

"(8) The court instructs the jury that a mere mental assent or acquiescence in the commission of a crime by one who did not procure or advise its perpetration, or took no part therein, gave no counsel, or uttered no word of encouragement to the perpetrator, however wrong morally, does not in law constitute such a person a party to the crime; and in this case the court instructs you that even though you should find that the defendant had knowledge of, and acquiesced in, the acts of his codefendant, W. H. Wainwright, which are charged to constitute embezzlement, that of itself would not be sufficient to find the defendant guilty."

The court refused to give each of said requested instructions, and the defendant separately excepted to the said action of the court.

The court among other instructions gave the jury the following instructions, to which the defendant separately excepted, viz.:

"You are further instructed that under the laws of the state of Oklahoma, that all persons concerned in the commission of any felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals; and in this connection you are instructed that if you should find beyond a reasonable doubt that D. H. Middleton did unlawfully, feloniously, fraudulently, and knowingly aid and abet, or did unlawfully, feloniously, fraudulently, and knowingly participate with the said W. H. Wainwright, in the commission of embezzlement as alleged in the indictment, then and in that event you should find the defendant guilty. Otherwise, if you entertain a reasonable doubt as to whether the said D. H. Middleton did knowingly, unlawfully, fraudulently, and feloniously aid or abet or participate with the said W. H. Wainwright in the commission of the embezzlements alleged in the indictment, then and in that event you should acquit him.

"G. You are instructed that if you should find from the evidence beyond a reasonable doubt that D. H. Middleton directly or indirectly was concerned in the commission of the acts constituting the offense as alleged in the indictment, he would be under the law charged as a principal as to the offense, whether he, or Wainwright, or others, as alleged in the indictment, enjoyed the benefits of the moneys alleged to have been embezzled or not."

Timely motions were made in arrest of judgment, and for a new trial each of which said motions were overruled by the court, and separate exceptions saved.

[1] The defendant most earnestly insists that the court committed reversible error in overruling the motion to set aside the indictment in this case upon the grounds:

"(1) That the court was without authority to make the order made convening the jury commissioners to select thirty names to be placed

in the jury box from which to draw twenty-four names from which to select a grand jury.

"(2) On account of the misconduct of the grand jury and the county selector."

Section 1802, Revised Laws, provides:

That "the procedure in [superior courts] shall follow the procedure provided for the district court, * * * and all laws relative to juries and jurors for district courts shall be and hereby are made applicable to the said superior courts."

Section 1798, Revised Laws, provides:

That superior courts "shall have and exercise concurrent jurisdiction with the district court in all proceedings, causes or matters."

Section 3690, Revised Laws, provides that the jury commissioners shall convene at stated times, "and at such other times as the district judge may order."

Section 3692, Revised Laws, provides:

That "additional and other drawing of as many names as the court may order may be had at such time as the court may order * * * for the impaneling of a new grand or petit jury, * * * if, in the judgment of the court, the same shall be necessary, or, if, for any cause, the court * * * shall deem other jurors necessary."

Hence, it appearing to the court that a grand jury was necessary, and it further appearing that there was an insufficient number of names in the jury box from which to draw a grand jury, the court had authority to make the order directing the jury commissioners to convene, and also direct them to place in the jury box the number of names directed by him, and the law requiring the jury commissioners to place in the jury box not less than 200 names only applied to the statutory times for preparing the jury boxes, and has no application in the instant case; and the court, in ordering the jury commissioners to convene and place in the jury box 30 names of qualified jurors from which to draw 24 names from which to select a grand jury, did not violate any substantial rights of the defendant.

[2] The provisions of the statute in regard to the mode of obtaining juries are directory, and a substantial compliance with the requirements of the law is sufficient. This court will not reverse a ruling of a district court overruling a challenge to the array upon objection to the manner in which the list of jurors from whom the panel was selected was made up when such objections are purely technical, and do not affect the substantial rights of the parties, and when it is not made to appear that any material rights have been lost thereby. *Malignon v. Territory*, 8 Okl. 439, 58 Pac. 505.

"The provisions of the statute in regard to the mode of obtaining jurors are directory, and a substantial compliance with the requirements of the law is sufficient. The court will not re-

verse the ruling of the district court overruling a motion to set aside an indictment on the grounds that the grand jury were not chosen, selected, and drawn according to the provisions of the statute, and overruling an objection to the manner in which the list of persons from which the panel was selected was made up, when such objections are purely technical, and do not affect the substantial rights of the parties, and when it does not appear that any material right has been lost thereby." *Sharp v. United States*, 13 Okl. 522, 76 Pac. 177.

The rule announced in *Malignon v. Territory*, supra, and *Sharp v. United States*, supra, has been approved by this court in *Hopkins v. State*, 4 Okl. Cr. 194, 108 Pac. 420, 111 Pac. 947; *Wells v. State*, 5 Okl. Cr. 22, 113 Pac. 210; *State v. Pollock*, 5 Okl. Cr. 26, 113 Pac. 207; *Tegeler v. State*, 9 Okl. Cr. 139, 130 Pac. 1165.

The reason of the said statutory rule established by the Supreme Court of Oklahoma, and by this court, is expressed in *R. C. L.* vol. 12, pp. 1016, 1017, as follows:

"The reason of this rule is that as the grand jurors do not try the case, but merely charge the accused, the names of these selectors is of no consequence to him, he being entitled to claim only fair and impartial grand jurors who possess the necessary qualifications, whereas it is of great consequence that the administration of justice shall not be delayed by mere technical objections."

The record in this case shows that not even technical errors were committed, but that the statutes of this state governing the selecting, drawing, and impaneling the grand jury finding the indictment in this case was strictly complied with.

We do not agree with the suggestion of the defendant that to uphold the procedure followed for obtaining the grand jury presenting the indictment in this case offers an opportunity for packing the grand jury. However, we are not empowered to change the law, and if a change of the law be desirable—which we do not even intimate—this rests with the Legislature. We can only apply the law as we find it. In the absence of any evidence in the instant case of any irregularity in drawing, summoning, or impaneling the grand jury that results "in depriving the defendant of a substantial right, or was reasonably calculated so to do, we conclude that the court did not err in overruling the motion to set aside the indictment on the ground of alleged irregularities in summoning the grand jury. Section 3701, Revised Laws; *Wadsworth v. State*, 9 Okl. Cr. 84, 130 Pac. 808.

In *Tegeler v. State*, supra, it is held:

"A substantial compliance with the law in the matter of selecting, summoning, and impaneling grand jurors is all the law requires."

[3] The defendant also insists that the presence of Mr. Wyand in the jury room, ostensibly as a witness, but in fact as a legal

adviser of the grand jury, was sufficient ground for setting aside the indictment in this case.

In *Fooshee v. State*, 3 Okl. Cr. 666, 108 Pac. 554, Judge Richardson, now counsel for the defendant, speaking for this court says:

"Furthermore our statute makes provision for setting aside an indictment on account of the presence of an unauthorized person before the grand jury only when such person was present when the jury were voting upon the question of returning an indictment. Section 6738, *Snyder's Comp. Laws*. And while we are not called upon to decide the point, and do not decide it, yet there are numerous respectable authorities holding that the presence of a stranger or unauthorized person in the grand jury room only while testimony is being taken, and not while the jury are voting or deliberating, will not invalidate the indictment, unless it is shown that the accused was thereby prejudiced in some substantial right. *Bennet v. State*, 62 Ark. 516, 36 S. W. 947; *State v. Bate*, 148 Ind. 610, 48 N. E. 2; *State v. Bacon*, 77 Miss. 366, 27 So. 563; *State v. Justice*, 11 Or. 178, 8 Pac. 337 [50 Am. Rep. 470]; *Mason v. State (Tex.)* 81 S. W. 718; *State v. Brester*, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444; *State v. Wood*, 112 Iowa, 484, 84 N. W. 503; *Wilson v. State*, 41 Tex. Cr. R. 115, 51 S. W. 916."

An examination of the several authorities cited by Judge Richardson in *Fooshee v. State*, supra, fully sustains the views which he therein expresses, but does not decide, and we adopt said dictum as the law on the question to which it relates, and are of the opinion that the presence of Mr. Wyand in the grand jury room, as shown by the evidence in this case, was not a ground for setting aside the indictment in this case, as it appears from the records that Mr. Wyand was not in the grand jury room when the grand jury was deliberating or voting upon the indictment in this case.

Section 5780, Revised Laws, provides:

That "the indictment or information must be set aside * * * in any of the following cases: * * * Third. When a person is permitted to be present during the session of the grand jury while a vote on the finding of the indictment is being taken."

[4, 5] The defendant further urges that because the grand jury became dissatisfied with "their worthy county attorney" and his assistants as their legal advisers, and repeatedly requested the county attorney to arrange for another legal adviser of the grand jury, and upon the county attorney refusing so to do reported his refusal to the court, with the request that the court aid them in causing the county attorney to discharge one of his assistants and appoint another assistant during the session of the grand jury which the court properly informed them it had no authority to do, that the grand jury had prepared a written complaint

against the county attorney, which was not presented to the court, but of which the county attorney had knowledge, that thereafter the county attorney secured the resignation of Stewart, with the understanding that he was to be reappointed after the term of the grand jury, and appointed B. B. Blakeney to fill the vacancy caused by the resignation of Stewart, and that the term of the said Blakeney was to terminate when the embezzlement cases were disposed of, and that the said Blakeney filed with the county commissioners a claim for \$500 for his services rendered the grand jury, that the appointment of said Blakeney was collusive and void and that therefore the indictment in this case should be set aside.

Conceding but not deciding that the resignation of Stewart and the appointment of Blakeney were brought about by collusion and coercion, nevertheless Blakeney was a duly appointed assistant county attorney took the oath of office and was legally authorized to appear before the grand jury and advise them as to finding the indictment preferred in this case and of this the defendant cannot legally complain nor of the fact that Blakeney filed an illegal claim of \$500 as compensation for services rendered the grand jury, as neither the appointment of Blakeney as assistant county attorney, nor his filing an illegal claim for his services rendered the grand jury, did not in any way prejudice the material rights of the defendant and authorize the indictment to be set aside.

[6] The defendant also urges that the court committed prejudicial error in overruling the motion of the defendant for a change of venue. A careful investigation of the record does not disclose that the defendant asked for a change of venue. It is true that, prior to the severance granted in this case, the defendant's codefendant, Wainwright, filed a motion for a change of venue, and offered voluminous evidence in support thereof, which the state met by counter evidence, and which motion was denied; but there was no evidence offered to show the defendant entitled to a change of venue. In fact, on the hearing of Wainwright's motion for a change of venue, not anything is said in regard to any prejudice existing against the defendant Middleton in Muskogee county. We conclude that there was no motion filed by the defendant Middleton for a change of venue.

It is a constitutional right of a defendant to be tried in the county in which the offense was committed, and he cannot be deprived of this constitutional right by a change of venue being granted his codefendant. The granting of a change of venue to a defendant does not have the effect to also change the venue as to his codefendant who has not joined in the motion for a change of venue.

[7-8] The defendant complains as to the sufficiency of the indictment. The indictment when demurred to contained two counts,

but before the jury was sworn the state, by leave of court, dismissed the second count and stood upon the first count, and this the defendant says could not be legally done. In support of said contention the defendant cites only one authority (*Bonitzer v. State*, 4 Okl. Cr. 354, 111 Pac. 980), which authority is not at all in point, said case not involving the question of the right of the state to dismiss one or more entire counts of an indictment. Certainly it does not require the citation of authorities to show that the rights of the defendant were not prejudiced by lessening his burden by dismissing said count, and that he has not the slightest right to complain at such dismissal. The second count of the indictment having been dismissed, we have to alone determine whether or not the demurrer should have been sustained to the first count of the indictment, as whether or not the second count thereof was subject to the demurrer interposed is entirely immaterial and will not be considered.

We have carefully considered said first count of the indictment—the only one upon which the defendant was tried—and are satisfied that it charges only one offense, the embezzlement by Wainwright, and the aiding and abetting of Middleton in the embezzlement of \$4,000, and that the indictment sufficiently informs the defendant of the offense with which he was charged, and was legally sufficient, as has been often held by this court.

[10] The defendant further complains that the court committed fundamental error—the defendant having exhausted his peremptory challenges—in overruling his respective challenges of W. H. Westlake, W. H. Keaton, S. E. Haxelet, and Fritz Haand, who were members of the jury which returned the verdict of guilty against the defendant.

As a condition precedent to the conviction of the defendant, it has to be established that Wainwright committed the embezzlement charged, and therefore any juror who had an opinion as to the general guilt of Wainwright having embezzled the county funds was an improper juror in this case, regardless of the fact that he had no opinion as to the guilt or innocence of the defendant.

Section 20 of article 2 of the Constitution of this state provides that—

"In all criminal prosecutions the accused shall have the right of a speedy and public trial by an impartial jury of the county in which the crime shall have been committed."

"The court should resolve all doubts as to the competency of the juror in favor of the defendant." *Johnson v. State*, 1 Okl. Cr. 321, 97 Pac. 1059, 18 Ann. Cas. 300; *Horn v. State*, 13 Okl. Cr. 354, 104 Pac. 685.

In *Scribner v. State*, 3 Okl. Cr. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985, it is said:

"The principle that every reasonable doubt must be resolved in favor of the defendant applies in this instance [as to the qualifications of

jurors] as well as to the evidence offered before the jury on the final trial. The evidence offered as to the qualifications of jurors enters into and becomes a material part of the trial, as much as the evidence offered by the witnesses on the part of the state, and in this case the trial court should have resolved that doubt in favor of defendant."

In *Scribner v. State*, supra, it is also said:

"It is a physical impossibility for a juror, who has an opinion based on what he has understood to be the facts in the case, to weigh the evidence as though he had never heard of the case and had not already made up his mind. He may have an earnest and conscientious desire to do so, and to deal out exact justice, but he will unconsciously attach a greater weight to the evidence which conforms to his preconceived opinion than he would otherwise do. He is not in that frame of mind * * * which is necessary to enable him to fairly and impartially judge as to the weight to be given to the evidence of each witness appearing before him."

"Persons called as jurors, who have heard and read detailed accounts of an alleged offense, from which they have formed such an opinion as to the guilt of an accused as will require evidence to remove, are not qualified jurors, although they believe, and express their belief, that they can and will fairly try the case upon testimony produced." *Scribner v. State*, 3 Okl. Cr. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985.

In *Tegeler v. State*, supra, this court said:

"The fact that said juror did testify in answer to questions from the court that, if selected as a juror, he could and would wholly disregard such opinion, and base his verdict alone upon the testimony and the charge of the court, did not in our judgment do away with and destroy the effect of his previous testimony; for, if it did, the juror would then become the judge of his own qualifications. When a juror states that he has an opinion as to the guilt of the defendant, he is not made competent to sit in the case merely because he may have stated that he can and will lay aside this opinion if taken on the jury and give the defendant a fair and impartial trial, and be governed alone in making up his verdict by the testimony of the witnesses and the charge of the court."

In the case of *Scribner v. State*, 3 Okl. Cr. 611, 108 Pac. 426, 35 L. R. A. (N. S.) 985, it is said:

"In determining this case, although the evidence may show the defendant guilty beyond peradventure of a doubt, and sufficient to support a verdict with the death penalty, we must nevertheless set a precedent under which a perfectly innocent man may be tried, and have preserved to him his constitutional rights of the presumption of innocence and a trial before an impartial jury. If a juror has prejudged the guilt of the defendant before hearing the sworn testimony, then it cannot be said that the defendant had a trial before an impartial jury. It is a physical impossibility for a juror, who has an opinion based on what he has understood to be the facts in the case, to weigh the evidence as though he had never heard of the case, and had not

already made up his mind. He may have an earnest and conscientious desire to do so, and to deal out exact justice, but he will unconsciously attach a greater weight to the evidence which conforms to his preconceived opinion than he would otherwise do. He is not in that frame of mind which the Constitution contemplates, and which is necessary to enable him to fairly and impartially judge as to the weight to be given to the evidence of each witness appearing before him. * * * The principle that every reasonable doubt must be resolved in favor of the defendant applies in this instance as well as to the evidence offered before the jury on the final trial. The evidence offered as to the qualifications of the jurors enters into and becomes a material part of the trial, as much so as the evidence offered by the witnesses on the part of the state, and in this case the trial court should have resolved that doubt in favor of the defendant, and sustained his challenges for cause of these jurors."

In the case of *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57, Chief Justice Bailey, rendering the opinion of the court, in part said:

"In the review of authorities we have already made, it has sufficiently appeared that, where the opinion of the juror is only slight or transient, or is hypothetical, very considerable reliance is placed upon his statement under oath, that his opinion is not of such character as will interfere with his action as a juror. Indeed, where the opinion is shown to be of that character, such statement is usually one of the most satisfactory tests of the juror's impartiality. But the holding of this and other courts is substantially uniform that where it is once clearly shown that there exists in the mind of the juror, at the time he is called to the jury box, a fixed and positive opinion as to the merits of the case, or as to the guilt or innocence of the defendant he is called to try, his statement that, notwithstanding such opinion, he can render a fair and impartial verdict, according to the law and the evidence, has little, if any, tendency to establish his impartiality."

In 1 *Burr's Trial*, 465 (Fed. Cas. No. 14692g), Chief Justice Marshall used this language:

"Light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitutes no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him."

In case of *State v. Otto*, 61 Kan. 63, 58 Pac. 996, Justice Smith, delivering the opinion of the court used this language:

"It is the duty of the court, imposed both by statute and by principles of natural justice, to stand as a vigilant guard over the jury box, to the end that bias, prejudice, and preconceived opinion do not enter. It is better that the first impression of a case come from the testimony of the witness after the jurors are sworn

to try the cause. While there is recognized in the law a distinction between an impression and an opinion, yet there is so little difference between the two, and the step so short from one to the other, that courts should be certain that a juror's mind which is possessed of the one has received it with pressure too weak to break over the dividing line."

We think it clearly appears from the evidence of each of the challenged jurors for cause, which challenges were overruled, and said jurors permitted to sit upon the jury in this cause, without distinguishing one case against Wainwright from another, were of the opinion that Wainwright was guilty of embezzling county funds generally, and that it would take evidence to remove such opinion, and consequently had a fixed opinion of a necessary charge to be proven to convict the defendant—that Wainwright had embezzled, together with other embezzlements, the said \$4,000 alleged to have been embezzled in this case; and therefore the said challenged jurors entered upon the trial with their minds favorably influenced to the conviction of the defendant, and at least placed upon the defendant the burden of eradicating such adverse opinion, and also deprived the defendant of the benefit of the presumption of innocence as to a material fact averred in the indictment, the guilt of Wainwright.

[11] And applying the rules announced and the reasons given therefor in the above-cited cases to the evidence had on the voir dire examination of the jurors challenged for cause, which challenges were overruled and said challenged jurors allowed to act as triers of their cause, the defendant having exhausted his peremptory challenges, we are of the opinion that the court committed prejudicial error in overruling each of the challenges to the said jurors, and the defendant was thereby denied that fair and impartial trial guaranteed to him by the Constitution and laws of this state.

The state in its brief has not combated or cited any authority that the court did not err in overruling said challenges to said jurors.

[12] The defendant insists that the court committed prejudicial error in refusing to give requested instructions numbered respectively 1, 3, 7, and 8 and in this instance we are not in accord. Said instructions numbered 1, 7, and 8 are in effect the same, are mere different ways of stating the same legal proposition, and are each in effect covered by the general instructions of the court, the court having instructed the jury—

"that if they entertain a reasonable doubt as to whether the said Middleton did knowingly, unlawfully, fraudulently, and feloniously aid or abet the said W. H. Wainwright in the commission of the embezzlement alleged in the indictment, then and in that event you should acquit him;"

and thus necessarily instructing the jury that the mere acquiescence of the defendant in the commission of said embezzlement was not sufficient to warrant the conviction of the defendant, and practically covering the legal propositions contained in said requested instructions numbered, respectively, 1, 7, and 8.

[13, 14] The vice of requested instruction numbered 3 is that it requires the presence of the defendant when the embezzlement was committed as necessary to the conviction of the defendant, while the statute under which the defendant was prosecuted (section 7437, Revised Laws) provides that—

"If any person shall advise, aid, or in any manner knowingly participate in" an embezzlement by an official of public funds, he "shall be deemed guilty of an embezzlement;"

either of which said interdicted acts may be done without the actor being in the presence of the official committing the embezzlement.

The defendant insists that the court committed reversible error in giving paragraph F of the instructions given the jury. We are of the opinion that said instruction correctly states the law of the case.

The defendant further insists that the giving of paragraph G of the instructions given the jury was prejudicial error, and in this contention we think there is some merit, that the said instructions do not technically correctly state the law, as the defendant might be indirectly concerned without having knowledge of the embezzlement charged, and yet not rendered guilty as charged in the indictment in this case, it being necessary to establish his guilt to show that he knowingly advised, aided, or abetted Wainwright in the commission of the embezzlement charged, but while we think the said instruction subject to criticism, yet considering the instructions as a whole, which we must do, the giving of said instruction is not such error as should cause a reversal of this case.

As the errors pointed out must work a reversal of the judgment rendered, we deem it inadvisable to lengthen this already extended opinion by a review of the other errors assigned.

However, we deem it proper to direct the attention of the trial court for guidance, in the event of another trial of this case, to the rule as announced in *State v. Rule*, 11 Okl. Cr. 237, 144 Pac. 807, that, "as a general rule, evidence of other offenses, though of the same general nature, is not admissible for the purpose of showing that the defendant is guilty of the particular offense charged," unless the evidence comes within the well-settled exceptions to said general rule as stated in said case.

And also to direct attention to the rule declared in *Driggers v. United States*, 1 Okl. Cr. 167, 95 Pac. 612, 129 Am. St. Rep. 823, that the statements or acts of one conspirator, made or done prior to the formation of

such conspiracy, are inadmissible as against a coconspirator.

The judgment of the trial court is reversed, and the cause remanded.

DOYLE, P. J., and MATSON, J., concur.

WALDON v. STATE. (No. A-2990.)

(Criminal Court of Appeals of Oklahoma. Sept. 16, 1919.)

(Syllabus by the Court.)

1. HOMICIDE \S 244(2)—SELF-DEFENSE.

Where an accused, on a trial for homicide, testified that he killed the deceased partially on account of wrongful treatment of his mother by deceased, he cannot successfully plead self-defense.

2. HOMICIDE \S 255(3) — MANSLAUGHTER IN FIRST DEGREE—SUFFICIENCY OF EVIDENCE.

The record in this case carefully considered, and found that the verdict is sufficiently supported by the evidence, and the trial of the case free from prejudicial error.

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW \S 1169(1)—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The admission of evidence not germane to the issues involved, but which in no wise tends to show defendant's guilt, while not approved, is not prejudicial error.

4. HOMICIDE \S 109—"SELF-DEFENSE"—REQUISITES IN GENERAL.

To maintain the plea of self-defense, it must be made to appear that the accused was free from fault in bringing on the difficulty, had reasonable ground to believe that he was in imminent danger of death or great bodily harm at hands of deceased, and that there was a necessity to kill to save himself therefrom.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Self-Defense.]

5. HOMICIDE \S 332(8)—SELF-DEFENSE—REVIEW.

Where the evidence as to self-defense is conflicting, but there is evidence to support a conviction, the Criminal Court of Appeals will not disturb it.

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Alcie Waldon was convicted of manslaughter in the first degree, and he appeals. Affirmed.

Bob Turner, of Oklahoma City, and Bridges & Vertrees, of Waurika, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Alcie Waldon, hereinafter referred to as defendant, was informed against jointly with Fred Wratlslaw and Martha E. Wratlslaw for the murder of O. J. McCarty; a severance was granted on the motion of the state; the defendant was tried separately, convicted, and sentenced to imprisonment in the penitentiary at McAlester at hard labor for 30 years. To reverse the judgment rendered, he prosecutes this appeal.

The material uncontradicted evidence is: That on the morning of the day that the deceased was killed the defendant came to the city of Ringland, and after going to several places, and after he had secured a pistol which belonged to him, and which he had previously loaned to another, the defendant went to a law office, where his mother and stepfather were, and about 15 minutes after leaving said office met the deceased, whom, prior thereto, he did not know was in the city, and shot him three times, from the effects of which said shots the deceased about four months later died; that immediately after the shooting a pistol was found in the overcoat pocket of the deceased.

The evidence was in conflict as to the circumstances surrounding said killing—witnesses testifying that they were near the scene of the homicide, and saw the defendant and the deceased just before and at the time the defendant shot the deceased; that deceased, just before he was shot, did not say anything to, or make any demonstrations against, the defendant. The defendant testified that on the day he killed the deceased he met him in the middle of the street in Ringland; that he was five or ten feet from him when he first saw him; that the deceased ran his hand back and says, "You son of a bitch, I am going to kill you;" and "that he [defendant] then got his gun and shot him." On cross-examination, the defendant testified that he knew that the deceased had whipped and wronged his mother; "that he was thinking about it when he killed him; that that was not all he killed him for, just partly;" that he shot him to prevent the deceased from shooting him; that he shot in self-defense.

On the cross-examination of the defendant, in response to questions propounded to him about what occurred at the store of the deceased on the Thursday preceding the Monday on which the deceased was killed, he answered:

"That he was at said store at the time named in company with his mother, brother, and stepfather; that deceased was asked if he was ready for a settlement, and said, 'Yes,' and that he would rather that Brooks and Elder were there; that he did not feel like going to town; that the defendant went to Ringland for Brooks and Elder, who declined to come, and upon the de-

tendant's return to the store, and reporting the result of his trip, the deceased said, "We will go," which they did; that he [defendant] did not in said store, and in the presence of his mother and Fred Wratlaw, tell the deceased that he had to make a deed to the land, and that he was going to get a notary public to take the acknowledgment; that there was no gun in the party, and that no unpleasantness occurred at the said store at the time named."

As it is not even suggested in defendant's brief that the verdict of the jury is not sufficiently supported by the evidence, and rests a reversal of this case alone upon the alleged error of the trial court in excluding evidence, offered on redirect examination, that the defendant, his mother, and stepfather were at the store of deceased, which was situated about four miles from Ringland, on the Thursday preceding the killing of the deceased on the following Monday, by the invitation of the deceased, we deem it unnecessary to detail more of the evidence than we have done, other than as may be necessary to an intelligent review of the error complained of, to which an exception was saved. The offered evidence, on redirect examination, which was excluded, was that a day or two before the defendant, his mother, and stepfather went to the store of the deceased; that the deceased requested the witness Wilson to go to the defendant, his mother, and stepfather, and ask them to come to his store, that he might settle with them and deed them back the property of which he had defrauded them; and a letter, the only identification of which was the admission of the deceased that he had the letter written, and that it has been received by the addressee through the due course of mail, from the deceased to the mother of the defendant, who resided in New Mexico, requesting her to return to Oklahoma, that he might, as he desired to do, make restitution to her of the property of which he had defrauded her and pay her an indebtedness he was owing her, and expressing great appreciation of his treatment by her, and asking her to go to Mexico, to which he intended shortly to remove.

It was stated by counsel for defendant, when offering said evidence as to defendant having been at the store of the deceased by invitation of deceased, on Thursday preceding Monday on which the deceased was killed:

"That it was offered principally for the reason that the state had attempted to show that this defendant, together with his mother and stepfather, had gone to the place of business of the deceased, and practically forced him to execute a certain deed and a bill of sale to certain personal property."

[3] The evidence developed by the cross-examination of the defendant as to what occurred at the store of the deceased on the

Thursday preceding the Monday on which the homicide was committed, was not germane to any issue involved in this case, and ought to have been, and doubtless would have been, excluded on proper motion, which was not made.

"The admission of evidence not germane to the issue involved, but which in no wise tends to show the guilt of the defendant, while not approved, is not prejudicial error." *Davis v. State*, 177 Pac. 621.

After a very careful reading of the entire record we have been unable to find that there was any evidence on the part of the state tending to show that the defendant, together with his mother and stepfather, had gone to the place of business of the deceased and practically forced him to execute a deed and a bill of sale on Thursday preceding the Monday on which the deceased was killed. Whether or not the defendant and others went to the store of the deceased by his invitation, and what the state attempted to show, and failed to show by evidence, is entirely foreign to any issue involved in this case, and the evidence offered on redirect examination of the defendant, including said letter, even if it was sufficiently identified, which we deem unnecessary to determine, to show that the defendant went to said store at the invitation of the deceased, was not in rebuttal of any evidence elicited on his cross-examination, and the court did not commit reversible error in excluding the said evidence, which is the basis of the only alleged error assigned and argued in defendant's brief.

[4, 5] It is the well-settled law of this state that, to maintain the plea of self-defense, it must be made to appear that the accused was free from fault in bringing on the difficulty, and had reasonable grounds to believe that he was in imminent danger of suffering death or great bodily harm at the hands of the person slain, and that there was a necessity to kill in order to save himself therefrom, and though the evidence as to self-defense be in conflict, if there is evidence, as in the instant case, to support the verdict, this court will not disturb it.

"In a homicide case, where there is evidence supporting the theory of the state that the defendant did not act in self-defense, and also evidence * * * that he acted in self-defense, it is the exclusive province of the jury to determine which is the correct theory, and, having done so, if the instructions of the court properly present the law of the case, this court will not disturb the verdict." *McClatchey v. State*, 177 Pac. 922.

[1] Where the accused, as in the instant case, admits the killing, and testifies that he killed the deceased "partly on account of wrongs done his mother by deceased," his plea of self-defense is not sustained. In

Wells v. Territory, 14 Okl. 436, 78 Pac. 124, it is held:

"The law of self-defense does not imply the right of attack, nor will it permit of acts done in retaliation, or for revenge."

In Caughorn v. State, 99 Ark. 462, 139 S. W. 315, it is held:

"If defendant sought, brought on, or voluntarily entered into a difficulty * * * for the purpose of vengeance, or if he shot and killed deceased with no reasonable apprehension of immediate and impending injury to himself, but from a spirit of retaliation and revenge for past injuries, he could not avail himself of the law of self-defense, and should not be acquitted, no matter how great the danger or imminent the peril to which the defendant may have believed himself exposed during the difficulty."

In Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96, it is held:

"If the defendant sought the difficulty with the deceased, for the purpose of chastising or beating him for some real or imaginary cause, and armed himself with a pistol for use, if necessary, and did use it, and killed the deceased, he is guilty of murder, although it may have become necessary for him to use the pistol during the encounter, in order to save his own life, or to prevent great bodily harm."

In Young v. State, 53 Tex. Cr. R. 416, 110 S. W. 445, 126 Am. St. Rep. 792, it is held:

"If one provokes a difficulty intentionally, to secure a pretext to inflict some unlawful injury on the person attacked, but not for the purpose of killing him or inflicting serious injury upon him, he cannot thereafter justify the killing of such person on the ground of self-defense."

In State v. Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289, it is held:

"One who brings on a difficulty with the purpose of wreaking his malice by slaying his adversary or doing him some great bodily harm, and, actuated by such felonious purpose, does the homicidal act, cannot avail himself of the right of self-defense and is guilty of murder in the first degree."

In 13 R. C. L. § 138, it is said:

"The rule is thoroughly established, and its general terms is universally recognized, that a plea of self-defense cannot be sustained, when the defendant shows that he was the aggressor and provoked the difficulty, or where he acted in retaliation. Neither state of facts is sufficient to show that necessity upon which the law of self-defense is based."

The above text is supported by citations of the courts of last resort of Alabama, California, Florida, Georgia, Illinois, Kansas, Missouri, New York, North Carolina, South Carolina, Ohio, Pennsylvania, Tennessee, and Texas.

[2] The defendant by his own evidence is shown to be guilty of at least manslaughter in the first degree, as found by the jury, while the entire evidence warranted his conviction for murder.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

PEYTON v. STATE. (No. A-8235.)

(Criminal Court of Appeals of Oklahoma.
Sept. 20, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §770(2)—REQUESTED INSTRUCTIONS—MATERIAL ISSUE.

The defendant has a right to have, when requested, an affirmative instruction given to the jury applicable to his testimony, based upon the hypothesis that it is true, when such testimony affects a material issue in the case and would constitute ground for acquittal.

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW §815(5) — UNLAWFUL TRANSPORTATION—INSTRUCTIONS.

In trial for unlawful transportation of liquor, an instruction leaving no alternative but to convict, though defendant had no knowledge of, or reason to know, contents of a package placed in his automobile by state's witness, which question was raised by defendant's testimony, which, if true, would have entitled him to acquittal, in connection with refusal of defendant's request thereon, was erroneous.

3. CRIMINAL LAW §1163(5) — ERRONEOUS INSTRUCTION—PREJUDICE.

In view of fact that defendant, in trial for unlawful transportation of liquors, had borne a reputation as a law-abiding citizen and had held offices in county, it could not be assumed that refusal of an affirmative instruction covering the law applicable to his testimony, which, if true, would entitle him to an acquittal, was not prejudicial.

Appeal from County Court, Payne County; Wilberforce Jones, Judge.

W. D. Peyton was convicted of unlawfully conveying intoxicating liquors, and punishment assessed at a fine of \$50 and 30 days' imprisonment in the county jail, and he appeals. Reversed and remanded.

Thos. A. Higgins and Sylvester J. Berton, both of Cushing, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. O. Fall, Asst. Atty. Gen., for the State.

PER CURIAM. W. D. Peyton was convicted in the county court of Payne county

of the crime of unlawfully conveying intoxicating liquors, and his punishment fixed at a fine of \$50 and 30 days' imprisonment in the county jail. From this judgment of conviction, he has appealed to this court, and has assigned numerous errors, all of which are without substantial merit, except one, which is treated in this opinion as the basis for reversal of the judgment.

The facts are substantially as follows:

The defendant, Peyton, lived in Cushing, Okla., had been constable of the city, and a member of the police force, and was the owner of an automobile, which he had used as a livery car. Numerous prominent citizens of the town testified that Peyton bore the general reputation of being a law-abiding citizen, and this fact was not controverted by the state.

According to the state's testimony, Peyton drove his car between the hours of 10 and 11 on the night of August 10, 1917, to a house northeast of the Katy depot in the city of Cushing, where one Spiker resided, and was seen to go into the house and come out with a gunny sack, which proved to be partially filled with 9 quarts of whisky.

Spiker, who was a witness for the state, testified that, some days before the night on which defendant was arrested, the defendant and one Reed had brought a large quantity of whisky to his (Spiker's) house, and had stored it there, and, knowing that the defendant was coming after some of the whisky on this particular night, he (Spiker) notified the sheriff, and arrangements were made to intercept the defendant in the act of transporting said whisky, and the evidence discloses that the arrest of the defendant was the result of such arrangement.

In substance, the defendant's testimony is as follows:

"I live in Cushing. I am now working by the day, dressing tools. I have been constable of the city of Cushing, and worked on the police force there, and aside from my official duties I have driven a livery car. I begun in July. Have also worked for the Oklahoma State Bank of Cushing, collecting and delivering money for them. On the 8th of August, 1917, at 2:30 a. m., I was home in bed. I bought my car on August 4th, on the Sunday before Friday when I was arrested. I was up on the livery stand usually occupied by livery drivers. At 3 o'clock in the afternoon I went driving, and was gone until 10:30; went home to bed. Monday I was on the stand. Sunday night my car stood in front of my house. Monday afternoon I went to Drumright, and drove from there some distance northeast, where my passengers looked at some leases; got back to Drumright at 5:30, and to enable them to catch a train I took them to Shamrock, arriving there at 7 o'clock, and turned right around and came home. I stood on the livery stand awhile and went home. The night policeman went with me and drove my car back. I left the livery stand Monday night about 10:30 and went home; and there was

no one else at home but my wife. On Tuesday I drove to the Consumers' Refinery in the afternoon. Tuesday night I went home and went to bed. Mr. Robinett went with me. Wednesday night I was home in bed. I went home at 5 o'clock, when my wife closed her office, which is the city clerk's office. I got my car about 9 o'clock Monday morning. Tuesday morning I got my car about the same time from the garage where I kept it. I didn't take the car out at all on Wednesday. It was raining, and I went home with my wife at 5 o'clock in the evening. During the day I did some work on the car; and the car was not out of the garage either Wednesday or Thursday. On Friday, the day I was arrested, I got the car about 7:30, came down to the café, got my passenger, and drove to Quay oil fields, and from there I drove to Cleveland, Okla., where I took my passengers to a hotel, and after telling them that I would check them out at the Thompson Hotel in Cushing, I started home. I never at any time had any arrangement with Bill Reed to transport any liquor for him or with him to Spiker's residence. I never went to Spiker's house with Bill Reed. I never at any time nor with any person carried whisky or other intoxicants to Spiker's house and put it in a cave. Bill Reed never asked me to do so. Reed knew I was an officer. I had raided him at least a half dozen times. I left Cleveland on August 10th at 5:30, and got to Cushing about 9:30. I never at any time or in any way had any communication with Bill Reed, in which he asked me to procure or haul any liquor for him. After arriving in Cushing, I first drove home. My wife was there, and she informed me that someone had been calling for me. I had to go down to the hotel to check my passengers out as I had agreed to do, and while there went to the American Café to eat lunch. While standing at the cash register the telephone rang and asked if Peyton's livery car was there. I answered the phone and said, 'This is Peyton talking.' They told me to come over to the Katy depot, and described the place for me to come to, and how to get in. After this telephone conversation I drove across the Katy tracks and turned east; had my light on all the time. I drove up to Spiker's house and stopped on the south side of it; about 25 feet. I saw Spiker and had a little conversation with him. I opened the door of my car, put my foot on the running board, and started to get out; he came around behind the car and set in something in a sack; I didn't ask him what; put it in the front seat. He told me the way was rough out to the east, and he would go back behind my car and tell me how far I could back to get out, and said, 'Now, you go across to the Katy tracks and wait, and I will meet you there;' and I didn't see him any more, and before I got off the road I was arrested. I didn't go in the house that night, nor get out of the car. I did not have my hands off the steering wheel, except to open the door, and I certainly didn't know that was whisky in that sack at that time, and didn't see Spiker for some time after that. At the time I was arrested I did not tell Lilley I had some whisky. They asked me what I was doing, and I told them I had come to make a drive. They didn't ask me what I had. I didn't know it was whisky that was in the sack; in fact, didn't know what it was."

The defendant, among other instructions, requested the court to instruct the jury as follows:

"The jury is further instructed that evidence has been introduced by the defendant, tending to explain his connection with the whisky testified to by the witnesses for the state; the contention of the defendant in this respect being that, while admitting there was whisky in the package testified to, he had no knowledge that the same contained whisky, or any other liquor or substance, the transportation of which is prohibited by the laws of the state. You are told that, before the defendant can be convicted of the charge against him, you must be satisfied from the evidence beyond a reasonable doubt that the defendant did know, or did have reasonable cause to know, that the contents of said package were such that their conveyance or transportation from one place within this state to another therein was in violation of law; and if you entertain a reasonable doubt as to whether the defendant knew or did not know the character of the contents of said package, and that its conveyance or transportation was prohibited by the laws of this state, then your verdict must be not guilty. You are further instructed, in determining this question, namely, whether the defendant knew of the actual contents of said package, you have a right to take into consideration all of the evidence and circumstances testified to on the trial.

"Refused and exception allowed defendant.
"Wilberforce Jones, Trial Judge."

The refusal to give this instruction, which was excepted to by counsel for the defendant, is urged as grounds for reversal of this judgment. The trial court nowhere gave an affirmative instruction covering the law as applied to the defense interposed. The Attorney General admits that the refusal to give this instruction, or one similar thereto, was error, but contends that the error was harmless because a new trial could not result in any other verdict than that of guilty.

[1] This court has repeatedly held that it is error for the trial court to fail and refuse to instruct on the law applicable to a theory of the defense which the evidence tends to support, when the defendant requests it, and when such evidence affects a material issue in the case. *Crittenden v. State*, 13 Okl. Cr. 351, 164 Pac. 675; *Payton v. State*, 4 Okl. Cr. 816, 111 Pac. 666; *McIntosh v. State*, 8 Okl. Cr. 469, 128 Pac. 735; *State v. Hill*, 63 Or. 451, 128 Pac. 444; *Harris v. State*, 11 Okl. Cr. 412, 146 Pac. 1086.

[2] Instruction No. 5, given by the court, is as follows:

183 P.—41

"The court instructs the jury that any person who receives intoxicating liquors from a bootlegger or other person not lawfully in possession thereof, and carries it any distance, however short, is subject to the same penalties for so doing as the person who unlawfully transferred the same, either by sale, gift, or otherwise furnishing the same to the person receiving the same; and if you believe from the evidence that the defendant received the liquor as shown in the evidence in this case from J. L. Spiker, and conveyed the same from one point to another as set forth in the information, you should find the defendant guilty and assess his punishment not to exceed 6 months in the county jail of Payne county and a fine of not more than \$500, or imprisonment in the county jail not less than 30 days and a fine not less than \$50.00.

"To which the defendant excepts; exception allowed. Wilberforce Jones, County Judge."

This instruction was given over the objection and exception of counsel for the defendant. When instruction No. 5, given by the court, is considered in connection with the refusal to give the instruction requested, as hereinbefore set out, it is evident that the court deprived the defendant of the benefit of his theory of defense, that he had no actual knowledge whatever of, or reasonable cause to know, the contents of the package which he claims the witness Spiker placed in his (defendant's) automobile, and which contained the whisky which he was charged with transporting. Instruction No. 5 practically informs the jury that the evidence shows that the defendant received whisky from the witness Spiker (inferentially with knowledge that it was whisky), and the instructions given, considered as a whole, leave no alternative to the jury but to convict the defendant, irrespective of the question of whether or not the defendant had any knowledge of, or reason to know, the contents of the package received from the witness Spiker. The defense, if believed, entitled defendant to an acquittal. *Golpi v. State*, 14 Okl. Cr. 564, 174 Pac. 288.

[3] In view of the fact that the defendant had borne a good reputation as a law-abiding citizen in that community, had held both the office of constable and deputy sheriff in that county, and had never been shown to be a violator of the law, it cannot be assumed that the failure of the court to give an affirmative instruction covering the law as applicable to the defense interposed was not prejudicial error.

The judgment of conviction is reversed, and the cause remanded for a new trial.

Ex parte DIXON. (No. 2386.)

(Supreme Court of Nevada. Sept. 5, 1919.)

1. LICENSES —11(1)—CITY OCCUPATION TAX.

An admission to the bar of a state is a vested and valuable right, but subject to taxation, including a city occupation tax.

2. LICENSES —7(2)—OCCUPATION TAX—UNIFORMITY—ATTORNEYS.

A city ordinance, imposing a tax upon the occupation of attorney at law, *held* not in violation of Const. art. 10, § 1, providing for an equal and uniform rate of taxation.

3. LICENSES —5—LICENSE TAX ON OCCUPATIONS—CONSTITUTIONALITY.

The imposition of a license tax upon an occupation is not illegal, because not expressly authorized by the State Constitution, but is permissible, unless prohibited thereby.

4. HABEAS CORPUS —92(1) — HEARING ON PETITION.

On an original petition for habeas corpus by an attorney at law, convicted on failure to pay occupation tax, petitioner cannot be permitted to show that the facts proven on the trial at which he was convicted were not sufficient to constitute the crime charged.

5. HABEAS CORPUS —92(1)—ORIGINAL PETITION—HEARING.

In an original application for habeas corpus by one convicted of violation of an occupation tax law, the court cannot consider the abuse of the lower court's discretion in refusing to grant a continuance of the trial in which the petitioner was convicted, or an objection to evidence as incompetent, or the exclusion of evidence offered in petitioner's behalf.

Original proceeding in habeas corpus upon petition of J. B. Dixon. Petition dismissed, and petitioner remanded to custody.

J. M. Frame, of Reno, for petitioner.

L. D. Summerfield, Dist. Atty., and W. D. Jones and Le Roy Pike, City Atty., all of Reno, for respondent.

COLEMAN, O. J. This is an original proceeding in habeas corpus. Petitioner was proceeded against before the judge of the municipal court of the city of Reno, charging him with violating the ordinance of that city making it a misdemeanor for attorneys to practice law without paying a license fee. Petitioner having been convicted as charged, it was adjudged that he pay a fine, and in default thereof that he be confined in jail. Failing to pay the fine, petitioner was incarcerated as adjudged. He now seeks to be discharged upon this writ, alleging numerous reasons as grounds therefor.

[1] The chief reasons urged upon our consideration are that the ordinance is unconstitutional, in that it is in violation of a

vested right, that it is *ex post facto*, and that it deprives petitioner of his property without due process of law.

Counsel for petitioner cites authorities to the effect that an admission to the bar is a vested property right, and call our attention to what is known as the Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, as sustaining the contention that a license tax upon an attorney, such as here questioned, is in violation of the constitutional rights of a member of the bar, and is null and void. While counsel for petitioner has filed a very elaborate brief, citing many authorities, and by a process of reasoning satisfactory and convincing to himself of the soundness of his conclusion, the only case cited which sustains the view contended for by him is the Lawyers' Tax Cases, *supra*. But that case stands alone, and is by a divided court. In a note to *Blanchard v. State of Florida*, 18 L. R. A. 409, it is said:

"In *Lawyers' Tax Cases*, 8 Heisk, 565, decided by the Supreme Court of Tennessee in 1875, which case was also reported as *Cardwell v. State*, in 17 S. W. 109, in advance sheets only and left out of the permanent bound volume, a statute making it unlawful to practice law without payment of a license tax was held unconstitutional; two judges holding that the right to practice law could not be taxed, and two others holding that the practice of law by a duly admitted attorney without payment of the tax could not be made unlawful, while two judges held that the statute was constitutional. The serious division of opinion among the judges of the court much impairs the effect of the decision as an authority, and it is at any rate in conflict with all other cases on the subject."

In *Stewart v. Potts*, 49 Miss. 749, the Supreme Court of Mississippi disposes of the question, without citing an authority, in the following words:

"The only question made * * * is as to the constitutionality of the tax. This question is considered too well settled to require discussion. This right has been directly exercised by the federal government, and its equivalent has been practiced by this state ever since its organization. The same may be said of every state in the Union. If the tax is inexpedient, or excessive, the remedy is at the ballot box."

In *Young v. Thomas*, 17 Fla. 169, 35 Am. Rep. 93, the court, passing upon the question, observed:

"The plaintiff in this case insists in his bill that the levy of this tax is in derogation of his vested rights as an attorney. In the language of the Court of Appeals of Virginia ([*Ould & Carrington v. City of Richmond*], 23 Grat. [Va.] 469, 470 [14 Am. Rep. 139]), 'a lawyer's license authorizes him to practice law in any court of the commonwealth. It is a vested civil right, yet it is as properly a legitimate sub-

ject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property was not taxable because he has a vested right to it, as for saying that a lawyer's license is not taxable because he has a vested right to it.' The matter of regulating the admission of persons to practice law is the subject of legislative action and control. At common law the courts had no power to admit attorneys or counselors. [State ex rel. Wolfe v. Kirke] 12 Fla. 281 [95 Am. Dec. 314]. Their duties are of such character that in order to secure proper qualification for their discharge the Legislature imposes the duty of examination and determination upon the courts. The only difference between this pursuit and that of any other for which a license is not required is that a qualification looking to competency is required in one, and the right independent of qualification is in the other. Because the law prescribes certain methods by which the existence of the qualification to follow a pursuit is determined, and after determining their existence a general authority to follow such pursuit is granted, gives no greater right to follow that pursuit than exists in any citizen to follow any other legitimate calling or avocation. There is a general right in every citizen to acquire, possess and protect property, and yet in the absence of such constitutional limitation upon the power of taxation, it extends, as is said by Mr. Justice Cooley, 'to every trade or occupation, to every object of industry, use or enjoyment, and to every species of possession.' The power of the Legislature to impose a license tax upon lawyers is affirmed in the following cases: [State v. King] 21 La. Ann. 201; [Simmons v. State] 12 Mo. 268 [49 Am. Dec. 131]; [Stewart v. Potts] 49 Miss. 749; [Ould & Carrington v. City of Richmond] 23 Grat. [Va.] 464 [14 Am. Rep. 139]; [Jones v. Page & Stallworth] 44 Ala. 658."

In *Cousins v. State*, 50 Ala. 113, 20 Am. Rep. 290, the Supreme Court of Alabama, in sustaining a license tax on attorneys, used the following language:

"But it is contended that the lawyer alone is exempted from this power of regulation by the General Assembly. This exemption he derives from the privilege to practice his profession at all, dependent upon his license as an attorney at law. In the technical sense of the word, the sense in which it is used in the statute, he is no lawyer without a lawyer's license to confer that privilege upon him. The license of an attorney at law creates his occupation simply. If he does not engage in its practice, he is not bound to pay the license demanded by the statute. If he does, then he must do so under the law which prescribed the conditions upon which the occupation may be engaged in or carried on. There is nothing particularly sacred in the profession or business of a lawyer, which puts him above the legislative power to place on his shoulders his just share of the necessary burdens of the state. If his share of this particular burden is unequal, and he complains of it for this reason, it will be removed; but, without this, he has no more right to avoid his duty than the tobacco

dealer, the peddler, or the citizen who publishes a newspaper or bakes bread. The right to regulate the property and the avocations of its citizens by the state is sovereign, and it should neither be abrogated nor abandoned."

The court of last resort of Virginia, in disposing of the question presented in *Ould & Carrington v. City of Richmond*, 23 Grat. (Va.) 464, 14 Am. Rep. 139, said:

"Yet, whilst a lawyer's license authorizes him to practice law in any court of the commonwealth, and it is not in the power of any municipality to deprive him of that right, or to take away his license, it is a civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the state, or by a municipal corporation where he resides and enjoys the privilege. It is a vested civil right; yet it is as properly a legitimate subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property is not taxable, because he has a vested right to it, as for saying that a lawyer's license is not taxable, because he has a vested right to it."

That great constitutional lawyer and jurist, Judge Cooley, whose word is accepted as of persuasive force in considering such questions, states the rule in the following words:

"Lawyers are subject to such license taxes for practicing their profession as may be imposed by the state and by municipal authorities. The license authorizing them in the first instance to pursue their calling, is an evidence of character and capacity, and carries with it no exemption from taxation by license tax. The profession has no special privilege from that of other occupations. It is true that the right to impose an occupation tax on practitioners of law has been much contested, as depriving the attorney of a vested right, or as impairing the obligation of a contract, or as being, in effect, a tax on the privilege of seeking justice in the courts; but it has, nevertheless, been sustained with only faint dissent."

In *Ex parte Williams*, 31 Tex. Cr. R. 262, 20 S. W. 580, 21 L. R. A. 783, it is said:

"But to tax the employment of a vested right has never been held to impair it, or interfere with its exercise. The question before us, then, is not whether defendant shall be deprived of the right to practice law by forbidding the exercise of the right, or by annexing conditions impossible of performance, as in the *Garland Case* [4 Wall. 833, 18 L. Ed. 366], but whether, having been licensed and permitted to practice, he may be taxed for the privilege granted by the state; for, though a license be a vested right, yet, unless there is something in the privilege by which the state has relinquished the right of taxation, it is presumed to be accepted subject to the power of the state to impose upon its exercise a share of the public burdens by way of taxation. *Providence Bank v. Billings*, 29 U. S. (4 Pet.) 553, 7 L. Ed. 953. This question has been repeatedly before the courts of

the country, and, with but a single qualified exception, they have declared that the practice of the legal profession is subject to an occupation tax, like any other occupation. In the leading case of *Ould v. Richmond*, 23 Grat. 464, 14 Am. Rep. 139, the court says that, while the lawyer could not be deprived of his right, except by the judgment of a court, it was also a valuable civil right and privilege, to which were attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the state. *Weeks, Attorneys at Law*, § 41; *Tiedeman, Pol. Powers*, 101; *State v. Haynes*, 4 S. C. 410; *Jones v. Page*, 44 Ala. 658; *Cousins v. State*, 50 Ala. 113 [20 Am. Rep. 290]; *In re Knox*, 64 Ala. 465; *Savannah v. Hines*, 53 Ga. 616; *Wright v. Atlanta*, 54 Ga. 645; *Holland v. Isler*, 77 N. C. 1; *Wilmington v. Macks*, 86 N. C. 88, 41 Am. Rep. 443; *State v. King*, 21 La. Ann. 201; *State v. Waples*, 12 La. Ann. 343; *Young v. Thomas*, 17 Fla. 170, 35 Am. Rep. 93; *State v. Gazley*, 5 Ohio, 22; *State v. Hibbard and State v. Proudfit*, 3 Ohio, 63; *St. Louis v. Laughlin*, 49 Mo. 559."

See, also, *Lent v. City of Portland*, 42 Or. 483, 71 Pac. 645; *City of Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674.

The authorities all agree with one contention of petitioner, and that is that an admission to the bar of a state is a vested and valuable right; but they go a step further than petitioner, and hold such vested right should be taxable, and rightly so. Why should a member of the bar who is engaged in the practice of his profession be free from taxation? Should he, merely because he has been adjudged qualified to pursue a certain calling and has acquired a vested right in consequence thereof, be more sacred than the peddler or the merchant? If there should be any preference, we can see no reason why the lawyer should be the privileged one. In his admission to the bar he is favored over the average citizen. He is protected. He is protected, in that no one else can invade the realm until designated by some authority as qualified to do so. But because he is thus favored for life, during good behavior, should that be pleaded as such a vested right as sets him apart from the rest of the world as one immune from sharing the burdens of the government which gives him protection? The man who acquires a right or privilege not enjoyed by all humanity ought to be willing to bear his share of taxation. The courts of the land, with a peculiar unanimity, have held, in no uncertain terms, that he should, and we are in accord with both the conclusions reached and the reasons given therefor.

[2] It is next contended that the ordinance is in violation of article 10, § 1, of the Constitution of Nevada, which provides for an equal and uniform rate of taxation. It is not pointed out in just what way the taxation under this ordinance is not uniform. It provides for a graduated rate of tax-

ation, based upon the individual income; and, as said in some of the cases in which this question is considered, it is impossible to attain uniformity to a mathematical exactness. In *Ould & Carrington v. City of Richmond*, supra, it was observed:

"* * * The tax ought to be proportioned, as nearly as practicable, to the value of that right and privilege. But, exact justice and equality are not attainable, and consequently not required" (citing authorities).

In *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794, the court, speaking through Hawley, J., held that the section of the Constitution in question did not apply to licenses imposed for conducting any business or profession. To the same effect: *Ex parte Cohn*, 13 Nev. 424; *City of Ogden v. Crossman*, 17 Utah, 66, 53 Pac. 985; *Dillon, Municipal Corporations*, vol. 4 (5th Ed.) § 1410; *McQuillin, Municipal Corporations*, § 1001.

[3] It is also insisted that the imposition of a license tax is illegal, because not expressly authorized by the state Constitution. Such is not the law. *Dillon, Mun. Corp.* (5th Ed.) § 410, says:

"In the absence of any constitutional prohibition or restriction, it is within the undoubted power of the Legislature to impose a tax upon employments, occupations, or avocations, or to authorize municipal authorities so to do."

Cyc. states the rule in the following language:

"In the absence of any inhibition, express or implied, in the state Constitution, the Legislature may, either in the exercise of the police power or for the purposes of revenue, levy license taxes on occupations or privileges within the limits of the state." 25 Cyc. 599.

The same rule is declared in 3 *McQuillin, Municipal Corporations*, § 986.

The Supreme Court of Kansas, speaking through Brewer, J., later one of the great Justices of the Supreme Court of the United States, in considering this and other questions raised in this case, said:

"In the absence of any inhibition, express or implied, in the Constitution, the Legislature has power, either directly to levy and collect license taxes on any business or occupation, or to delegate like authority to a municipal corporation. This seems to be the concurrent voice of all the authorities. In 1 *Dill. Mun. Corp.* (3d Ed.) § 357, note, the author says: 'Unless specially restrained by the Constitution, the Legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations.' In *Burroughs, Tax'n*, 148, is this language: 'Where the Constitution is silent on the subject, the right of the state to exact from its citizens a tax regulated by the avocations they pursue cannot be questioned.' In *Savings Soc. v. Coite*, 6 Wall. 606 [18 L. Ed. 897], the Supreme Court of the United States thus states the law: 'Nothing can be more certain in legal

decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government.' *Hamilton Co. v. Massachusetts*, 6 Wall. 638 [18 L. Ed. 907]; *Cooley, Tax'n*, 384-392, 410. On page 394 the author observes: 'The same is true of occupations; government may tax one, or it may tax all. There is no restriction upon its power in this regard, unless one is expressly imposed by the Constitution.' In *State Tax on Foreign-Held Bonds*, 15 Wall. 300 [21 L. Ed. 179], Field, J., among other things, speaking of the power of taxation, says: 'It may touch property in every shape—in its natural condition, in its manufactured form, and in its various transmutation; and the amount of taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, and in transportations. Unless restrained by the Constitution, the power as to the mode, forms, and extent of taxation is unlimited.' See, also, the authorities collected in *Fretwell v. City of Troy*, 18 Kan. 274. Nor does this rest alone upon a mere matter of authority. Full legislative power is, save as specially restricted by the Constitution, vested in the Legislature. Taxation is a legislative power. Full discretion and control, therefore, in reference to it, is vested in the Legislature, save when specially restricted. There is no inherent vice in the taxation of avocations. On the contrary, business is as legitimate an object of the taxing power as property. Oftentimes a tax on the former results in a more even and exact justice than one on the latter. Indeed, the taxing power is not limited to either property or avocations. It may, as was in fact done during the late war and the years immediately succeeding, be cast upon incomes, or placed upon deeds or other instruments. We know there is quite a prejudice against occupation taxes. It is thought to be really double taxation. Judge Dillon well says that 'such taxes are apt to be inequitable, and the principle not free from great abuse.' Yet, wisely imposed, they will go far towards equalizing public burdens. A lawyer and a merchant may out of their respective avocations obtain the same income. Each receives the same protection and enjoys the same benefits of society and government. Yet the one having tangible property pays taxes; the other, whose property is all in legal learning and skill, wholly intangible, pays nothing. A wisely adjusted occupation tax equalizes these inequalities." *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288.

[4] It is urged that petitioner should be permitted to produce evidence for the purpose of showing that the facts proven on the trial at which he was convicted were not sufficient to constitute the crime charged. To support this contention our attention is called to the *Eureka Bank Cases*, 35 Nev. 80, 126 Pac. 655, 129 Pac. 308. Those cases do not justify any such contention; and this

court, speaking through Hawley, C. J., in *Phillips v. Welch*, 12 Nev. 158, squarely disapproved of such a practice. The court said:

"No court can discharge on habeas corpus a person that is in execution by the judgment of any other court having jurisdiction of the subject-matter. * * *

This statement is reasonable and unanswerable. If any other position be taken, it will lead to interminable litigation, and establish a rule that, in its consequences, if carried to its logical conclusion, will destroy the force of every judgment, until, perchance, the court of final resort has put its stamp of approval upon it.

[5] It is also contended that petitioner should be discharged because the trial court abused its discretion in refusing to grant a continuance of the trial of petitioner, and for the further reason that the trial court admitted, over objection, incompetent evidence, and refused to admit in evidence competent and material testimony offered in behalf of petitioner, "and, in various ways prevented petitioner from having a fair and impartial trial." These are matters which a court cannot consider in a proceeding of this character.

Petitioner's brief presents some other points, but they are either disposed of by what we have said, or are so utterly without merit as not to justify specific consideration. The petition should be dismissed, and petitioner remanded to custody.

It is so ordered.

SANDERS and DUCKER, JJ., concur.

PETERSON v. INCORPORATED TOWN
OF GUERNSEY, IN PLATTE COUN-
TY. (No. 921.)

(Supreme Court of Wyoming. Sept. 22, 1919.)

1. INTOXICATING LIQUORS ~~§~~69, 106(1)—
REVOCATION OF LICENSES LIMITED TO STAT-
UTORY GROUNDS.

The power of a board of county commissioners, under Comp. St. 1910, §§ 2835, 2836, to grant, refuse, or revoke a retail liquor license, is not one of unlimited discretion, but is limited to the causes stated in the statutes.

2. INTOXICATING LIQUORS ~~§~~96—ON REVO-
CATION OF COUNTY LICENSE, UNEARNED
FEE NOT RECOVERABLE.

A grantee of a saloon license from the board of county commissioners cannot recover an unearned portion of a license fee voluntarily paid and turned over to the town treasurer in accordance with statute, where the license was revoked by the county board, and the revocation was without fault on the part of defendant.

city, in view of Comp. St. 1910, §§ 2826, 2835, 2836, and particularly Laws 1911, c. 13, § 1, providing that no liquor license money shall be refunded to licensee.

3. STATUTES — 220 — LEGISLATIVE CONSTRUCTION OF FORMER STATUTE OF GREAT WEIGHT.

A legislative construction of Comp. St. 1910, §§ 2826, 2835, 2836, and Laws 1911, c. 13, § 1, relating to granting of liquor licenses, that no license fee shall be refunded to any licensee, as shown by Laws 1919, c. 100, § 1, relating to refunding of license fees after enacting statutory prohibition, is entitled to great weight.

Error to District Court, Platte County; William C. Mentzer, Judge.

Action by Kate F. Peterson against the Incorporated Town of Guernsey, in Platte County. From a judgment of dismissal, plaintiff brings error. Affirmed.

Kinhead & Henderson, of Cheyenne, for plaintiff in error.

O. O. Natwick, of Wheatland, and M. A. Kline, of Cheyenne, for defendant in error.

BLYDENBURGH, J. The plaintiff in error, plaintiff below, brought this case in the district court of Platte county to recover the sum of \$926.05 from the defendant, incorporated town of Guernsey, as the alleged unearned portion of a license fee paid for a license granted to the plaintiff by the board of county commissioners of Platte county to sell intoxicating liquor at retail at a designated place within the defendant town. An amended and substituted petition was filed by the plaintiff by leave of court, and a demurrer, "that said petition does not state facts sufficient to constitute a cause of action against the defendant," and "that the facts stated in the petition are not sufficient to entitle plaintiff to the relief demanded in said petition or to any relief whatsoever," having been sustained by the court, and the plaintiff declining to plead further, judgment was rendered against the plaintiff, and her action dismissed, and, seasonable exceptions having been taken by plaintiff, the case is here on error alleged in sustaining the demurrer and rendering the judgment of dismissal.

The sole question before this court is: Does the amended and substituted petition state a cause of action against the defendant? Said petition, in substance, alleges:

That the defendant is an incorporated town, situated in Platte county, Wyo. That the board of county commissioners of Platte county, on proper application by plaintiff on June 5, 1916, licensed plaintiff to maintain and carry on the business of retail liquor dealer in a certain building in the defendant town, in consideration of which license the plaintiff paid into the treasury of the defendant the sum of \$1,000 as required by law. The license to run from January 4, 1916, to

January 4, 1917; said license being set out in full in the petition. That after, but not before, the issuance of the said license, the plaintiff entered upon the business authorized by the license and in strict conformity therewith, and with the law applicable thereto, and continued to operate thereunder until the said permit was revoked by the said board of county commissioners, but not after the license was revoked.

"That during all the time plaintiff operated under said permit she neither suffered nor permitted any disorder, disturbance of the public peace, drunkenness, or unlawful games or practices, or any violation of any law whatsoever, in or about the house or place for which said license was granted aforesaid; but, on the other hand, plaintiff states that at all times subsequent to the granting of said permit aforesaid plaintiff conducted said place in an orderly and lawful manner and strictly as required by law, and that subsequent to the granting of said permit she gave to said board of county commissioners no cause or reason or lawful excuse for the cancellation or revocation of said permit, nor did any of her agents or employees give said board any lawful reason or excuse or cause for the revocation of said permit, but, on the other hand, performed their duties in and about said place in strict accordance with law."

That on February 2, 1916, said board of county commissioners, no fault, cause, or reason having been furnished therefor by the plaintiff or her agents, revoked the license and notified plaintiff that said revocation would become effective at 12 o'clock midnight of February 5, 1916, at which time plaintiff discontinued said business and ever since has ceased to operate under said license. That no previous notice was given plaintiff of the intention of the board to revoke said license, or any opportunity to be heard thereon, and no objections or complaints as to plaintiff's conduct of the place were filed with the board or made against the plaintiff. That the board revoked said license "without any pretense of lawful reason or ground therefor existing or occurring at any time since the issuance of said permit." That plaintiff at all times conducted a quiet and orderly place, in strict compliance with law in every particular. That by reason of the action of the board of county commissioners plaintiff was denied the right to carry on said business subsequent to February 5, 1916,

"and without any fault on her part, or any of her agents, ^{305/355} of the consideration for said sum of \$1,000 paid by plaintiff to the treasurer of the town of Guernsey for said license, to wit, the sum of \$926.05, has wholly failed and plaintiff received nothing whatever therefor. That said defendant is now wrongfully withholding from plaintiff said sum of \$926.05, and refuses to return the same to plaintiff, and that said town of Guernsey aforesaid is therefore indebted to plaintiff in the sum of \$926.05, with interest thereon from the 6th day of February, 1916."

The petition then alleges that the \$1,000 is still in the town treasury, having been ordered by the town council to be kept in a special fund to await the result of this action, and that plaintiff presented her verified claim, as required by the statute, to the town council for allowance, and that said town council on November 9, 1916, rejected and refused to allow said claim.

The demurrer admits these facts as true for the purposes of this case, and the question to be decided is: Can one who has paid the required license fee into a city or town treasury for a liquor license granted by the board of county commissioners of the county, which has ceased to be effective through no fault of the person licensed, and through no action or fault of the city or town or its officers, recover an amount of the money paid proportional to the time during which the license was inoperative?

[1] Under the laws of this state relating to the issuance of liquor licenses, in force at the times mentioned in the petition in this case, the boards of the county commissioners of the several counties were the officers vested with the power to grant licenses to sell intoxicating liquors, but when granted the license fee or tax of \$1,000 provided by statute for the yearly license was to be paid into the treasury of the city or town within which the place mentioned in the license was situated, and additional power was given to the municipality to regulate, license, or suppress the sale. This power was in some instances exercised by the town by enacting additional town licenses of a regulatory character, but, as far as appears from the record before us, had not been taken advantage of in any way by the defendant town of Guernsey. That the power of the board of county commissioners to grant or refuse licenses was not one of unlimited discretion, or to refuse without some cause based upon the qualifications of the applicant as indicated in the statute, this court decided in *State v. Board of Commissioners of Platte County et al.*, 177 Pac. 131. The power of the board to revoke licenses is contained in sections 2835 and 2836 of Wyoming Compiled Statutes of 1910, which are as follows:

Section 2835: "Whenever any person or persons, having a retail liquor license, shall suffer or permit any disorder, disturbance of the public peace, drunkenness, or unlawful games or practices, or violation of any law whatsoever, in his, her or their house or place for which such license shall be granted, such person or persons shall forfeit said license, and such license shall not be renewed for three months thereafter."

Section 2836: "Whenever it shall appear to the board of county commissioners that any person licensed as aforesaid is conducting a disorderly place it shall be within the power of, and further the duty of said board, by order duly made, to revoke said license, and in such case there shall be no rebate of the license fee of such persons."

Under the maxim "*Expressio unius est exclusio alterius*," the power of revocation is limited to the causes stated in these statutes. 17 R. C. L. 555. And what was said in the case of *Pehrson v. City Council of City of Ephraim*, 14 Utah, 147, on page 150, 46 Pac. 657, on page 658, is applicable here:

"If, then, those sitting to administer the law, upon lawful application therefor, can only refuse a license for cause, and must determine each case upon relevant facts, and exercise a sound discretion, can they revoke such license at mere will? Counsel for the appellant insists that section 2, above quoted, confers such power. We do not think this position tenable. Under such a construction the two sections would be in conflict with each other, or, rather, the effect and operation of the one would avoid and annul the effect and operation of the other, because, under the first section, upon application therefor, unless good cause existed for refusing, the license would have to be granted, and under the second it might be immediately revoked without cause. This would be unreasonable."

It may therefore well be admitted that under the facts alleged here the action of the board of county commissioners in revoking the license was unwarranted and void. 23 Cyc. 156.

[2] But does that give the plaintiff the right to recover the money from the defendant town. By the weight of authority it is generally held that, in the absence of statutory authority to refund, there can be no recovery of an unearned portion of a license fee from a municipal corporation. 23 Cyc. 153. The reasons given for these decisions are that the payment is voluntary, and under the well-established principle of law:

"That money paid voluntarily and with knowledge of the facts cannot be recovered and that this is especially true of money paid in the nature of taxes, even if the taxes are illegal."

It is, however, claimed by the plaintiff that an action in the nature of *assumpsit*, such as the one at bar, "will lie whenever one has the money of another which he in equity and good conscience has no right to retain," and a number of cases are cited and quoted in the brief sustaining this principle as applied to cases where a license to sell liquor has been revoked, or failed for various causes. We think that all of these cases are distinguishable from the case at bar. In nearly all the decision is based on the fact that the license failed or was revoked by the act of the defendant city, and the action is brought against the one who granted the license and received the money. In a number of the cases cited the courts based the decision on the fact that the money had been paid under mistake of either fact or law and could therefore be recovered. *Northrop's Executors v. Graves*, 19 Conn. 548, 50 Am. Dec. 264; *Ray v. New Castle*, 3 B. Mon. (Ky.) 510, 39 Am. Dec. 479; *Scott v. New Castle*, 132 Ky. 616, 116 S. W. 788, 21 L. R. A. (N. S.) 112.

The cases that hold a recovery can be had base the right on the principle that the defendant is wrongfully retaining money of the plaintiff, as stated in *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 33 L. R. A. 670, 55 Am. St. Rep. 878, 882, quoting from *State v. St. Johnsbury*, 59 Vt. 332, 10 Atl. 531, as follows:

"When the fact is found that the defendant has the plaintiff's money, if he can show neither *legal nor equitable ground for keeping it*, the law creates the privity and the promise." (The italics are ours.)

And the same case, quoting from *Attorney General v. Perry*, 2 Comyn, 481, states the rule as follows:

"Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this as well where the money is received through mistake, under color, and upon an apprehension, though a mistaken apprehension of having good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver."

The case at bar does not come under either of the alternatives of this rule. The money was not received under any mistake, either of law or fact, nor has the defendant done anything to nullify the consideration to the plaintiff, and the defendant is entitled to retain it under, not only the permission, but the mandate, of the statutes of the state, as we shall show further on.

The cases relied on by plaintiff are all primarily based on decisions of the Supreme Court of Nebraska, and the court of that state in later cases seems to doubt the correctness of its earlier decisions, while following them. In *Chamberlain v. City of Tecumseh*, 43 Neb. 221, 61 N. W. 632, referring to these Nebraska cases on this question the Supreme Court of Nebraska says:

"While each member of the court, as now constituted, entertains some doubt as to the soundness of the doctrine laid down in these cases, we do not now feel justified in disturbing a rule which has been so long recognized and followed by the courts. The right to recover unearned license money is settled by the above decisions, and if a different rule is to be adopted it must come through a legislative enactment."

And in *Wood v. School District No. 32*, 80 Neb. 722, 115 N. W. 308, 15 L. R. A. (N. S.) 478, where the administrator of a deceased person sued to recover the unearned portion of a license fee rendered inoperative by the death of the licensee, that court said:

"Upon the oral argument, I was favorably impressed with this proposition, for the reason it seemed fair and just that the estate of a deceased person should recover unearned license money so long as it was impossible to continue the business under the license. But upon fur-

ther consideration I am convinced that the law will not permit a recovery. The deceased paid the license fee voluntarily, and received all that the licensing board could give to him. The license was not rendered inoperative through any fault of the authorities. In the absence of a statute permitting it, the legal representatives of a deceased licensee cannot recover any part of the amount paid for the liquor license because of the latter's death before the expiration of the term of the license."

The case of *Allsman v. Oklahoma City*, 21 Okl. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184, is relied on generally as the leading case on this question of the right to a refund where prohibition has gone into effect, either locally or state-wide, and thus the right to sell liquor has ceased before the expiration of the license. In that case the court founded its decision on the Nebraska cases, as from that "state the territory of Oklahoma adopted its statutes regulating the license and sale of intoxicating liquors." The cases from the state of Washington are also strongly relied upon by plaintiff to support her contention. These cases are also based on the Nebraska cases, and on the principle as stated in *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884, as follows:

"The respondent paid his money for a consideration which he has, in part, failed to receive, by reason of the act of the city. On the other hand, the city has received money for the granting of a privilege *which it has repudiated and annulled*. It is therefore in justice and equity, bound to repay it." (Italics are ours.)

The case of *State v. Ritter*, 74 Wash. 649, 134 Pac. 492, was a case in which the license failed because the licensees were not citizens of the United States, and the city council allowed a rebate and ordered a warrant drawn, which the defendant, as mayor, refused to sign, and mandamus was brought to compel him to do so. The court held that, while the city might not be compelled to refund, they had a right to compromise or settle disputed claims, and, having ordered the warrant issued, the mayor should be compelled to sign it, saying:

"Such repayment might not be compelled—that question is not before us—but the council may, if it sees fit, return any money which has been paid under a mistake of law or of fact, and to which it has no moral claim."

And it quotes with approval from *Mathews v. Westborough*, 131 Mass. 521, as follows:

"A vote to appropriate money for such a purpose is therefore binding upon them, even if upon subsequent examination it is ascertained that the claim which was to be settled thereby was one which could not have been successfully maintained."

In *Bart v. Pierce County*, 60 Wash. 507, 111 Pac. 582, 31 L. R. A. (N. S.) 1151, while holding that (Syllabus 2) "a municipality which has obtained money or property without authority of law must, under principles of natural justice, refund it to the true owner," but as 10 per cent. of the money had been paid by the county into the state treasury that could not be recovered, the court said:

"The fee was lawfully paid into the county treasury in the first instance, and, in so far as it has passed beyond the control of the county authorities in accordance with law, the county is not liable for its return. This is undoubtedly true of the 10 per cent. of the fee paid over to the state treasurer."

And the decision is based on the *Pearson Case*, supra, and the *Nebraska cases*. On the other hand, the cases holding against the right to recover, in the absence of statutory authority authorizing it, are numerous and in various ways state the rules applicable. In *Phoebus v. Manhattan Social Club*, 105 Va. 144, 52 S. E. 839, 8 Ann. Cas. 667, it is said:

"In order for the plaintiff to maintain its action it was necessary to show (1) that defendant had no authority to impose the tax; (2) that it actually received the money paid (this is conceded); and (3) that the payment was not voluntarily made."

There is no question that the money was legally paid into the town treasury, and the town, or its officers, have not done anything to render the license inoperative. As is said in *Fitzgerald v. Witchard*, 130 Ga. 552, 61 S. E. 227, 16 L. R. A. (N. S.) 519:

"The agency which prevented the licensees from enjoying the privileges was the state law, separate and distinct from the municipal government. There is no more reason in equity and good conscience why the municipal authorities should be allowed to refund the money in this instance than there would have been had the licensee been prevented from enjoying the privileges of his license under some other independent agency over which the municipal government had no power or control."

In *Peyton v. Hot Spring Co.*, 53 Ark. 236, 13 S. W. 764, the court said:

"The payment of the license tax was legal, when made by appellant, and was voluntary on his part. If the effect of the judgment of the circuit court upon the petition for prohibition did not annul and revoke his license, he was not injured, and could not recover the amount paid therefor. If his license were annulled and revoked by said judgment, there is no authority in the statute for apportioning the amount of the license tax according to the time that appellant sold under the license. When the license was granted and accepted by him, the law authorized the county court, upon proper petition, to do what was afterwards done, and he is presumed to have known this, and to have taken the risk of this being done."

And in *McGinnis v. Medway*, 176 Mass. 67, 57 N. E. 210, it is said:

"The licensing board, whether a special commission, or the mayor and aldermen, or the selectmen, do not act as the agents of the city or town, but as public officers specially designated in that behalf, and, in the absence of any statute to the contrary, the city or town is not answerable for their acts as such officers. The license is not granted by the city or town, but by the state acting through its duly appointed officers. It is to be noted that we are not dealing with a case where from its very inception the license was a nullity. These licenses were issued by the proper tribunal, acting within its jurisdiction and having the power to issue them."

In *Neumer v. Jackson County*, 271 Mo. 594, the court, on page 600 (197 S. W. 139, 140), said:

"In order to recover from a municipal corporation a tax or fee paid to it involuntarily and under protest, one of the essential prerequisites (among others), of the right of recovery, absent a statutory rule to the contrary, is that it must appear that the tax or fee was illegal. 4 *Dillon on Municipal Corporations* (5th Ed.) § 1617; *American Union Express Co. v. St. Joseph*, 66 Mo. 675, loc. cit. 683 [27 Am. Rep. 382]."

And again, on page 601 of 271 Mo., on page 140 of 197 S. W.:

"The Court of Appeals permitted a recovery from the city of Carthage for the amount represented by the unexpired portion of the license, on the theory that the city itself, by adopting the Local Option Law, had made it impossible for the plaintiff to use his license. * * * In the present case, it does not appear that any act of the county or its voters prevented the appellant from having the full use of the license granted him."

And the court held the petition did not therefore state a cause of action.

In the case of *Smith v. Mayor and City of Toledo*, 16 Ohio Cir. Ct. R. 362, the plaintiff sued both the mayor and the city to recover \$100 as damages paid by him for a license which the mayor revoked without authority, as alleged, and ordered the policemen to prevent plaintiff from conducting the business licensed. A demurrer was interposed to an amended petition, as in this case, and the court said:

"Now the question is—and the sole question: Do the facts stated in this petition constitute a cause of action against the defendants, or either of them? It will be observed that it is nowhere stated or claimed that the city in any way, or any of its subordinates, by virtue of the action of the council, or in any other manner, interfered with this business of the plaintiff in any particular; but the allegation is that it was the mayor, claiming to act in his official capacity as mayor of the city, who revoked the license and interfered, with the assistance of a policeman, in preventing the plain-

tiff from carrying on his business under the license.

"It appears to us, from the facts as stated, that the mayor had no power or authority to revoke that license. There is no provision of the ordinance cited whereby the mayor is invested with any such power. The council passed an ordinance authorizing the license to be given upon payment of the sum of one hundred dollars. The mayor was authorized to issue the license upon the payment of such sum; but it is nowhere provided that the mayor may revoke the license which he has given and forbid the plaintiff from carrying on his business. The council has not, in any manner, so far as this petition shows, taken any steps in the premises; they have not, by resolution or otherwise, directed the police authorities nor the mayor of the city to interfere or interrupt or prevent the plaintiff from carrying on his business. * * *

The petition, therefore, shows no cause of action against the city as it appears to us, and the demurrer of the city, therefore, for that reason, if for no other, was properly sustained. "Now, as to the mayor himself, the proceeding being brought for the purpose of recovering from the mayor the sum of money which had been paid for the license and which he had paid into the treasury of the city, it shows no cause of action against the mayor. The mayor is authorized to issue the license, upon payment of a certain sum of money. It appears from the petition that the money has been paid and the license has been issued, and the mayor has paid the money into the treasury of the city. He has not got the money, and he is not responsible for it. He cannot be called upon to return the money which has been paid for the license."

But the decision in this case might well be based on our statutes alone. Those applicable are sections 2835 and 2836, above quoted, and section 2826, which reads as follows:

"All licenses issued by any county in this state for the sale of liquors, or for owning or keeping a billiard table, or any table used for pool or bagatelle, and all licenses issued by said counties for any other game or games, not prohibited by the laws of this state, when the licensee shall be a resident of and carrying on the business for which he is licensed within the corporate limits of any incorporated town, city or village, the license shall be collected by the city marshal or collecting officers of such incorporated town, city or village, for the purposes mentioned in this chapter. It shall be the duty of such collecting officer, between the first and fifteenth days of each month, to pay into the treasury of such incorporated town, city or village, all moneys collected for such licenses, which moneys shall be applied to the general revenue purposes of such incorporated town, city, or village."

Also section 1, chapter 13, Session Laws of 1911, as follows:

"That in all cases where a retail liquor license has been duly and legally issued and the license money fully paid into the treasury of any city or town of this state, and the said owner of

such license having sold in good faith to a purchaser such saloon business, and a new license issued by any county, city or town for the carrying on and continuance of such saloon business, then and in that case, the authorities of such city or town shall credit upon such new license the unused portion of the license so belonging to the vender of such saloon business, and the purchaser of such business shall pay into the treasury of such city or town the remaining portion of such new license, and *no license money paid to any city or town for any liquor license shall be refunded to any licensee.*" (Italics are ours.)

[3] It is evident that the Legislature did not intend that any moneys paid for liquor license should ever be paid back and plaintiff paid the money in face of, and with knowledge of, these statutory provisions. As the authorities hold that voluntary payments cannot be recovered in absence of statutory authority, how much more is this true under the mandatory provision of our statutes against repayment. It is sometimes argued that liquor license fees are for regulation and not revenue and therefore are not governed by the rule as to no recovery of money paid as taxes, and while licenses to sell intoxicating liquor are generally for the purpose of regulation, they are also often for revenue as well, and in this state as to the cities and towns the county license fee is paid to the town as revenue simply, as is expressed in section 2826, Compiled Statutes 1910, supra.

"A construction of a statute by the Legislature as indicated by the language of subsequent enactment is entitled to great weight." 36 Cyc. 1142.

That the last Legislature of this state construed these statutes as prohibiting the return of any license fees by cities is shown by the fact that, after enacting a statutory prohibition law to take effect after June 30, 1919, it enacted a statute permitting the cities and towns to refund the unearned portion of the license fee after prohibition went into effect. Section 1 of chapter 100, Session Laws of 1919, is as follows:

"That whenever it shall become unlawful by reason of any United States law, or by reason of any state law, for any person, persons, company or corporation to be engaged in the retail liquor business in the state of Wyoming before the expiration of the full period for which a license authorizing the sale of liquors, wines and beers shall have been issued, as provided by section 2832 of chapter 10, Wyoming Compiled Statutes of 1910, as amended by section 1, of the Session Laws of the year 1917, or, as provided by any other existing law of the state of Wyoming, the board of county commissioners of the respective counties in the state of Wyoming, and the city commissioners and city councils of any incorporated city in the state of Wyoming, who may have issued such license, may refund to the person, persons, company or corporation who have paid the full license mon-

ey, provided by law, such an amount of such license money paid as will cover the period of time, when by the laws of the United States or of the state of Wyoming, it shall have become unlawful for any person, persons, company or corporation, to be engaged in the retail liquor business in the state of Wyoming."

We hold that, under our laws as they existed at the times mentioned in the amended petition, there could be no recovery from a city or town of any portion of a liquor license fee paid for a license granted by the board of county commissioners of the county wherein such city or town was situated, the defendant city or town or its officers not having done anything to nullify the license; that the demurrer to the amended and substituted petition was properly sustained; that no error was committed by the lower court; and that the judgment is in all things affirmed.

Affirmed.

BEARD, C. J., and POTTER, J., concur.

ROBERTSON v. MARTIN et al.

(Supreme Court of Oregon. Sept. 9, 1919.)

1. PUBLIC LANDS ¶26—WHEN EVIDENCE INSUFFICIENT TO AUTHORIZE CORRECTION OF SURVEY.

Evidence to show a mistake in a United States survey, which has been acted on and upheld by its Land Department and is presumed to be correct, *held* not of the clear and cogent character necessary to authorize the court to correct it, and overthrow the credit due it as established by the field notes.

2. VENDOR AND PURCHASER ¶85(2)—WHEN EVIDENCE SHOWS SALE IN GROSS.

Trade, for a house and \$2,000, of a farm represented in the conveyance as 24.75 acres, according to government survey, "be the same more or less," *held* in gross, and not by the acre.

3. VENDOR AND PURCHASER ¶44—WHEN EVIDENCE SHOWS NO FRAUDULENT REPRESENTATIONS.

Evidence *held* to sustain finding that there was no fraudulent representation in the trade of a farm.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Suit by W. D. Robertson against Annie Maude Martin and others. Decree for plaintiff, and defendants Martin appeal. Affirmed.

This is an appeal by defendants Annie Maude Martin and E. F. Martin from a de-

cree foreclosing a mortgage given by them to Marilla S. Smith on January 21, 1914. The complaint is in the usual form. It is alleged that on or about the 23d day of March, 1915, the said Marilla S. Smith, for a valuable consideration, indorsed and delivered said promissory note to the plaintiff, and at the time assigned the mortgage to plaintiff.

The answer admits the execution of the note, the giving of the mortgage, and the recording of the same; that it was given to secure the note; that the note had not been paid; that the Eugene Loan & Savings Bank, a codefendant, had a second mortgage on the premises, and that no proceedings had been had at law or otherwise for the collection of the said amount; then denies generally all of the other allegations of the complaint. It is then alleged in the answer that the note and mortgage were by the said Marilla S. Smith assigned to the respondent on the 23d day of March, 1915; that the respondent herein is a daughter of the said Smith, and took said note and mortgage without consideration, and with full knowledge of the equities existing between the appellants and the said Smith. It is then alleged that defendants, the Martins, in November and December, 1918, were residents of San Diego, Cal., and were the owners of certain residence property in said city, together with household furniture therein, and that they advertised the same for sale or trade, and that the said Marilla S. Smith, acting through her husband and agent, E. O. Smith, entered into negotiations for the exchange of the property described in the complaint for the San Diego property of the appellants, and in order to induce these defendants to make such trade represented to them that the property described in the complaint contained 25 acres of land, that 20 acres thereof were in a high state of cultivation, and that 5 acres of the same were timbered land, of a lighter soil, and gravel bar; that the county road ran east and west on the south side of said premises to near the west line thereof; that all of the timbered land, gravel bar, or rocky places were in the little 5-acre corner lying south of the road; that the balance of the premises, 20 acres, was all in a high state of cultivation, and river bottom land, and worth the sum of \$350 per acre, or \$8,750. It is alleged that these appellants had never seen the premises, which was well known to the said Smith; that all of said statements and representations were positive statements of facts, and were made for the purpose of inducing the defendants Martin to purchase said property, and were made by the said Smith recklessly and as of his own knowledge, and without any regard for the truthfulness of the same, without knowing whether they were true or

false, and with the intent that they should be relied upon and acted upon by the appellants; that the Martins, relying upon said statements, consummated the trade upon the basis of \$350 per acre, aggregating \$8,750, and conveyed the California property to Smith, and executed the mortgage of \$2,000 set out in the complaint in part payment for the premises. It is further alleged that there were but 20.55 acres in said premises; that there were 6.5 acres of the gravel bar, unfit for cultivation, and not to exceed 12 acres of the land in cultivation; that the premises were not worth to exceed \$6,550; that if they had been as represented they would have been worth \$8,750; that by reason of the misrepresentations appellants were induced to execute a mortgage and to pay \$2,100 more than the premises were worth; that in addition thereto they had paid interest on the mortgage amounting to \$148, and sought to recoup against the said mortgage the amount of \$2,248. It is also alleged as a separate defense that the note and mortgage in suit were transferred to the plaintiff as security for a loan of \$1,000; that in any event the plaintiff had only an interest in the note to the extent of that amount.

The reply put in issue all of the affirmative allegations of the answer, and averred that the appellants pursued their own investigation of the tracts of land in Lane county, and caused the premises to be examined, and relied absolutely and entirely upon their own investigation and examination of the premises; that the defendants traded for the premises as a whole, and not by the acre; that there was no purchase price fixed or determined with reference to the different kinds of land constituting the premises, nor the number of acres thereof; that said E. C. Smith never knew the exact amount of bottom land, or land in a high state of cultivation, on the premises, or the exact number of acres contained therein; that any statements made as to the amount of the land were made in good faith by the said E. C. Smith, and believed by him to be true.

O. H. Foster, of Eugene, for appellants.
Chas. A. Hardy, of Eugene (Smith & Bryson, of Eugene, on the briefs), for respondent.

BEAN, J. (after stating the facts as above). Upon the trial it was shown that the appellants and the Smiths at the time of the execution of the note and mortgage were residents of San Diego, Cal.; that the Martins owned the residence property and household furniture which they advertised for sale. The advertisement was answered by a letter from E. C. Smith, the agent of Marilla S. Smith, wherein it was stated:

"I have a very choice little farm of 25 acres of river bottom land on the Willamette river.

* * * 20 acres are in a high state of cultivation, producing immense crops; * * * the other 5 is timber which is valuable."

Pursuant to this letter, the parties met in San Diego, and Smith produced a sketch or map of the land marked, "All choice land, 20 acres; timber, 5 acres." During the trade Mr. Smith said, "To be exact, there are 24.75 acres" in the tract. The parties made an exchange of their respective properties, and the Martins executed a mortgage in favor of Mrs. Smith for the sum of \$2,000. Appellants procured a survey of the land in March, after they had established their residence thereon in the preceding September; according to such survey and measurement made by the defendant Martin, with the assistance of a neighbor, they computed the number of acres in the entire tract to be 20.55 acres, or 4.20 acres short. They also claimed that there were but 13.52 acres of land in cultivation. The trial court found that there was no competent evidence showing that there was a shortage in the acreage, and that the evidence did not establish that there were false or fraudulent representations as to acreage made by E. C. Smith, but that all the statements made by the said E. C. Smith were in good faith, according to the information which he had concerning the same, based upon the abstract of title showing the government survey of the land, and upon the information given to him by the grantors who sold said tract of land to Mrs. Smith; that the value of the land is \$350 per acre.

The allegations of fraudulent representation made by E. C. Smith, the husband and agent of defendants' grantor in the exchange of the real properties, are not sustained by the evidence. The area of the land traded to defendant the Martins by the Smiths consisted of 24.75 acres according to the government survey, "be the same more or less," thereof, and plats. It was so represented in the deed of conveyance from the Smiths to the Martins; also in several conveyances shown in the abstract of title furnished by the Smiths to the Martins at the time of the exchange. There is no competent evidence that the government survey was incorrect. The deputy county surveyor surveyed the 31.64-acre tract. He did not furnish any field notes of his survey, nor state in what manner the survey was made. His conclusion was based upon the assumption that the 6.89-acre tract, which had been sold off from the larger lot, was correct. He figured the number of acres sold to defendant Martin and another, neither of whom were surveyors, and made the number of acres of the cultivated land 13.11 acres, instead of 20 acres, as defendants claim Smith represented. In doing this the deputy surveyor assumed that the laymen who made the

measurements had made a correct plat of the tract, with the proper angles.

[1] The testimony is not convincing or sufficient to overcome the government survey and field notes. The burden of proof is upon the appellants. United States government surveys are presumed to be correct. Before courts will correct such surveys, that have been acted upon and upheld by the United States Land Department, and overthrow the credit due them as established by the field notes, a mistake therein must be shown by clear and cogent testimony. Blair et al. v. Brown, 17 Wash. 570, 50 Pac. 483; Whitaker v. McBride, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857; Kneeland v. Korter, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. (N. S.) 745.

[2] Before making the exchange, the defendant Martin wrote to a banker at Eugene in regard to the value of the Oregon property, and was urged by Smith to come to Oregon and make an investigation himself. After the respective conveyances were made, the appellants came to Lane county, examined and moved onto the land, and wrote Smith that they were satisfied with the farm. The trade of the Oregon farm to defendant Martin was made in gross, and not by the acre. Ogilvie v. Stackland, 179 Pac. 669.

[3] After a careful reading of the testimony in the case, we approve the finding of the trial court, to the effect that the complaint of fraud had not been sustained by the evidence.

The decree of the lower court is therefore affirmed.

McBRIDE, O. J., and JOHNS and BENNETT, JJ., concur.

STATE v. MARCO.

(Supreme Court of Oregon. Sept. 9, 1919.)

FISH — 13(1) — WHEN EVIDENCE SUSTAINS CONVICTION OF USING PURSE NETS UNLAWFULLY.

Where parties convicted of violating Laws 1917, p. 403, § 2, stipulated that, in purse net fishing, removing the net from the water and emptying it of the catch of fish is a necessary part of the fishing operation, one permitting his seine to drift with the tide across the dead line into the forbidden territory, and there causing same to be lifted from the water to the vessel, is guilty of violation of such statute, although the fish entered the seine outside of the forbidden territory and the seine was closed before drifting across the line.

Bennett, J., dissenting.

In banc.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Chas. Marco was convicted of violating Laws 1917, p. 403, § 2, prohibiting fishing for salmon with a purse net, and he appeals. Affirmed.

The defendant is charged with having violated the provisions of section 2 of chapter 207 of the Laws of 1917, by fishing for salmon, with a purse net, in a portion of the Columbia river in which such fishing is prohibited by the act mentioned. Upon the trial in the lower court, the facts in the case were stipulated as follows:

"There being no disagreement between the parties to this action as to the actual facts pertaining to the matter, for the purpose of setting the same out in writing, so that there will be no misunderstanding thereto, it is hereby stipulated and agreed between the parties that the following constitutes the actual facts in the case:

"That said defendant was the owner and operator of a purse seine, under a duly and regularly issued purse seine license of the state of Oregon; that on the day complained of in the complaint he was operating said purse seine westerly on that certain line described in chapter 207 of the Laws of 1917, and was fishing for salmon, by means of a device known as a purse seine; that in such operation he laid out his purse seine westerly of said line in the Columbia river, and the action of the tide carried the said purse seine into the Columbia river in an easterly direction, and east of that said certain line hereinbefore mentioned; that just before reaching said certain line he caused the purse seine to be brailled, meaning thereby that the net was pursed or drawn in such a manner that no fish could then be entrapped in the said purse seine; that after such brailing or inclosing process he allowed the net with the fish caught west of said line to be carried by the action of the tide east of that certain line in waters of the Columbia river and after the net arrived at a point about 100 yards easterly of that certain line, he caused the net to be taken from the water and then onto the deck of the purse seine vessel and the fish removed from the net onto the deck of said purse seine vessel.

"It being stipulated that the fish were actually caught before the net was pursed or inclosed, and westerly of the line mentioned.

"It is further stipulated that in purse seine fishing, the act of removing the net from the water and emptying the same of the catch of fish is a necessary part of the fishing operation.

"It is further stipulated that it was impossible in this case to catch any fish in the net after it arrived at the said designated line by reason of the fact that the said net had been brailled, as mentioned. It is further stipulated that this action shall be tried by the court without a jury."

A judgment of conviction followed, from which the defendant appeals.

Norblad & Hesse, of Astoria, for appellant.
Jasper J. Barrett, Dist. Atty., of Astoria, for the State.

BENSON, J. (after stating the facts as above). The sole question submitted for our consideration, by this appeal, is this: Do the stipulated facts constitute a violation of the provisions of the act of 1917? This law is as follows:

"It shall be unlawful for any person or * * * corporation, to fish for salmon, sturgeon or other anadromous fish by means of devices known as purse seines in any of the waters of the Columbia river in the state of Oregon or over which the state of Oregon has concurrent jurisdiction, east of a certain line which shall be drawn from the present inshore end of the north jetty on the Columbia river to the knuckle of the south jetty on said river, which knuckle is approximately four miles westerly from the government dock at Fort Stevens. Said line will pass approximately three-eighths ($\frac{3}{8}$) of a mile westerly from Buoy No. 10, as shown on the Coast and Geodetic Survey Chart No. 6151, dated January 5, 1917."

Was the defendant fishing in forbidden waters, when he permitted his seine to drift with the tide across the dead line, into the forbidden territory, where he caused the seine to be lifted from the water to the deck of his vessel? The defendant urges that since the seine was brailled or pursed, so that no fish could thereafter be entrapped in the net, before it was carried over the line, and so remained until it was finally lifted into the boat, it cannot be said that he has violated the law by fishing east of the line.

With the assistance of able and industrious counsel, representing both plaintiff and defendant, we have succeeded in discovering but one authority which throws any light upon the problem thus presented, and that is the case of *The Ship Frederick Gerring, Jr., v. Queen*, 27 Canada Supreme Court Reports, 271. In this case, an American fishing schooner had been fishing at a point more than three marine miles from the coast of Nova Scotia, and after the seine was pursed up and secured to the schooner, and while the crew were engaged in the act of hauling the fish out of the seine with a long-handled dip net, the vessel drifted to a point within a mile and half of the coast, where she was seized by the authorities, and condemnation proceedings followed, for a violation of the treaty between the United States and Great Britain and of certain English statutes. By the convention of 1818, the United States renounced forever:

"Any liberty heretofore enjoyed to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of his said (Britannic) majesty's dominions in America."

In harmony with this treaty, it was enacted by the Canadian Parliament that—

"If a foreign ship (unlicensed) has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles," etc., "she shall be forfeited."

There, as here, then, the question was: Was she "fishing" at the time of the seizure? The opinion of the court, which is quite extended and elaborate, contains the following:

"The act of fishing is a pursuit consisting, not of a single, but of many, acts, according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process, beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what 'fishing,' according to the ordinary acceptation of the word, means, and that, I think, is the meaning which we must give to the word in the statutes and treaty. There is here, as I conceive, no need for interpretation, and the fundamental canon is: 'Do not interpret where there is no need of interpretation.' If when the steamship *Aberdeen*, moving eastward, saw the *Gerring*, a mile and three-quarters from shore, engaged as I have described, some of her crew hauling fish from the water, others assisting to confine the fish into smaller and smaller compass, so as to be more easily secured, others driving the fish within the ambit of the dip net by splashing with their oars in the water, others sorting and dressing and otherwise treating the fish, the question were asked: 'What is the vessel doing?' Would not the inevitable answer be: 'She is fishing?' And if any one on board could be found bold enough to affirm that she was not 'fishing,' that that operation was completed hours before, when the seine was pursed up and the mackerel therein inclosed, would he not be set down as either ignorant of language or as bereft of reason?

"Even if the question depended upon the 'taking' of the fish, I do not understand that fish are 'taken' when they are inclosed in a seine, or encompassed about by it. They are still alive in their native element, possibly with few, but still with some, chances of escape. As I understand, they are never all taken; numbers escape. There is the contingency of the seine breaking, or the fish falling from the dip net between the seine and vessel, or of a storm arising and the vessel breaking away from the seine altogether. And there are, doubtless, many other chances of escape. The 'fishing' is not over—although there may be a moral certainty that the fish will eventually be secured—until as a fact they are secured."

In addition to the persuasive argument which we have just quoted, we are impressed with the fact that fishing with purse seines is looked upon with disfavor by legislators, and the act upon which the prosecution herein is based is in the nature of a police regulation of a type of fishing which calls for restraint. This is indicated by the fact that the act of 1917 was amended by chapter 269, Laws of 1919, so as to make it unlawful, within the specified area, "to have any devices known as purse seines, whether fishing or not, in any of the waters of the Columbia river in the state of Oregon, or over which the state of Oregon has concurrent jurisdiction."

tion," etc. The opinion from which we have already quoted speaks of fishing with purse seines as—

"a business that, according to present light, and present scientific knowledge, may be characterized as nefarious; a business, the tendency of which is to annihilate for all time the fish food supply of this continent; a business, too, which, so far as Canadian waters are concerned, has been prohibited and criminalized."

It appears to us quite conclusive that, since the parties hereto have stipulated that, "in purse seine fishing, the act of removing the net from the water and emptying the same of the catch of fish is a necessary part, of the fishing operation," it is not our province to determine what particular steps in the fishing are intended to be prohibited by legislative enactment.

The defendant was "fishing" in forbidden waters, and the judgment must be affirmed.

BENNETT, J., dissents.

ROSEBURG NAT. BANK v. CAMP et al.

(Supreme Court of Oregon. Sept. 9, 1919.)

1. APPEAL AND ERROR ⇐240—WITHOUT OBJECTION TO CONFIRMATION OF SALE JURISDICTIONAL QUESTIONS ONLY REVIEWABLE.

Where no application to set aside the order of confirmation of sale of real property was made, and there was no attempt to call the lower court's attention to want of service on defendants of motion to confirm as violating the court rules, and there being no action in the lower court raising and reserving this or other questions, the review is limited to jurisdictional questions and sufficiency of pleadings.

2. EXECUTION ⇐242—SERVICE OF MOTION TO CONFIRM SALE UNNECESSARY.

L. O. L. § 241, subd. 2, as amended by Laws 1917, p. 64, requires the court to allow the order confirming sale, unless upon hearing it satisfactorily appears that the sale proceedings were substantially irregular to the probable injury of the objector, and service upon the judgment debtors of a motion to confirm is not required by statute, and, where they had knowledge of the final decree directing sale, they cannot be heard to complain of not being served.

3. EXECUTION ⇐242—NOTICE TO CONFIRM SALE OF LAND SUBJECT TO RULE OF COURT.

A court, granting an order of confirmation of sale of real property, may construe its own rules as to requiring service of motion to confirm sale of real property upon the judgment debtor.

Department 2.

Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Action by the Roseburg National Bank against E. N. Camp and others. From an order confirming a sale pursuant to an execution, the defendants appealed, and the order was reversed, and the cause remanded (89 Or. 67, 173 Pac. 313), and an alias execution was issued, and a resale made, and from an order confirming the same, defendants appeal. Order affirmed.

This is an appeal by defendants from an order of confirmation of sale of real property. A resale of the property was directed by this court upon a former appeal of the cause. See 89 Or. 67, 173 Pac. 313. After entering the mandate of this court, the trial court ordered that upon application of the plaintiff an alias execution issue upon the decree of foreclosure for a resale of the property.

Albert Abraham, of Roseburg, for appellants.

B. L. Eddy, of Roseburg, for respondent.

BEAN, J. [1] The assignments of error specify that the court erred in hearing the motion for confirmation, and entering the order of confirmation, without notice to defendants, as required by the rules of the trial court. Section 241, L. O. L., as amended by General Laws of Oregon 1917, p. 64, entitles the plaintiff in the writ of execution, on motion therefor, to have an order confirming the sale, unless the judgment debtor, or in case of his death his representatives, shall file with the clerk, within 10 days after the return of the execution, his objections thereto. The record discloses no objection to the confirmation of sale. No illegal procedure in making the sale has been pointed out. No application was made to the trial court to set aside the order of confirmation, nor any attempt made to call the attention of that court to any irregularity in the sale, or want of service of the motion, so as to obtain any ruling in regard thereto. In the absence of some action in the lower court, raising and reserving other questions, review, upon appeal, is limited to jurisdictional questions, and the sufficiency of the allegations of the pleadings. Marks v. First National Bank, 84 Or. 601, 165 Pac. 673.

[2, 3] Even if objection to the confirmation of sale had been filed on behalf of defendants, the mandate of subdivision 2, section 241, requires the court to allow the order confirming the sale, unless upon the hearing it satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the objector. It is not shown nor suggested that the rights of the defendants have been prejudiced in any manner in the matter of the sale which was confirmed. See Wolfer v. Hurst, 50 Or. 218, 91 Pac. 366. A

resale was granted in this case upon the former appeal, in order that the sale of personal and real property might be made separately, so as not to complicate the matter of redemption. That object has been attained. The trial court, in granting the order of confirmation, did not construe its rules to require service of the motion for confirmation. Obviously, the same power that adopted the rule could construe it. 15 O. J. § 294. A final decree had been entered in the case, directing that the property be sold. The defendants had knowledge of this. An alias execution was regularly issued, and the property duly advertised for sale and sold. The defendants no doubt expected that such proceedings would be taken. The sale was ordered confirmed without objection.

In the case of *Brand v. Baker*, 42 Or. 426, 71 Pac. 320, former Justice Bean said in the opinion:

"The law does not require notice to a judgment debtor of a proposed effort to collect the judgment against him, nor of the levy and sale of his property under an execution issued thereon, except by the filing of a sheriff's certificate in the county clerk's office, and the publication and posting of notices of sale."

In order for defendants to raise any issue concerning the sale of the real estate, it was necessary for them to file objections thereto within the time provided by the statute. Not having done so, they have no cause for complaint. Our statute does not require service upon the judgment debtor of a motion for confirmation of sale. Counsel for defendants does not claim that it does.

We find no prejudicial error in the record. The judgment of the lower court is therefore affirmed.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

STOCK et al. v. PLUNKETT. (Sac. 2756.)

(Supreme Court of California. Sept. 3, 1919.
Rehearing Denied Oct. 2, 1919.)

1. MINES AND MINERALS \S 15 — VALIDITY
OF LOCAL REGULATIONS RECOGNIZED BY
FEDERAL LAWS.

Rev. St. U. S. \S 2318-2320, 2324 (Comp. St. \S 4613-4615, 4620), with reference to the location of mining claims, recognize the validity of local regulations and customs covering locations, and state statutes are construed to have the same force and effect as such regulations.

2. MINES AND MINERALS \S 29(5)—NONCOM-
FORMITY OF FIRST NOTICE WITH STATE STAT-
UTE DOES NOT RENDER LOCATION INVALID.

Subsequent locators of a quartz mining claim, having seen and read the prior location notice of the first locator, to which his name was signed, cannot take advantage of the fact that such prior notice was undated or was not recorded as required by Civ. Code, \S 1426, 1426b, the first locator having fully complied with the laws of the United States pertaining to the location.

Olney, J., dissenting.

In Bank.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Hugh E. Stock and another against William R. Plunkett. From judgment for defendant, plaintiffs appeal. Affirmed.

Rehearing denied; OLNEY, J., dissenting.

Edwin V. McKenzie, Harry A. McKenzie, and William F. Herron, all of San Francisco, for appellants.

A. H. Ricketts, of San Francisco, for respondent.

WILBUR, J. A transfer to this court was ordered in the above cause, after an affirmation of the judgment of the superior court by the District Court of Appeal for the Third Appellate District.

[1] The action is an ejectment, involving a contest arising between two locators of a quartz mining claim. The respondent, the first locator, posted an undated notice upon the property on November 13, 1914. The appellants, the subsequent locators, saw such notice before posting their notice of location, observed that it was undated, and based their claim to the property upon the proposition that the notice in question failed to comply with section 1426 of the Civil Code, which requires a location notice to be posted upon a quartz claim, containing, among other things, the date of location, and upon the further assertion that the prior locator did not within 30 days after the posting of his notice of location cause a true copy thereof to be recorded in the office of the county

recorder of the county in which the quartz claim was situated, as required by the provisions of section 1426b of the Civil Code. It is conceded that the prior locator fully complied with the laws of the United States pertaining to such location. The only question in the case is the effect of the failure to comply with the provisions of our Civil Code requiring the posting and recording of a dated location notice. The subsequent locators were informed by the posted location notice of the prior claim of the respondent and the extent thereof. By inquiring of the respondent, whose name was signed to the notice, they could have ascertained the nature of his claim and the date of his location. Consequently appellants are charged with knowledge thereof. Civ. Code, \S 18, 19. The laws of the United States with reference to the location of mining claims expressly recognize the validity of local mining regulations and customs governing locations, and state statutes are construed to have the same force and effect as such regulations. Daggett v. Yreka Mining Co., 149 Cal. 357, 86 Pac. 968; Rev. St. U. S. \S 2318, 2319, 2320, 2324 (Comp. St. \S 4613, 4614, 4615, 4620); Clason v. Matko, 223 U. S. 646, 32 Sup. Ct. 392, 56 L. Ed. 588. The question involved here is whether respondent's location, which conforms to the requirements of the United States statute, but fails to conform to the state statute, is valid as against subsequent locators who have seen and read the location notice. This is a federal question, and the principle involved has been passed upon by the United States Supreme Court (Yosemite Mining Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374; Butte & Superior Copper Co., Ltd., v. Clark-Montana Realty Co., 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. 447), and by the Circuit Court of Appeals of this circuit (Butte & Superior Copper Co., Ltd., v. Clark-Montana Realty Co., 248 Fed. 609, 160 C. C. A. 509). The decisions of the former are binding on this court, and those of the latter are entitled to great weight in determining such federal question.

[2] The Supreme Court of the United States, since the decision of the District Court of Appeal in this case, in Butte & Superior Copper Co., Ltd., v. Clark-Montana Realty Co., supra, has held that subsequent locators, having knowledge of the previous location, could not avail themselves of defects in the prior location, and in so holding declared that it was unnecessary to determine which was correct—the decisions of the Montana Supreme Court, holding that the defect in question, a failure to comply with the state law in reference to the recordination of a certificate of location, invalidated the location, or the rule announced by the District Court (233 Fed. 547), and af-

firmed by the Circuit Court of Appeals of the Ninth Circuit (248 Fed. 609, 160 C. C. A. 509) in the same case, declining to follow the Montana Supreme Court. The decision of the District Court and its affirmance by the Circuit Court of Appeals in the last-mentioned case were based upon the rule that, where the local statute failed to expressly declare the invalidity or forfeiture of a location which did not conform to the state law, a failure to comply therewith did not work a forfeiture. While the United States Supreme Court refrained from deciding this point, its decision in that case determines the proposition that such location, even though failing to comply with the state law, was good as against a subsequent locator having notice thereof. This is made clear by the following statement in the opinion:

"The District Court, and the Circuit Court of Appeals, affirming it, decided both issues against appellant on the grounds: (1) That the Montana cases did not furnish the rule of decision for the federal courts, the better reasoning being (for which cases were cited) that, as the Montana statute did not impose a forfeiture, hence none resulted from defects in the declaratory statement of the Elm Orlu. (2) That the Elm Orlu people [the first locators] were, in possession of their claim, working the same—of which the Black Rock people [the second locators] had knowledge—and that hence the latter could not avail themselves of the defects in the location of the Elm Orlu. Yosemite Mining Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374, was adduced. In the latter ground we concur, and we need not express opinion of the other, although it has impressive strength, and was conceded to have in Yosemite Mining Co. v. Emerson. * * * Yosemite Mining Co. v. Emerson was concerned with a regulation of the state of California which prescribed the manner of the location of a claim. The regulation had not been conformed to, and the validity of the location was attacked on that ground by a subsequent locator, who had had notice of the claim; he contending that there was forfeiture of it. The contention was rejected, and we said that to yield to it would work great injustice and subvert the very purpose for which the posting of notices was required, which was, we further said, 'to make known the purpose of the discoverer to claim title to the claim to the extent described and to warn others of the prior appropriation.' The comment is obviously applicable to the asserted defects in the declaratory statement of appellees. It, like the California requirement, had no other purpose than 'to warn others of the prior appropriation' of the claim, and such is the principle of constructive notice. It—constructive notice—is the law's substitute for actual notice, and to say that it and actual notice are equivalents would seem to carry the self-evidence of an axiom. Besides, in this case there was an unequivocal possession of the Elm Orlu and it is elementary that such possession is notice to all the world of the possessor's rights thereunder."

The case of Yosemite Mining Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed.

374, thus referred to by the Supreme Court of the United States, was a decision rendered on a writ of error from this court. The question involved was the validity of a location where the locator had posted only one notice at one end of a claim, while the local mining regulations of Tuolumne county required the posting of two notices, "one of which shall be posted in a conspicuous place at each end of the claim." This court held, upon the first appeal of that litigation (*Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036), that in the absence of an express declaration in the mining rules that such failure worked a forfeiture of the mining claim it would not have that effect. The case having been reversed, it was retried and again appealed to this court, after substitution of parties, and it was held that this decision had become the law of the case. *Emerson v. Yosemite Gold Min. & Mill. Co.*, 149 Cal. 50, 85 Pac. 122. The Supreme Court of the United States, upon the writ of error, declined to pass upon the question of whether or not the failure to comply with the local mining regulations invalidated the location, holding that that question was immaterial in view of the knowledge of the subsequent locator of such defective location. It follows, from these decisions of the Supreme Court of the United States, that the appellants herein, having seen and read the prior location notice of the respondent, cannot take advantage of the fact that such notice was undated, or of the fact that it was not recorded.

It is claimed, however, that, whatever the view of courts of other jurisdictions, our own court has affirmatively decided in *Dwinnell v. Dyer*, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. (N. S.) 763, that a failure to comply with a law of this state with reference to location notices invalidates such location. Even if this were true, we would be bound to follow the decisions of the Supreme Court of the United States. The case of *Dwinnell v. Dyer* dealt with mining locations that had been made under the statute of 1897, regulating the posting and recordation of a mining location notice (Stats. 1897, p. 214), which expressly provided that locations which did not conform thereto were void (Id. § 6). While that provision of the statute is not specifically pointed out in the decision, it is evidently the basis of the assumption by the attorneys and by the court that locations which failed to conform to the state statute were void. Previous to the enactment of this statute this court had held in *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283, decided in 1891, and *Emerson v. McWhirter*, supra, decided in 1901, that a failure to conform to a local regulation with reference to the manner of making a location, in the absence of a rule declaring a forfeiture for such failure, did not render it invalid, and could not be taken

advantage of by a subsequent locator having knowledge of the actual location. We had also held in *Webb v. Carlon*, 148 Cal. 555, 83 Pac. 998, 113 Am. St. Rep. 305, decided in 1906, involving a location made after the repeal of the statute of 1897, that a failure to comply with a mining rule which required the record of a mining location in Tuolumne county, did not invalidate the claim by reason of an erroneous date (the notice having been posted October 20th, but dated October 23d), as against one who located the claim October 22d, although under section 2324 of the Revised Statutes of the United States it was required that records of locations when made should contain the date of the location, etc. It should be noted also that the legislation of 1909 is essentially different from that of 1897, in that the law of 1909 did not, and the law of 1897 did, declare a forfeiture for a failure to comply therewith. Furthermore, in view of the fact that previous to the enactment of section 1426 et seq. of the Civil Code in 1909 this court had held that a failure to conform to mining rules governing a location did not invalidate the location when the rule did not expressly so declare (*Emerson v. McWhirter*, supra), and that the United States Circuit Court of Appeals of this district had, in effect, adopted the same rule of decision (see *Butte & S. Copper Co. v. Clark-Montana Realty Co.*, 248 Fed. 612, 160 C. C. A. 509, supra, and cases cited), and that this court had held that such failure did render a location invalid where the local rule or statute did expressly declare such invalidity (*Dwinnell v. Dyer*, supra), and that the United States Supreme Court had concurred in that view in *Butte Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409, a case from Montana (see, also, *Clason v. Matko*, 223 U. S. 646, 32 Sup. Ct. 392, 56 L. Ed. 588, decided in 1912), the fact that the Legislature did not expressly declare that a failure to comply with its new regulations concerning mining locations would invalidate such locations is conclusive that no such result was intended.

As the point involved in this case is thus covered by our own and by authoritative decisions of the Supreme Court of the United States, it is unnecessary to discuss or consider the numerous cases cited from other states or federal courts. It follows that the location notice of the respondent, even though undated, was sufficient to establish his rights against the appellants—subsequent locators having notice of the prior location.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

OLNEY, J. I dissent. The main opinion in its discussion is beside the mark, and

touches upon the real point involved only in the most casual fashion. Its conclusion is rested primarily upon the authority of *Butte, etc., Co. v. Clark, etc., Co.*, 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. 447, very recently decided by the Supreme Court of the United States. The essential facts in that case were that, while the first locators were in actual—not merely constructive—exclusive and notorious possession of the claim and working it, the second locators attempted to locate it, relying upon the fact that the notice of location by the first locators was defective in some particular required by the statutes of Montana, in which state the claim was situate. The court held that under these circumstances the second location was inferior to the first, putting its decision in express terms solely on the ground:

"That the Elm Orlu people [the first locators] were in possession of their claim, working the same—of which the Black Rock people [the second locators] had knowledge—and that hence the latter could not avail themselves of the defects in the location of the Elm Orlu."

Without exception every decision cited in the main opinion here to support its conclusion upon this point involves similar facts. These decisions are to the point alone that, where a would-be locator has notice or knowledge of a subsisting and genuine prior location, and particularly when the first locator is in actual possession of and working the claim, which fact is notice to all the world, the would-be locator cannot take advantage of defects in the posted or recorded notice of the first locator, that he has in fact the notice or knowledge which it was the purpose of the statute should be given by the posted or recorded notice required, and that having such notice or knowledge it is enough.

But the present case is not of that character. The first locator made his location on November 13, 1914. He posted a location notice, but it was undated. The location would expire at the end of the following year, unless the necessary assessment work was done. It was impossible for any one reading the notice to know, when it would so expire, or in the absence of assessment work that there was a subsisting location there claimed. Nor did the first locator record his notice, so that any information could be derived from that source. He did not do the assessment work or remain in possession of the property. Some 10 months later, in September, 1915, the second locator came upon the ground, which was wholly unoccupied. So far as appears, he had no notice or knowledge of the first location, except such as he received from the undated notice of the first locator, which he found and read. But this did not, as has been indicated, inform him as to the essential point for which a posted and recorded notice is required by the statute, namely, that there was a then subsisting location.

So far as he could tell, the ground might at that time have been wholly unclaimed and open to location. The second locator, by an employé, remained in actual possession of the property, doing work thereon, until the following month, October, when the first locator came upon the scene, rifle in hand, to do his assessment work, and ejected the employé of the second. It is plain that such facts are not within either the actual decision or the principle of such cases as *Butte, etc., Co. v. Clark, etc., Co.*, supra.

On the other hand, the facts do bring the case within the principle of *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409, where it was held that the first location was inferior to the second, when the notice of the first location did not contain certain matter required by the Montana statutes. The main opinion here cites the last-mentioned decision as one "where the local rule or statute did expressly declare such invalidity." The decision is not put on that ground, and the statute did not in fact so provide. *Butte, etc., Co. v. Clark, etc., Co.*, 248 Fed. 609, 612, 160 C. C. A. 509.

The true doctrine of the cases may, I believe, be stated with fair accuracy as follows: (a) If the requirements of the statute are observed, the location is valid, and is protected against subsequent locators, regardless of whether they have notice or knowledge of the first location or not. (b) Conversely, if the requirements of the statute are not complied with, as, for instance, if the location notice is defective in a material particular, and a second location is made in good faith by a party who has neither knowledge nor notice, actual or constructive, of the first location, the first location, being defective, will not be protected, but is inferior to the second. If this is not the case, the whole state statute might just as well have never been enacted. (c) If the first location be defective, but the second location be made by a party who had knowledge or notice of the prior location, and particularly where there is such notice because the first locator is in actual possession working the claim, the first location, although defective, is nevertheless superior to the second location so made.

If the foregoing is a correct statement, the first location here was defective, and the real question in the case is whether or not the reading by the second locator of the undated notice posted by the first is sufficient to charge him with notice of the first location. Practically all that is said in the main opinion on this point is that the second locator, by inquiring of the first, could have ascertained the date of the location, and therefore he should be charged with knowledge of it. But could the second locator inquire of the first? He may not know who he is, or where

he is to be found. If the first locator is a wandering prospector, who has apparently gone his way, and the notice is old, as it was in this case, finding him would be a most uncertain task. Locations are frequently, if not usually, made in remote and almost inaccessible places, and the legislation should be reasonable as to locations so made. It seems to me wholly unreasonable to require of a locator, prospecting ground on which there is an old and undated location notice, either to spend days, weeks, or maybe months, hunting the first locator, or else to spend his time, labor, and possibly money in making a discovery at his peril. It is easy to imagine, also, just how much information the first locator would probably give when inquiry was made of him, and just how much reliance could be placed in any statement he might make. In the majority of cases the only result of an inquiry of the first locator would be a hasty and immediate trip on his part to the claim, to see what was there, with a consequent probability of litigation, and a fair chance of more violent methods of settling the almost certain dispute. I do not believe the second locator can properly be charged with the duty of inquiring of the first under such circumstances.

SMITH v. ROYER et al. (L. A. 4943.)

(Supreme Court of California. Aug. 29, 1919.
Rehearing Denied Sept. 25, 1919.)

1. ANIMALS §72 — HARBORER OF VICIOUS DOG LIABLE FOR INJURIES CAUSED.

The harborer and keeper of a dog known by him to be vicious is responsible for injury caused by it, regardless of ownership.

2. ANIMALS §72—WHEN EVIDENCE ESTABLISHES OWNERSHIP OF VICIOUS DOG.

Where defendant was the head of a family having possession and control of a house and premises, and suffered or permitted to be kept thereon the dog which attacked and personally injured plaintiff, the fact that plaintiff's son, who was away at school at the time of the injury, testified to his own ownership of the dog, did not present a conflict with other testimony showing that defendant kept and harbored the dog.

3. ANIMALS §74(5)—WHEN EVIDENCE SUFFICIENT TO IDENTIFY VICIOUS DOG.

In a personal injury action, where evidence showed that plaintiff was attacked by certain dogs answering description of those defendants had harbored on the ranch for two or three years prior to such injury, it cannot be urged that there was no evidence showing that the dogs harbored by defendants were the dogs which attacked plaintiff.

4. ANIMALS —70—KNOWLEDGE OF WIFE HAVING CUSTODY OF VICIOUS DOG IS KNOWLEDGE OF HUSBAND.

Actual notice to the owner or keeper that a dog is vicious is not necessary; notice to or knowledge of his wife while she was with his knowledge in custody or control of the dogs, or to his agent in such control, being sufficient.

5. ANIMALS —74(5)—WHEN EVIDENCE ESTABLISHES KNOWLEDGE OF VICIOUSNESS OF DOG.

In an action for personal injury resulting from the attack by defendant's dogs, evidence held to show that defendant's wife was in charge of the premises and had control of the dogs, that defendant was the head of the household, with authority over the premises superior to that of his wife and foreman, and that they had knowledge of the dogs' viciousness, which must be imputed to defendant.

6. NEW TRIAL —71 — MAY BE GRANTED THOUGH VERDICT BASED ON CONFLICTING EVIDENCE.

In a jury trial, a party is entitled to two decisions on the evidence, one by the jury and one by the trial court, and the latter is not bound by a conflict in the evidence.

7. ANIMALS —74(5)—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT FOR PLAINTIFF.

In an action for personal injuries resulting from an attack by defendants' vicious dogs, evidence held to present no substantial conflict on the question of defendants' liability, based on knowledge of the dogs' viciousness.

8. DAMAGES —131(2)—WHEN DAMAGES FOR WOUND BY DOG NOT EXCESSIVE.

Where plaintiff, 70 years of age, was attacked while riding a bicycle by two vicious dogs, receiving a wound in his leg which had to be dressed twice a day by a trained nurse for three weeks, during which he was confined to his home, and daily for three weeks thereafter, and it was more than three months before he could walk without experiencing pain, and he sustained a severe nervous shock, which continued until time of trial, a verdict of \$700 is not excessive.

9. APPEAL AND ERROR —1078(6)—GRANT OF NEW TRIAL REVERSED AS WITHOUT SUPPORT.

On appeal from an order granting a new trial, notwithstanding appellants limited their contention on appeal to two grounds, the entire record must be reviewed, and where it fails to disclose any ground supporting such order, it must be reversed.

Department 1. Appeal from Superior Court, Orange County; William H. Thomas, Judge.

Action by C. H. Smith against J. O. Royer and Mrs. L. Royer. Judgment for plaintiff, and from an order vacating and setting aside the judgment, and granting a new trial, the plaintiff appeals. Order reversed.

Tipton & Cailor, of Los Angeles, for appellant.

Williams & Rutan, of Santa Ana, for respondents.

LAWLOR, J. This is an appeal by the plaintiff from an order vacating and setting aside the judgment and granting a new trial.

Action was brought by the plaintiff in the superior court of Orange county against the defendants to recover damages for personal injuries sustained as a result of an attack by two vicious dogs, alleged to have been harbored and kept by the defendants, who, it is further alleged, knew of the vicious characteristics of the dogs and that they were accustomed to bite people. The complaint prayed for damages in the sum of \$2,550. The case was tried by jury, and a verdict in favor of the plaintiff was rendered in the sum of \$700. Judgment was entered on the verdict, with costs to the plaintiff, amounting to \$36.65.

On January 20, 1914, the plaintiff, a man 70 years of age, while riding his bicycle along the sidewalk in front of the "Royer place" in the city of Anaheim, was attacked by two dogs, a St. Bernard and a bull terrier, which rushed out from the Royer place. The St. Bernard sprang upon the plaintiff and barked at him in a threatening manner, while the smaller dog, the bull terrier, seized the plaintiff by the calf of his right leg, tearing his clothes, and inflicting a painful wound. Following the attack the plaintiff was confined to his home for a period of 3 weeks, suffering from the wound in his leg and from a severe nervous shock. The plaintiff was not able to walk without experiencing pain from the bite for more than 3 months, and he testified at the trial, more than 2 years after the injury, that he was still suffering somewhat from the nervous shock.

No reason was assigned for ordering a new trial, but it was stated that it was "not on the ground that the jury violated the instructions of the court." However, in their notice of motion to vacate and set aside the judgment and for a new trial, the defendants set out the following statutory grounds: (1) Newly discovered evidence material to the defendants, which they could not with reasonable diligence have discovered and produced at the trial. (2) Excessive damages appearing to have been given under the influence of passion or prejudice. (3) Insufficiency of the evidence to justify the verdict. (4) That such verdict is against law. (5) Misconduct of the jury. (6) Errors in law occurring at the trial and excepted to by the defendants.

The record discloses that the defendants, in arguing the motion, urged but two points: (1) Excessive damages; and (2) insufficiency

cy of the evidence. The arguments of the defendants in their brief on appeal are also confined to these two points.

[1] 1. The defendants contend that the "evidence was either conflicting upon material issues, or there was no evidence to support certain material issues necessary for the plaintiff to prove." In this connection the defendants point out that the evidence shows that there were two St. Bernard dogs on the place—one belonging to the defendant J. O. Royer; the other to his son-in-law, Walter Olmstead; so that the St. Bernard which attacked the plaintiff may or may not have belonged to the defendant J. O. Royer, while the other, the bull terrier, was owned by Max Royer, the adult son of the defendants. Hence they argue that, since it was admitted by the plaintiff that it was the bull terrier alone which did the biting, they are not responsible for the damage done by this dog, because he did not belong to them. In other words, the position of the defendants is that, before liability can be established in such a case, one of the things which must be proved is that the defendant is the owner of the dog. The contention ignores the element of damage which may have been caused by the St. Bernard; but, even assuming that the legal injury is to be limited to the damage caused by the bull terrier, and that the ownership of the bull terrier was in the son of the defendants, the fact of ownership would be immaterial, and we must presume, in the absence of such a specification in the order, that the new trial was not granted upon that ground. This would also be true as to the ownership of the St. Bernard, which by its barking and threatening manner, it was alleged, contributed to the injury. The rule of decision in this and other jurisdictions is against the contention of the defendants. It has been held in similar cases that in order to recover damages it is necessary to prove: (1) That the dog bit the plaintiff. (2) That the dog was vicious and accustomed to bite people. (3) That this fact was known to the defendant. (4) That the dog was harbored or kept by the defendant. The question of ownership is not an issue in such cases. *Wilkinson v. Parrott*, 32 Cal. 102; *Strouse v. Leipf*, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122, and cases there cited. Hence, any insufficiency in the evidence to establish the ownership of the dogs was not material, and could not properly have been made the basis of an order granting the new trial.

[2] But the defendants go a step further and cite the record that Max Royer testified that he owned the property where these dogs were kept—that it was his home. From this it is argued that he alone would be responsible for the injury, since it was his dog, kept on his premises, which did the biting. Max Royer did testify that he owned the place where the dogs were kept, and that it was

his home, but he also testified that it was the home of his mother and father; that his father had deeded to him, in 1910, the part of the property upon which the house stood, and that the title had been in his name since that time; that his brother-in-law, Walter Olmstead, was the manager or foreman of the ranch known as the Royer place, 20 acres of which belonged to the Anaheim Investment Company; that he himself did not run the ranch, or in any way exercise control over it, but that Mr. Olmstead took his orders from J. O. Royer, defendant herein; and that at the time the plaintiff was attacked by the dogs he (Max Royer) was away at school. Therefore the contention of the defendants that there was a conflict or an insufficiency in the evidence to establish the fact that the defendants kept and harbored the dogs is without foundation. It has been held that if the head of a family, having possession and control of a house or premises, suffers or permits an animal to be kept on the premises, he may be regarded as the keeper. 3 *Corpus Juris*, 106.

[3] The defendants further urge that there is no evidence establishing or tending to establish the fact that the dogs which attacked the plaintiff on January 20, 1914, were the same dogs which other witnesses had testified were kept on the Royer place, and which dogs were of a vicious nature. There is no merit in this contention. It was established by the testimony of witnesses Max Royer, J. L. Thompson, and the plaintiff that certain dogs answering to the description of the ones which caused the injury to the plaintiff had been on the ranch for 2 or 3 years prior to January 20, 1914. This evidence stands uncontradicted.

[4] The defendants further contend that there is no evidence that the defendant J. O. Royer ever had any knowledge of the vicious character of any of the dogs. It is true that there is no direct evidence that the defendant J. O. Royer was ever personally notified that the dogs on his place were accustomed to run out and bark at and attack people. But it seems to us idle to assume, in view of the fact of his residence on the place and the other evidence, that J. O. Royer did not have personal knowledge of the vicious propensities of the dogs. Moreover, actual notice to the owner or keeper of a vicious dog is not necessary; notice to or knowledge of his wife, while she was with his knowledge in custody or control of the dogs, or to his agent in such control, is sufficient. 2 *Cyc.* 378.

[5] There is a partial conflict in the evidence as to whether Mrs. L. Royer had personal knowledge or was notified of the vicious nature of the dogs. What we have said touching the personal knowledge of J. O. Royer applies with increased force to his wife, who, according to the testimony of the plaintiff and the witness Thompson, was

notified of previous attacks by the animals. Plaintiff testified that on one occasion, a few months before he was injured, while he was riding by the Royer place on his bicycle, these same dogs "dived" out at him, and that Mrs. Royer was standing on the sidewalk and prevented them from doing him any harm at that time by calling them off, and that he had then told Mrs. Royer that the dogs were dangerous, and that they should be tied up or otherwise taken care of. Mrs. Royer denied that such an incident had ever occurred. She testified that to her knowledge she had never seen the plaintiff in her life until he was pointed out to her in the courtroom. Plaintiff attempted further to show that the defendant J. O. Royer had constructive notice through his agent, Mr. Olmstead, the foreman of the ranch. In this behalf, John Kellenberger, the city marshal of Anaheim, testified that he had visited the Royer place, as deputy assessor, more than two years before January 20, 1914, and that at that time he had seen two dogs there; that they had rushed upon him in a threatening manner, and that Mr. Olmstead had called them off. One of these dogs was a St. Bernard; the other, a small white Spitz. There is no direct evidence of identity between the dogs which attacked Mr. Kellenberger and those which inflicted the injury on the plaintiff, unless such identity may be inferred from the fact that two St. Bernards were kept on the place, and that on each of the two occasions the attacking dog was accompanied by a St. Bernard. The testimony of Mr. Thompson that he called at the Royer place in August, 1913, and while there was attacked by dogs answering the description of those that injured the plaintiff, stands uncontradicted. The witness testified that he had been employed as a driver for the Standard Oil Company; that in this capacity he had often visited the Royer place to deliver oil; that on such an occasion in August, 1913, he was attacked by three dogs—two large St. Bernards and a white bulldog; that the three dogs set upon him, and that the bulldog bit his hand, while one of the St. Bernards bit his leg, the other St. Bernard tearing his clothes, but doing no damage otherwise; that after he had kicked himself free from the dogs Mrs. Royer came out and took him into the house and administered first aid to his injuries; that as a result of this attack he was laid up for three weeks. Mr. Thompson further testified that he had occasion to pass the Royer place several times after that during the year 1913, and that on each of these occasions he saw the same dogs about the place; that the last time he had been by the place was in December, 1913, and that he had seen the same dogs there at that time. This would seem to be sufficient to establish the fact, through the knowledge of his wife, that defendant J. O. Royer knew the vicious char-

acter of the dogs kept on the place, and, from the description, that these were the same dogs which attacked the plaintiff, inflicting the injury complained of.

The evidence shows, without conflict, that Mrs. Royer was in charge of the premises and had control of the dogs, and that J. O. Royer was the head of the household, with authority over the premises superior to that of his wife or of the foreman, Olmstead. If either the wife or the foreman, in the exercise of their functions as custodians, obtained knowledge of the vicious character of the dogs, it was their duty, respectively, to inform their superior, J. O. Royer, of the fact. Their knowledge, so obtained of that fact, is imputed to him and he is chargeable therewith. The fact that they both had knowledge of the vicious nature of the dogs, as has been shown already, was established by uncontradicted evidence. There was, therefore, no cause for granting a new trial to J. O. Royer on the ground that the evidence was insufficient to charge him with that knowledge; and, of course, there was no such cause respecting Mrs. Royer, who was also a defendant.

[6, 7] We have reached the conclusion that the contention of the defendants that the order granting a new trial was made upon the ground of the insufficiency of the evidence cannot be supported. In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence. *Dickey v. Davis*, 39 Cal. 585; *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. 806; *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715; *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26; *Green v. Soule*, 145 Cal. 96, 78 Pac. 337. In passing upon the question before us, we are not to weigh the evidence, but only to consider its legal sufficiency, as distinguished from its probative force, and accept a substantial conflict as conclusive upon us. After examining the evidence, we find that there is no substantial conflict on the question of the liability of the defendants. It has not been questioned that the plaintiff was injured by dogs kept and harbored by the defendants on the premises where they resided. The defendants offered no evidence that the dogs were not vicious. Indeed, with the exception of the denial of Mrs. Royer that plaintiff was once pounced on by the dogs in her presence, the evidence that the animals were vicious and had previously attacked persons stands uncontradicted. The only dispute in the evidence is whether the defendants had knowledge that the dogs were accustomed to attack and bite people. On this question we do not think it can be maintained that there was a substantial conflict. From the evidence it is inconceivable to us that either the jury or the trial court believed that the defendants did not have knowledge within the meaning of

the decisions, that the dogs had vicious propensities and were accustomed to attack people. Here, according to the evidence, we have the case of a man and his wife living together on a place where, for several years, they kept and harbored vicious dogs, and yet it is insisted that the evidence does not show that they knew of the dangerous propensities of the animals. In our view, the proof of scienter is so complete that it would involve a waste of effort to discuss the argument on behalf of the defendants on the subject. As already pointed out, there are some discrepancies in the testimony as to identity between the dogs that figured in previous attacks and those that injured the plaintiff, but the absence of complete harmony in the testimony on this point, in view of the fact that it is not every individual who can distinguish the different species of dogs, cannot, any more than the contradiction of Mrs. Royer of the testimony of the plaintiff as to the action of the dogs in her presence on a previous occasion, be held to constitute a substantial conflict in the face of the inherent probabilities arising from the evidence bringing liability home to the defendants for the injury. And the contention that the trial court disagreed with the jury as to the facts is, in our opinion, equivalent to a declaration that the former disregarded the evidence.

[8] An examination of the evidence precludes the suggestion that the new trial was granted upon the ground of excessive damages, the second point urged by the defendants. Assuming that the trial court believed that the plaintiff was entitled to recover, we find no warrant for the conclusion that it deemed a verdict for \$700 disproportionate to the injury suffered. As we have stated, the plaintiff was an old man 70 years of age at the time of the injury; he was confined to his home for a period of 3 weeks, during which time his wound was dressed twice a day by a trained nurse, and daily for 3 weeks thereafter, and it was more than 3 months before he could walk without experiencing pain, and he sustained a severe shock, produced partly by his dread of hydrophobia, from which shock he was still suffering at the time of the trial. It was said in *Harrison v. Sutter Street Ry. Co.*, 116 Cal. 156, 47 Pac. 1019, approved in *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513:

"It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury."

We must hold, therefore, that the trial court did not view the verdict of \$700

as "grossly disproportionate to any reasonable limit of compensation warranted by the facts," nor "based on prejudice or passion rather than sober judgment."

[9] The granting of a new trial rests very largely in the trial court, and such an order will not be disturbed if it can be upheld upon any ground shown by the records. *Hitchcock v. Rooney*, 171 Cal. 285, 152 Pac. 913, and cases there cited. Hence, notwithstanding the defendants limited their contention on appeal to the two grounds herein discussed, we have examined the entire record, in order to determine whether the order can be supported upon any ground, and, none appearing to us, the order must be reversed.

Order reversed.

We concur: SHAW, J.; OLNEY, J.

SIEGEL v. HECHLER et al. (L. A. 4935.)

(Supreme Court of California. Sept. 3, 1919.)

1. PRINCIPAL AND SURETY ⇨115(1)—PREMATURE PAYMENT OF SUBCONTRACTOR'S DEFAULT WILL NOT RELEASE SUBCONTRACTOR'S SURETY.

In an action by a contractor upon a bond of a subcontractor guarantying performance of the contract, the effect of contractor's premature payment of subcontractor's defaults would not be to release the surety from the whole bond, but only from the amount so paid.

2. PRINCIPAL AND SURETY ⇨115(1)—CONTRACTOR'S IMMEDIATE PAYMENT OF CLAIMS AGAINST SUBCONTRACTOR NOT PREMATURE.

Where a subcontract provided that subcontractor should save contractor free and harmless from any liability that might accrue from the former's default, and subcontractor's bond bound the surety company to the performance of such covenant, upon breach by subcontractor, the contractor's immediate payment of parties performing work and furnishing material, who were entitled to a lien under Code Civ. Proc. §§ 1184, 1187, was not premature, and did not violate the contract or affect the bond's validity.

Department 1.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Fred W. Siegel against G. A. Hechler and the Southwestern Surety Insurance Company. From a judgment for plaintiff upon the bond of defendant Hechler, the Surety Company appeals. Affirmed.

Hickcox & Crenshaw, of Los Angeles, for appellant.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

SHAW, J. The Southwestern Surety Insurance Company appeals from a judgment against it in favor of plaintiff upon a bond executed by it as surety for G. A. Hechler for the performance of a subcontract between Hechler and the plaintiff for the doing of a part of the work upon a building under erection by Siegel.

The Marlborough School for Girls, a corporation engaged in the business of conducting a girls' school, made a contract with Siegel for the erection of a school building on its premises at the contract price of \$70,000. The contract, with elaborate plans and specifications, was duly filed in the recorder's office on July 12, 1915. Siegel and Hechler entered into a subcontract, whereby Hechler agreed to do the excavation and concrete work on the building as required by said plans and specifications, for the sum of \$7,000. Hechler began work on the subcontract about September 7, 1915, and continued at the work until November 7, 1915, at which time he absconded, leaving the work unfinished. Siegel completed the subcontract work at his own expense. Hechler was made a defendant, but he was not served with process. The case proceeded to judgment against the surety company alone.

The complaint alleges that while Hechler was engaged in the work Siegel paid him, in accordance with the terms of the contract, \$4,537.87; that after Hechler abandoned the work Siegel paid for labor performed upon, and materials and supplies used in, the subcontract work by Hechler and left unpaid by him, sums amounting to \$3,925.33; and that in completing the building after the abandonment by Hechler plaintiff expended \$2,139.43, which was the reasonable cost of such completion. He asked judgment for the difference between the aggregate of these sums and \$7,000, the subcontract price.

The denials and affirmative allegations of the answer set up the defense that the sums, amounting to \$4,537.85, alleged to have been paid to Hechler while the work was going on, were not paid "in accordance with the terms of said contract," and that Siegel violated his agreement with Hechler, for the performance of which the bond was given, by paying money to Hechler in excess of the amount due on the subcontract at the time of such payment, whereby, it is claimed, the surety was released.

The court found that while Hechler was engaged in the work Siegel paid him "in accordance with the terms of said subcontract" \$4,526.90; that after the abandonment Siegel paid \$3,925.33 on bills due from Hechler for materials and labor used in the subcontract work; and that Siegel completed the work on the subcontract at the reasonable expense of \$2,139.43. This made an excess of \$3,591.66 paid out by Siegel over the sub-

contract price, for which excess judgment was given in favor of the plaintiff.

The terms of the subcontract regarding payments by Siegel to Hechler, and which it is claimed Siegel violated by premature payments, were as follows:

"Second. That the said general contractor will, in consideration of the said covenants and agreements being strictly performed and kept by the said subcontractor, as hereinabove mentioned, well and truly pay or cause to be paid unto the said subcontractor the said sum of money above mentioned as the subcontract price, in the manner following: Such amounts as Hechler may need for pay roll on or before 12 o'clock noon of each and every Saturday following beginning of work and balance 35 days after completion of this contract; but in the event that the general contractor should deem himself insecure by reason of a possibility that the laborers or the materialmen of the subcontractor may file claims of liens upon said property, or may give to the owner notices to withhold money from the general contractor, then the general contractor may at his option withhold further payments until furnished with receipts or releases from all such materialmen and laborers."

[1] It is the contention of the plaintiff that the phrase "such amounts as Hechler may need for pay roll on or before 12 o'clock noon of each and every Saturday following beginning of work" covers only payments of the weekly wages of the men employed by Hechler, or other regular weekly sums contracted to be paid by him for the doing of work on the subcontract. It appears from the evidence that in the course of the work Hechler incurred bills in the performance thereof upon which Siegel paid the sums following, to wit: On September 23, 1915, to Butterfield & Scaer, \$350, for steam shovel work; October 1, 1915, to E. E. Scott, for hauling and excavating, \$450; and on October 21, 1915, to L. A. Rock & Gravel Company, \$759, for materials used in the work—a total of \$1,559. The point made by the appellant is that these sums could not have been included in any pay roll, within the meaning of the subcontract, and that under its terms they did not become due to Hechler, or payable on his account, until 35 days after the completion of his subcontract. The argument is that by this departure from the terms of the contract the surety was prejudiced, and thereby it was released from its obligation. If the words "pay roll" have the meaning this argument assumes, the above-mentioned payments were premature, so far as the terms of the subcontract just quoted are concerned.

It is not an accurate statement of the law to say that the surety would be released from the entire obligation by reason of premature payments. They would not be an alteration of the contract for the performance of which the defendant had become

surety. They would be a departure therefrom, or a violation thereof, effected by the parties during its performance, without the consent of the surety. The legal result of such departure would not be to release the surety from the entire obligation. The effect would be that Siegel would have no cause of action on the bond to recover from the surety that part of Hechler's defalcation that was made up of these premature payments. The authorities cited by appellant, concerning the effect of a material alteration in the contract after the surety has become bound thereon and without its consent, are not strictly applicable.

There are persuasive reasons, growing out of the nature of the subcontract and the work to be done thereunder, in connection with the law as to the liens of mechanics, for giving the above-quoted phrase "pay rolls" a broader meaning. But we take a view of the case which renders it unnecessary to determine whether the narrower or broader interpretation is correct, and we therefore leave the question undetermined. There are other terms of the subcontract and there were other circumstances, both of law and fact, which must be taken into consideration, and which show that Siegel had the right to pay these bills at the time they were paid.

[2] The subcontract provides that Hechler shall save Siegel "free and harmless" from any and all liability which might accrue against or upon Siegel as the result of any default of Hechler in the performance of the subcontract. By the bond executed by the surety company it became bound to the effect that Hechler should perform all the covenants and agreements on his part in said subcontract, including, of course, the one just mentioned, and should indemnify and save harmless the said Siegel against all loss which he might sustain by reason of any claim or claims of lien filed with the county recorder, or any notice given to the owner to withhold money from Siegel for any labor performed or material furnished in the work, "or by reason of any demands or claims which shall be made against said owner or Fred W. Siegel for such labor or materials." Under the law as it stood at the time these contracts were made and the work done, every person furnishing materials or doing work upon the building, whether for a subcontractor or for the general contractor, was entitled to file a lien upon the owner's property and upon the building therefor, at any time within 30 days after he had ceased to labor or had ceased to furnish materials (Code Civ. Proc. § 1187), and such person could also at any time give a stop notice to the owner, and thereby authorize the owner to withhold payments from the general contractor upon the principal contract (Code Civ. Proc. § 1184). It ap-

pears from the evidence that the bills aforesaid were presented to Siegel, and that the money was then due from Hechler to the respective claimants for work done or material furnished and used in the building. The answer does not allege, and it is not claimed, that the demands thus made upon Siegel were not then lienable under the law. A stop notice could have been given therefor immediately. Siegel, therefore, immediately incurred a liability, through this default, to have liens filed on the premises for these bills, and stop notices given therefor to the owner to withhold money due to Siegel on the main contract. He was liable to be greatly embarrassed by these consequences of such failure on the part of Hechler. Such failure was a violation of Hechler's covenant to save the general contractor "free and harmless" from any and all liability which might accrue against or upon Siegel as the result of any default of Hechler. It was also a violation of the terms of the bond, whereby the surety undertook that Hechler should perform all the covenants of the subcontract and save Siegel harmless against loss by reason of any demands or claims which might be made against him or the owner for labor or materials upon the subcontract work, and against loss which he might be put to by reason of liens filed or stop notices given to the owner. Hechler having failed, the only way by which Siegel could save himself harmless from such failure and free himself from the liability thus imposed was by paying the bills at once. It was his right, if not his duty, to prevent as much of the damage that might flow from Hechler's nonpayment as he could with reasonable effort, under the circumstances. If he had not been able to pay these bills at the time, and additional damage to himself had followed therefrom, the surety would have had so much the more to pay on the bond. The mere fact, therefore, that the bills were paid prior to the time specifically fixed by the payment clause of the subcontract for the payment of anything other than the sums necessary for pay rolls, even if it were true, does not determine the question of the surety's release. Siegel had the right to rely upon the other covenants of the contract and bond, whereby the surety became bound for Hechler's failure to save Siegel free from the liability that stop notices and liens should be filed. His payment of these bills for that purpose was therefore not a violation of the contract, but was in accordance with his rights thereunder. The fault was that of Hechler in leaving his bills unpaid, thus to become a demand against Siegel, or a potential lien upon the building being erected by Siegel, and the surety's obligation was that Hechler would not commit such default.

For these reasons we are of the opinion

that the finding of the court, of which appellant complains, to the effect that all sums of money paid by plaintiff to defendant Hechler were paid in accordance with said subcontract and for pay rolls, was immaterial, and not prejudicial to the appellant, even if it were based on an erroneous construction of the contract. The evidence shows that these payments were not made to Hechler personally, but were paid to the respective claimants by Siegel at Hechler's request. As Siegel had a right to pay them, it is immaterial whether they were technically to be included in the pay rolls or not.

There is a general finding that while Hechler was engaged in the work Siegel paid to him, in accordance with the terms of the subcontract, the sum of \$4,526.90. This sum includes the above-mentioned payments claimed to be premature. We have shown that these payments were paid in accordance with the terms of the subcontract. This finding is supported by the evidence, and it is sufficient to support the judgment.

The judgment is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

SEELYE v. SOUTHERN CALIFORNIA CANNING CO. (Civ. 2952.)

(District Court of Appeal, First District, Division 1, California. July 29, 1919.)

APPEAL AND ERROR §—1011(1)—FINDING OF FACT ON CONFLICTING EVIDENCE NOT REVIEWABLE.

Findings of fact on substantial conflict in the evidence will not be disturbed on appeal.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by O. L. Seelye against the Southern California Canning Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodcell & Goodcell, of San Bernardino, for appellant.

E. H. Jolliffe and Archie D. Mitchell, both of Ontario, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action brought by him against the defendant to recover damages for breach of a contract between the parties for the sale and delivery of the plaintiff's crops of fruit covering a series of years. The said contract was entered into in April, 1914, and by its terms the plaintiff sold and the defendant bought all of the peaches of specified kinds and grades that should be raised upon the plaintiff's orchard during the ensuing five years. The contract contained various conditions as to

the care and delivery of the fruit by the plaintiff, and as to the acceptance and payment therefor by the defendant. The plaintiff's crop of fruit for the year 1914 was delivered and paid for pursuant to the terms of the contract but as to the crop for the year 1915 disputes arose between the parties, during which some portions of the fruit tendered by the plaintiff were rejected by the defendant as being below standard as fixed by the contract. Other portions of said fruit were accepted, but, as claimed by the defendant, subject to certain discounts from the contract prices, on account of the fruit being inferior to the grade called for by the terms of the agreement. The parties having disagreed as to these matters, and hence as to the amount due to the plaintiff at the close of the cropping season, the plaintiff instituted this action, wherein he sought to recover for the fruit delivered and tendered by him according to the full contract prices therefor provided in said contract. The trial of the cause was held before the court without a jury, and findings and judgment were thereupon entered in favor of the plaintiff for the amount prayed for in his complaint, whereupon the defendant prosecuted this appeal.

Examination of the briefs of counsel will disclose that the entire discussion of the merits of the case upon appeal is a discussion of matters of fact, and that as to each and every one of said matters, the evidence is in substantial conflict. This being so, the decision of the trial court upon all of such contested matters will not be disturbed upon appeal. The sole contention of the appellant deserving even a passing consideration is the contention that, under the terms of the contract between the parties the appellant, as the purchaser of the fruit in question, was entitled to exercise an unbridled judgment as to whether any portion of said fruit was not in quality up to the specifications of the contract, and was entitled thereupon to elect to accept or refuse to receive said fruit, and that the seller thereof was, under the terms of said contract, bound to abide by the conclusion of the purchaser in this regard, and was not thereafter entitled to insist upon the delivery of such fruit so rejected, and hence that the judgment of the court in respect to so much of the said fruit as the purchaser had thus rejected was erroneous and excessive. We do not so interpret the contract between the parties, but on, the contrary, we are of the opinion shared by the trial court, that if the plaintiff's fruit was of the quality required by the terms of the agreement between the parties, he was entitled to deliver it, and the defendant was bound to receive it or, in the event of his refusal, to pay such damages as were the rightful penalty imposed upon his wrongful rejection of the fruit. The judgment of the trial court im-

posed this penalty, and in our opinion imposed no more.

There being no merit in this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

KELSEY v. TRACY. (Civ. 2989.)

(District Court of Appeal, First District, Division 1, California. July 28, 1919.)

LIMITATION OF ACTIONS §31—ACTION FOR MALPRACTICE LIMITED TO ONE YEAR.

An action against a physician and surgeon for injuries resulting from want of knowledge and unskillfulness is within Code Civ. Proc. § 340, subd. 3, requiring the action to be begun within a year.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Kenneth G. Kelsey against Coyle J. Tracy. From a judgment for defendant, plaintiff appeals. Affirmed.

Flint & Jutten, of Los Angeles, for appellant.

W. H. Dehm and Burton R. Fitts, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in the defendant's favor after an order sustaining the latter's demurrer to the plaintiff's second amended complaint.

The action is one in which the plaintiff seeks to recover damages from the defendant for alleged losses of time and wages and for expenses incurred and pain in body and mind suffered by reason of the alleged want of knowledge and unskillfulness of the defendant as a physician and surgeon in the treatment of the plaintiff for certain bodily injuries under an agreement engaging the defendant to treat plaintiff professionally for such injuries. The action was commenced one year and six months after said treatment had ceased. The defendant's demurrer upon the ground that the action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure was sustained, and judgment in his favor followed, from which judgment this appeal has been taken.

We are unable to distinguish this case, either as to its substantial facts or as to the issue of law involved, from the case of *Harding et al. v. Liberty Hospital Corp.*, decided by this court in 24 California Appellate Decisions, 1021, which decision was upon rehearing affirmed by the Supreme Court in 177 Cal. 520, 171 Pac. 98. On the authority

of that case, and of the cases cited therein, the judgment is affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

PEOPLE v. TRIGAROS. (Cr. 667.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1919.)

1. HOMICIDE §244(1)—WHEN EVIDENCE INSUFFICIENT TO SHOW SELF-DEFENSE.

Evidence in homicide case held to justify jury's finding against self-defense.

2. HOMICIDE §300(9)—INSTRUCTIONS WITHOUT EVIDENCE TO SUSTAIN SAME PROPERLY REFUSED.

There being no evidence that deceased was known as a dangerous character, there was no occasion for giving the requested instruction, in homicide, as to apprehension of danger from one of rash and violent disposition.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Rito Trigaros was convicted of manslaughter, and appeals. Affirmed.

Robert J. Adcock, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SLOANE, J. The defendant was convicted of manslaughter on an information charging him with the murder of Ascension Ramirez. The defendant admitted the killing, but claimed that Ramirez came to his house, insulted and threatened him, and then threw a beer bottle at him, and attempted to assault him with an iron of some description in his hand, and that he shot him in self-defense.

[1] We find no sufficient ground for disturbing the verdict of the jury. The defendant was found guilty of manslaughter. That he shot and killed Ascension Ramirez is not disputed. The only question as to the justness of the verdict arises under the plea of self-defense. The facts testified to on behalf of the defendant, if true, would justify the homicide. The jury evidently did not accept the evidence as true.

According to the testimony on behalf of the people, neither the defendant nor his relatives and friends who witnessed the shooting, in giving an account of what took place to the officer and those accompanying him on their visit to the place of the tragedy soon after it occurred, while they told of the insulting remarks and threats of Ramirez, made any reference to any attempt on his part to attack defendant with a bottle or

piece of iron, or any other weapon, although they were questioned as to the nature of the provocation for the shooting. This omission tends to discredit their subsequent story as being fabricated.

The interpreter, Dominguez, who was present at the place of the shooting with the officer, soon after it occurred, testifies:

"I asked Trigaros if he shot Ascension Ramirez, and he said, 'Yes.' I asked him what was the trouble, and he said: 'He came here and insulted me, and I shot him.' I said: 'Did he threaten you? Draw anything against you?' He said: 'No.' I said: 'That is a poor way to do, to kill a man just because he called you a bad name.'"

The constable, Freeman, who interrogated the defendant at the same time, testifies that in answer to the query as to why he shot Trigaros, he answered that he shot him for "disturbing his peace." The witnesses Freeman and Borden also testify that on the night of the shooting they carefully looked over the ground in the vicinity with their searchlights, and found no evidence of the beer bottle or the iron alleged to have been seen in the hands of the man who was shot, and which defendant's sister-in-law claimed to have found there two or three days later. The evidence as to the size and nature of this piece of iron is very vague and indefinite.

We cannot say that the jury was not justified in rejecting the evidence tending to show a justifiable homicide. "It requires a clear case—one in which there is an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor—to justify an interference with the verdict of the jury." *People v. Ah Loy*, 10 Cal. 301.

[2] The instructions were ample, and as favorable to the defendant as they properly could be, on the question of self-defense, and fully covered the ground to which the refused instructions were directed. There was no occasion for the instruction as to apprehension of danger from one of rash and violent disposition, as there was no evidence that the deceased was known as a dangerous character. The law of the other instructions, the refusal of which is complained of, was fully covered by instructions given.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

WILLIAMS, Superintendent of Banks, v. CARVER et al. (Civ. 2950.)

(District Court of Appeal, First District, Division 1, California. July 24, 1919.)

JUDGMENT 6674—WHEN DECISION ON APPEAL LAW OF CASE IN ANOTHER ACTION.

Decision on appeal that authority attempted to be given by statute to superintendent

of banks to maintain action to enforce liability of bank's stockholders to creditors was not within the title of the act is the law of the case in second action by him against the same defendants, with the bank, an unnecessary party, added, brought pending appeal in the first case, but after an amendment of statute merely defining more specifically his powers.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by W. C. Williams, as Superintendent of Banks, against L. J. Carver and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. A. De Ligne and Hiram W. Johnson, Jr., both of San Francisco, for appellant.

Corbet & Selby, of San Francisco, for respondent Carver.

Thos. Scott, of Bakersfield, for respondent White.

E. L. Foster and C. A. Barnhart, both of Bakersfield, for respondent McDonald and others.

Matthew S. Platz, of Bakersfield, for respondent Cohn.

Rowen Irwin, of Bakersfield, for respondent Jastro.

C. C. Cowgill, of Sonoma, for respondent Conner.

J. W. Wiley, of Bakersfield, and Hunsaker & Britt, of Los Angeles, for respondent Stevens.

RICHARDS, J. This is an appeal on the part of the plaintiff from a judgment in favor of the defendants upon the pleadings. The following is a history of the case:

Prior to the institution of this action, the plaintiff herein, in his official capacity of superintendent of banks of the state of California had commenced an action against all of the defendants herein, with the exception of the Kern Valley Bank, having for its purpose the collection from each of said defendants of an amount alleged to be due upon their individual liability as stockholders of the said Kern Valley Bank, arising under the terms of the state Constitution and of section 322 of the Civil Code. That former action was in due course tried, and thereafter appealed by the plaintiff therein to the Supreme Court. Upon said trial and appeal the defendants in that action successfully assailed the constitutionality of that portion of the banking act which purported to authorize the plaintiff therein, in his said official capacity, to institute and prosecute said action. During the time when said cause was still pending upon appeal, the said Legislature undertook to amend the banking act under which said action had been begun, the said amendment consisting of a more express declaration of the power of the superintendent of banks to institute and prosecute actions of that character; the said

amendment being evidently intended to eliminate the ground of objection which had been urged in said action to the effect that the superintendent of banks under the terms of the act prior to said amendment possessed no such power. See Stats. 1913, pp. 136-192. After the taking effect of said amendment to the banking act (St. 1909, p. 87), but before the decision of the Supreme Court in the former suit, the plaintiff instituted the present action against the same defendants with the addition of the Kern Valley Bank. Thereafter the Supreme Court handed down its decision in the said former action, which is reported in 171 Cal. 658, 154 Pac. 472, to which reference is made for a more particular statement of the facts, set forth in the identical language in the complaints in each of said actions. Upon the handing down of said decision by the Supreme Court, the defendants herein moved the trial court in which this action was pending for a judgment in their favor upon the pleadings, upon the ground that the said decision constituted the law of the case, and that by the terms thereof the objection which was therein successfully urged to the banking act as it existed before the said amendment thereof applied equally to its amendment; the said objection being that the title, both of said act and of the amendment thereof, did not sufficiently embrace such powers as the superintendent of banks was attempting to exercise in each of said actions. The trial court sustained the contention of the defendants, as urged in said motion, and rendered judgment in their favor upon the pleadings from which judgment the plaintiff has prosecuted this appeal.

We do not deem it necessary to further review the history and identity of these two cases, nor to go further into this discussion than to quote the closing language of the decision of the Supreme Court in the case of *Williams v. Carver*, supra, wherein the learned justice writing the opinion uses the following words:

"Moreover, if the provision be construed as authorizing the superintendent of banks to enforce the constitutional liability of stockholders to the creditors, then it is void as being obnoxious to the provisions of section 24, art. 4, of the Constitution, which provides that every act shall embrace but one subject, which shall be expressed in its title. As stated, the subject of the legislation, as shown by its title, is to 'define and regulate the business of banking.' The constitutional liability of the stockholders of a corporation to its creditors and the enforcement of such liability is no part of the business of banking. Hence the subject of the legislation, if its purpose be to deprive the creditor of the right to enforce such liability and confer upon the superintendent of banks the power to act for and on behalf of the creditor in the collection thereof, is not embraced in the title."

We are of the opinion that the foregoing language of the Supreme Court in the former actions constitutes the law of the case, and, as such, is binding both upon the trial court and upon this tribunal. The mere fact that the Kern Valley Bank has been added to the list of defendants in this action does not militate against this conclusion, since the Kern Valley Bank cannot be said to be a necessary party to the determination of the issues involved in either case.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

WANGENHEIM v. GARNER et al.
(Civ. 1995.)

(District Court of Appeal, Third District, California. July 22, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. FRAUDULENT CONVEYANCES §230 — QUIETING TITLE §10(2)—WHEN CREDITOR PURCHASING AT EXECUTION SALE ACQUIRES LEGAL TITLE.

Under Code Civ. Proc. § 700, as to execution sale of real property, where land fraudulently conveyed was sold under execution in favor of a creditor and bid in by him, he acquired, by virtue of the sheriff's certificate and the sale, the legal title, and not merely an equitable interest in the land, and could therefore maintain action, by cross-complaint in partition suit, against debtor's vendee.

2. QUIETING TITLE §43—WHEN PURCHASER UNDER EXECUTION AGAINST PLAINTIFFS' VENDOR CAN SHOW FRAUD OF VENDOR.

Where land fraudulently conveyed was sold under execution in favor of a creditor, and bid in by him, and in partition suit involving such land the creditor cross-complained against the vendee of the debtor, the creditor might, as against such vendee, introduce evidence to show that the vendee's deed was in fraud of creditors, although fraud was not pleaded in the cross-complaint; such fraud being matter in avoidance of the vendee's answer, setting up title based on such deed.

3. FRAUDULENT CONVEYANCES §172(1), 206 (1)—ONLY CREDITOR AT TIME OF DEED CAN ATTACK IT.

Only one who was a creditor at the time a conveyance was made can attack it as being fraudulent as to creditors; the conveyance being good between the parties.

4. FRAUDULENT CONVEYANCES §296—SUBSTANTIAL EVIDENCE OF FRAUD IN CONVEYANCE IS SUFFICIENT.

A finding of invalidity of a deed as being in fraud of creditors will not be reversed, as not supported by sufficient evidence, because respondent's proof that the attacking creditor was a creditor at the time of the conveyance is not "clear and satisfactory," but substantial evidence of the fact is sufficient.

5. APPEAL AND ERROR — 623 — WHEN REVERSAL UNNECESSARY FOR INSUFFICIENT EVIDENCE BECAUSE OF ADMISSIONS OF COUNSEL.

It is not necessary to reverse a case because the record does not contain sufficient evidence of a fact of which there is no possible doubt; respondent's counsel asserting that it would have been proven by abundant evidence, if questioned in the lower court, which statement appellant must be deemed to have admitted by failure of his counsel to deny.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by E. S. Wangenheim against Mary Garner and others, in which the defendant Otto Olsen filed a cross-complaint against defendants Josephine Parten and others. From a judgment holding a deed invalid, the defendant Augustus Knight appeals. Affirmed.

Ostrander, Tuttle, Griffin & Shaffer and H. K. Landram, all of Merced, for appellant.

Edward Bickmore, of Merced, and Harry W. Hanson, of Los Angeles, for respondent.

BURNETT, J. The action was for partition of certain real property in Merced county. As to defendant Otto Olsen, the complaint alleges that he claims an interest in the property by virtue of the levy upon it of a writ of attachment issued in the case of Otto Olsen v. Josephine Parten, pending in the superior court of Los Angeles county. In his answer Olsen alleges that subsequent to the levy of said writ he obtained judgment in said case, and thereupon a writ of execution was issued and levied upon the interest of said Josephine Parten in the property, and on the 11th day of September, 1916, he purchased said interest at a sheriff's sale and received the certificate of the sheriff therefor. He also filed a cross-complaint against Josephine Parten, her husband, and Augustus Knight, in which it is alleged that said Josephine Parten was the owner of an undivided one-sixth of said land until he acquired her interest by virtue of said judgment and sale under said writ of execution. It is further averred that said Parten and Knight claimed some interest adverse to Olsen, and the prayer is for a decree determining that their claims are subordinate to his ownership. The cross-complaint was served only on Knight, who answered by averring that he is the owner of said undivided one-sixth by virtue of a deed, for a valuable consideration, from said Josephine Parten, executed on January 28, 1916.

The controversy in the court below, as herein, was between said Knight and Olsen; the said writ of attachment having been levied subsequent to the alleged purchase by Knight. As to this issue the court found:

"That the alleged and purported sale and conveyance by Josephine M. Parten to Augustus Knight of her interest in said real estate was not in good faith, and was for a consideration much less than the value of the property, and was made for the purpose of preventing the defendant and cross-complainant, Otto Olsen, from recovering the amount owed to him by the said Josephine Parten; that the said purported conveyance to the said defendant Knight is therefore void and of no effect, and the recorder of the county of Merced is hereby ordered to cancel and the said conveyance is hereby canceled upon the records of the office of the county recorder of Merced county; that the defendant Augustus Knight acquired no interest in the said real estate under and by virtue of said alleged and purported deed."

The appeal is by Knight from the determination of the court that the said deed is invalid, and he makes three points: First, that respondent had only an equitable interest in the land by virtue of said certificate and sale, and therefore could not maintain the action as against the holder of the legal title; second, that the issue of fraud was not raised by said cross-complaint, and is not, therefore, within the issues; and, third, that the evidence is insufficient to support the finding that the conveyance to Augustus Knight was fraudulent and void.

[1] The first point is answered by section 700 of the Code of Civil Procedure and the decisions of the Supreme Court in Judson v. Lyford, 84 Cal. 505, 24 Pac. 286, and Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648. In the former it is said:

"A deed in fraud of creditors is absolutely void as against them, and an execution sale of the debtor's interest carries the legal title, and not an equitable interest only."

In the Pollard Case the holding is that under said section 700—

"the purchaser under execution sale acquires the legal title of the judgment debtor, defeasible upon condition subsequent, and that the effect of the sheriff's deed is not to create a new title, but is merely evidence that the title of the purchaser has become absolute."

[2] The second contention is fully covered by the case of Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 Pac. 15, wherein it is held that—

"In an action to quiet title to land, in which the defendant by his answer sets up title through a sale by a trustee under a deed of trust, executed by the plaintiff's predecessor in interest, the plaintiff, in avoidance of such defense, may offer evidence to show that the trustee's sale and deed made in pursuance thereof were invalid by reason of fraud, without pleading the fraud in his complaint."

The reason is, as stated, that it is a matter of avoidance of the defense set up in the answer.

[3] It is due to the learned counsel for appellant to say that in their closing brief, they do not insist upon either of these positions, and they limit the third contention to the specification that the evidence is insufficient to show that, at the time of the conveyance to Knight, Olsen was a creditor of Josephine Parten. It is not disputed that it is only as a creditor that he can question the validity of said deed to appellant; the conveyance being good as between the parties. *First National Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626. The finding that the deed was fraudulent as to creditors, in other words, must fall if it was not shown that there was a creditor. It is admitted by respondent that—

"The most serious contention raised by appellant is that there is no evidence in the record showing that the respondent, Otto Olsen, was the creditor of Mrs. Parten at the time of the conveyance to the appellant, Knight."

It is claimed, however, that it is sufficient, and, moreover, it is asserted that—

"This fact was not even questioned by the appellant during the course of the trial, and he raises the point for the first time on appeal, and the failure of appellant to even question the fact that this indebtedness existed at the time of the conveyance no doubt explains any lack of evidence of the existence of this indebtedness, which could have been clearly established, and which is conceded throughout the whole deposition of Mrs. Parten."

[4] The answer to this by appellant is:

"That Mrs. Parten was indebted to Olsen is not disputed, but there is absolutely no evidence in the record as to the time such indebtedness arose. Counsel complained that appellant did not instruct them as to how to prove their case or as to the facts that were necessary to establish their contention. We submit, however, that the duty of proving his case devolved upon respondent, and if Mrs. Parten were in fact indebted to Olsen prior to the conveyance from Mrs. Parten to Knight, respondent should have supplied such evidence in a clear and unequivocal manner. Such evidence was a condition precedent to his right to attack the conveyance from Mrs. Parten to Knight, and without a clear and satisfactory showing on the point the case for respondent must naturally fall."

Respondent probably deserves the criticism for his carelessness, and the importance of the point is quite apparent. It is not, however, for us to require that the showing be "clear and satisfactory." It is sufficient if there be substantial evidence of the fact. We feel some doubt as to that—the evidence being meager—but we are satisfied that under the circumstances the cause should not be reversed for that reason.

[5] Respondent has virtually said in this court that the fact was never questioned in

the court below, that appellant made no such claim therein, and that if there had been any controversy about it, abundant evidence could and would have been furnished to prove it. These statements are not denied by appellant, and they must be deemed admitted. The counsel are honorable officers of this court, and we attach the same weight and significance to their statements and admissions as though they were testifying as witnesses.

The status of the matter may be thus presented: Appellant admits that respondent was actually a creditor; that he never questioned it in the court below; that, if he had, it would have been amply proven; "but, since the record does not contain sufficient evidence of the fact, the cause should be reversed, and additional cost incurred in proving a fact that never has been really disputed, and concerning which there is no possible doubt.

We do not think the practical administration of justice would be subverted by such a course. The rules of pleading and practice are designed primarily to promote the righteous determination of a judicial proceeding, and in their application we must not lose sight of that purpose. If appellant had stipulated in this court that Olsen was a creditor, it would not be seriously contended that the cause should be reversed, in order that the fact might be proven in the court below. His acquiescence in the statement of respondent is equivalent to such stipulation.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

KLEIN v. SAN PEDRO, L. A. & S. L. R. CO. (Civ. 2145.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919.)

WATERS AND WATER COURSES — 179(4) — CONSTRUCTION OF BRIDGE — DAMAGE TO REALTY—SUFFICIENCY OF EVIDENCE.

In an action for damages to land abutting on a stream by reason of defendant railroad's wrongful acts in constructing its trestle bridge and a rock bulkhead across and within the stream, so as to obstruct the same causing overflow in time of flood, evidence that the construction did not conform to good engineering practice held to support verdict for plaintiff.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Eugene L. Klein against the San Pedro, Los Angeles & Salt Lake Railroad Company. From judgment for plaintiff, and an order denying defendant's motion for new

trial, defendant appeals. Appeal from order dismissed, and judgment affirmed.

James E. Kelby, of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for appellant.

Oliver O. Clark, of Los Angeles, for respondent.

THOMAS, J. In his complaint plaintiff alleged that he had sustained certain damages to his real property adjacent to and abutting upon the Arroyo Seco, in the city of Los Angeles, by reason of the wrongful acts of defendant in so constructing (1) its railroad trestle bridge, and (2) a certain rock bulkhead across and within said Arroyo Seco, as to obstruct the same in time of flood, and to cause the water therein to be dammed up and diverted from its regular course and channel over and across the real property of plaintiff, cutting and washing it away. There was a verdict for plaintiff for \$1,000, and judgment was accordingly entered in his favor. Defendant filed a motion for a new trial, which was denied. From the order denying said motion, and the judgment so entered, defendant appeals.

Defendant urges that the order and judgment should be reversed upon several grounds, which, for convenience here, may be grouped under two heads, viz.: (1) Errors of law occurring during the trial, including errors in giving certain instructions to the jury; and (2) insufficiency of the evidence to justify the verdict.

Much space is devoted by appellant in support of this appeal to the argument of the point that the lower court erred in denying its motion for a directed verdict, and which argument is indeed very persuasive. After quoting at length from the evidence, appellant, in its opening brief, says:

"It results, therefore, that the witness Jessup's testimony to the effect (1) that the bridge was constructed with due care and engineering skill; (2) that the bents thereof were practically parallel to the stream; (3) that the bridge was of approved construction and standard; (4) that the available waterway provided by it was infinitely more than was necessary for any flood which happened in the arroyo; (5) that it was constructed in such a manner as to afford security for life and property; (6) that the arroyo crossed by the bridge was restored to its former state of usefulness; and (7) that the usefulness of the arroyo on the property adjoining it was not impaired, is absolutely uncontradicted by any witness, and stands unimpeached and is unimpeachable."

If this comprehensive and far-reaching statement is supported by the record here, it would seem that no other point need be considered. We shall see.

Plaintiff, respondent here, seeks to support his contention that the evidence does not support the statement quoted above by arguing that—

"Counsel reviews the evidence presented by defendant, and concludes that the only conclusion which can be drawn is that the bridge 'conformed to good engineering practice,' thus entirely ignoring the statement of their own expert, Mr. Olmstead, that '*it was not good engineering practice then or ever.*'"

The fact is defendant did not ignore such testimony, but used the very words which we have last italicized in referring to the testimony of the said witness. The conflict is not in the evidence, but in the construction which counsel places thereon. The fact is, also, that appellant's statement of the evidence now under consideration is the one which agrees with the recorded testimony itself. Mr. Olmstead did testify that "the bridge as constructed conformed to the practice of building bridges at that time"; but he added that "it was not good engineering practice then or ever." From the standpoint of bridge construction, it was all right. From a civil engineer's view, it was not good engineering. We have not only read that portion to which our attention has been called, but have read the whole of the testimony of the witness Olmstead, and we think it is not susceptible to any other construction. But, even so, this places the first claim of appellant, referred to above, viz. "That the bridge was constructed with due care and engineering skill," beyond the scope of appellant's general statement in regard to Mr. Jessup's testimony; i. e., that the same was "uncontradicted," etc. On this first point alone there seems to be such a conflict in the testimony as to overcome the assignment that it was error not to grant defendant's motion for a directed verdict.

The instructions given by the court, to which appellant objects, were, we think, ample, and as favorable to appellant as they properly could be on the questions presented. Especially is this so when the instructions objected to are considered in connection with, and in the light of, the other instructions given.

The evidence, we think, amply supports the verdict upon which the judgment was entered.

Finding no error in the record which would justify a reversal of the judgment entered herein, it is ordered that the appeal from the order denying defendant's motion for a new trial be and the same is hereby dismissed, and the judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

PEOPLE v. LOPEZ. (Cr. 665.)

✓District Court of Appeal, Second District, Division 2, California. July 23, 1919.)

1. CRIMINAL LAW §1170(2)—EXCLUSION OF EVIDENCE HARMLESS WHEN SHOWN BY TRANSCRIPT OF PRELIMINARY EXAMINATION.

In a prosecution for rape, any error in sustaining the district attorney's objection to testimony of prosecutrix admitting that on preliminary examination she had testified to certain facts contrary to her testimony on trial was harmless to defendant, where the evidence was in the record through reading of a portion of the transcript on preliminary examination.

2. CRIMINAL LAW §673(5) — EVIDENCE OF SIMILAR CRIMES ADMISSIBLE TO SHOW DISPOSITION.

In a prosecution for rape, where defendant's counsel elicited from prosecutrix on cross-examination that defendant had had relations with her for two years before the date of the crime charged, the court properly instructed that such evidence was received and admitted to prove the adulterous disposition of defendant, etc.

3. CRIMINAL LAW §815(13) — INSTRUCTION NOT ERRONEOUS AS EXCLUDING CONSIDERATION OF PROSECUTRIX'S AGE.

In a prosecution for rape, an instruction that the jury under the information could find a verdict of guilty of rape as charged, of assault with intent to commit rape, of assault, and of not guilty, *held* not erroneous as taking from the jury the right to consider whether or not prosecutrix was over 16 and under 18; the only evidence being that she was 18.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Joe Lopez was convicted of rape, and, from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Frank E. Dominguez and Paul Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

THOMAS, J. This is an appeal from a judgment on conviction for the crime of rape committed upon one Clorinda Manriquez, a female person under the age of 18 years, not being the wife of defendant.

Defendant was sentenced to imprisonment in the state's prison. There was a motion for new trial, which was denied. From the order denying said motion, and the judgment, defendant appeals, and for reversal relies upon the following grounds:

"(1) Error occurring at the trial in the admission and rejection of evidence; (2) error in instructions to the jury; and (3) the improbability of the truth of the testimony of the complaining witness, Clorinda Manriquez."

[1] On cross-examination the defendant sought to show, by the testimony of the prosecuting witness given at the preliminary examination of defendant, that she there testified to certain facts contrary to her testimony on the trial in the superior court in this action; and after the portion of the transcript of the evidence taken at the preliminary examination, which defendant desired to have read, was actually read into the record, and the witness had answered the question, admitting that she had so testified, the district attorney objected on the ground that it did not tend in any way to impeach the witness. This objection was sustained by the court. As already stated, however, the evidence was in. There was no motion to strike. The evidence is still a part of this record. If the ruling was error, it was without prejudice, because the defendant, so far as this point is concerned, had full opportunity to use the transcript. It was resorted to, too, on other occasions, as disclosed by the record, and for the same purposes. The ultimate question is not, "Is there conflict between the testimony given by the prosecuting witness at the preliminary hearing and that given by her at the trial in the superior court?" but rather, "Do the jury believe the testimony given at the trial, notwithstanding said conflict?" In this case the jury apparently believed the testimony of the little girl.

[2] It is urged that the court erred in giving the following instruction:

"You are further instructed that the evidence of other acts of sexual intercourse between the defendant and the prosecutrix, and of the improper familiarity on the part of the defendant towards and with the prosecutrix, shown before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant, and as having a tendency to render it more probable that the act of sexual intercourse charged and relied on in the information was committed at the time and place as charged in the information, and for no other purpose"—because it assumes that there was evidence introduced at the trial tending to show that defendant had had acts of sexual intercourse with the prosecuting witness prior to the date charged in the information.

The record discloses that this assumption was based upon the evidence, and that this evidence was elicited from the prosecuting witness by defendant's counsel on cross-examination—testimony showing that defendant had had sexual intercourse with the prosecutrix for a period of two years prior to the date of the crime charged in the information. The instruction given, therefore, was a proper one.

[3] It is also urged that the court erred in giving the following instruction:

"It is competent for you, under this information, to find either one of four verdicts: Rape,

as charged in the information; assault with intent to commit rape; assault, and not guilty—as you may be convinced from the evidence in the case,” on the ground that this instruction took away from the jury the right to consider whether or not the prosecutrix was over the age of 16 and under the age of 18 years.

The answer to this contention is that the court was not called upon to submit to the jury any question predicated on the assumption that the prosecutrix may have been between the ages of 16 and 18 years; and the only evidence in the case touching her age was to the effect that she was 13 years old at the time of the commission of the crime.

The third point urged, namely, the improbability of the truth of the testimony of the complaining witness, is not well taken. It will not be discussed here, because both this court and the Supreme Court have said so much about this phase of the law that it is useless to take further space with such discussion. We cite the case of *People v. Vickroy*, 182 Pac. 764, in support of our present conclusion, and rest the matter there.

There is no merit to the points urged.

The judgment and order are affirmed.

We concur: FINLAYSON, P. J.;
SLOANE, J.

HAMILTON v. KLINKE et al. (Civ. 2005.)

(District Court of Appeal, Third District, California. July 28, 1919. Rehearing Denied Aug. 27, 1919; Denied by Supreme Court Sept. 25, 1919.)

1. SALES §12 — UNPLANTED CROPS SUBJECT TO SALE.

In view of Civ. Code, §§ 1039, 1721, defining sales and transfers, and section 1722, declaring what property may be subject to sale, and section 1730, providing that any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not, a future crop of beans, not yet planted, was subject to sale contract.

2. SALES §197 — CONTRACT FOR SALE OF UNPLANTED CROPS PASSED TITLE.

A contract for sale of an unplanted crop of beans, providing that, until the bill of lading or warehouse receipt covering them was received by the vendee, the vendor agreed to assume “all risks of loss or damage to said beans,” construed as passing title.

3. SALES §201(1), 202(1) — MAY BE COMPLETED WITHOUT DELIVERY OR PAYMENT OF CONSIDERATION.

Under Civ. Code, § 1721, defining a sale, as between the parties a sale may be completed without either delivery or payment of consideration.

4. TENANCY IN COMMON §48 — SALE TO THIRD PERSON OF COTENANT'S CROP.

Where defendant sold plaintiff beans, to be grown on a certain piece of land, and the evidence showed that certain beans were grown on the land by defendant as a cotenant with defendant's wife, and were subject to a lien as a mortgage on the interest of both, in adjusting the right of the parties, it must be held that plaintiff succeeded to the interest of the defendant.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Roth Hamilton, surviving partner of the copartnership of Hamilton & Menderson, against W. A. Klinke and another, in which Geneva R. L. Klinke intervened. Judgment for defendants, and plaintiff appeals. Reversed.

Hawkins & Hawkins, of Modesto, for appellant.

Hatton & Scott, of Modesto, for respondents.

CHIPMAN, P. J. The action is in claim and delivery, arising out of the contract of purchase and sale set forth in the complaint as follows:

“Ceres, Cal., R. D. A. Box 393, 3/3, 1917.

“Hamilton & Menderson, Los Angeles, California—Gentlemen: This contract confirms sale to you this day of our/my entire 1917 crop of choice cleaned black eye beans from 30 acres on own ranch in Stanislaus county, about 5 miles So. of Ceres, less none of the crop which is reserved for rental, and less — sacks reserved for seed, at five cents per pound net weight, f. o. b. cars or warehouse Ceres. We/I estimate the quantity hereby sold to be 600 sacks (at 80 lbs. each), and agree to deliver all of said beans in good marketable condition and free from damage, on or before October 30, 1917, in good new bean sacks, you to pay us/me cash for said beans on receipt of shipping documents. If not delivered within the specified time you may accept or reject the beans at your option. We/I hereby guarantee that the said crop of beans is our/my sole and absolute property and free from all incumbrance except as specified herein. Should the above estimate be exceeded by more than 10 per cent. of same, you may accept or reject at your option all in excess of the original estimate plus 10 per cent. thereof. If we/I fail to deliver the beans as herein provided, unless nondelivery results from crop failure or other cause beyond our/my control, we/I will pay you the difference between the price herein fixed and the market price of such beans on th—/ last day specified for delivery.

“It is mutually understood that this contract, which is signed in duplicate by both parties hereto, constitutes an absolute sale, but until you receive bill of lading or negotiable warehouse receipt covering the beans, we/I agree

to and to assume all risks of loss or damage to said beans.

"Yours truly,

W. A. Klinke,
"of ——— Post Office.

"W. A. Klinke, Ceres:

"We confirm purchase of beans in accordance with the foregoing contract.

"Hamilton & Menderson,
"By R. L. Brown."

It is alleged that defendant W. A. Klinke grew on the premises mentioned in said contract in 1917 certain 400 sacks of black eye beans, weighing 31,000 pounds, being the same beans mentioned in said contract; that on October 31, 1917, said beans were of the value of 8 cents per pound; that said Klinke did not deliver said beans on said date, or at all, although plaintiff demanded delivery, and "said defendants do still fail and refuse to deliver such beans or any part thereof"; that defendant Hatton claims an interest in said beans by virtue of a certain chattel mortgage; that by the terms of said contract plaintiff is entitled to the possession, and was so entitled at the commencement of the action, but that defendants, "both of whom have possession of said beans, refused and still refuse to deliver possession of said beans to plaintiff"; that on November 3, 1917, plaintiff demanded of defendants, and each of them, possession of said property, but defendants, and each of them, refused to deliver the same to plaintiff, and still refuse to deliver said beans.

The complaint was filed on November 3, 1917. The defendants answered and filed a counterclaim. They denied that the defendant Klinke sold to the copartnership of Hamilton & Menderson said Klinke's crop of beans, but do not deny the execution of the before-mentioned contract, and allege there was no consideration for the said alleged written contract; deny that said Klinke grew on any ranch belonging to him in the year 1917 any beans whatever. They deny that the said beans were of the quantity and value alleged, but do not allege any value; deny that plaintiff demanded delivery of said beans as alleged in the complaint; "deny that both of said defendants have possession of said beans belonging to plaintiff, and to the possession of which plaintiff is entitled"; deny that on November 3, or at any other time, plaintiff demanded of defendants "delivery to plaintiff of any beans belonging to plaintiff"; and deny that they, or either of them, refused to deliver to plaintiff any beans belonging to him.

Further answering said complaint, it is alleged "that on March 3, 1917, defendant Klinke and his wife were, and ever since have been, the owners as tenants in common of a certain 40-acre tract of land (describing the same); that about June 1, they planted "beans on about 39 acres of said above-described land," prior to which date no beans had been planted thereon; that they there-

after jointly cared for, cultivated, and harvested the same, and each of said parties is the owner of an undivided one-half interest in said crop of beans. It is then alleged that on October 18, 1917, the said Klinke and his wife executed and delivered to defendant Hatton their promissory note for \$750, secured by a chattel mortgage on said beans; that about November 2, 1917, a part of said beans, to wit, 294 sacks, were stored in a certain designated warehouse in the town of Modesto, and were so stored in the name of defendant Hatton, as mortgagee. The commencement of the present action is then alleged, and that on the affidavit filed therein were written instructions to the sheriff to take possession of certain beans, being the same beans referred to in said warehouse; that in pursuance of said order the sheriff took possession of 294 sacks; that the papers in the said action were served upon the defendants on or about November 7, 1917; that on November 12, 1917, defendants Klinke and Hatton executed and delivered to the sheriff an undertaking for the delivery to defendants of said 294 sacks of said beans, together with a written demand for a return to defendants of the same; that said sheriff "has failed and refused to deliver to said defendants, or either of them, said 294 sacks of beans, or any part thereof"; that at the time of the taking of said beans they were in the rightful and lawful possession of the defendants. They allege the value of said beans to be the market price of said beans, being 8½ cents per pound, and they pray for judgment for the recovery of the possession of said beans or the value thereof. For further defense, defendants set up substantially the foregoing facts by way of counterclaim.

Plaintiff answered the counterclaim by denials and admissions which we do not deem it necessary to set forth. Geneva R. L. Klinke filed a complaint by way of intervention by leave of the court, in which she set forth her interest in the beans, substantially, as set forth in the answer of defendants. The pleadings are verified.

The action was tried by the court without a jury, and findings of fact and judgment were in favor of the defendants. The judgment directed that the defendants and intervenor recover the said beans and the possession thereof, and in case delivery cannot be had that they have judgment for the sum of \$2,129.40, the value of said beans, and costs of the action. The appeal is on the judgment roll alone.

Appellant makes three points: I. The judgment is not supported by the findings. II. The court failed to find on a material fact. III. The findings are inconsistent.

By finding II the court found that with the said copartnership W. A. Klinke made the contract set forth in the complaint. Finding III is "that said defendant W. A.

Klinke did not sell any beans whatever to said Hamilton & Menderson by the written contract set forth in finding II herein." Finding IV is "that there never was any consideration whatever for the execution by said defendant W. A. Klinke of said written contract set forth in finding II," and "that neither of the defendants received any consideration in connection with the execution of said contract." Finding VI is that prior to the commencement of the action said Klinke did not at any time sell to said co-partnership any beans for any purchase price whatever. Finding XI is that the beans were planted in June, and afterwards harvested; and Finding XIII is that they were stored in the warehouse on November 2, 1917.

[1] Concededly these findings were made and are now defended by respondents upon the assumption that, inasmuch as the contract was made March 8, 1917, and no beans were planted by defendant Klinke until June 1, 1917, as found by the court, the subject of the sale (the beans) had no existence when the contract was entered into, and there was therefore no sale. The argument of respondents is based upon the Code provisions as follows:

"Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." Civ. Code, § 1721.

Says the brief:

"The definition of sale above given uses the word 'transfers' and does not use the words 'agrees to transfer.'"

Again quoting from the Code.

"Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Civ. Code, § 1039.

The brief proceeds:

"We submit that, if property does not exist, title to said property does not exist, and therefore that there cannot be a transfer of title to nonexistent property."

Again resorting to the Code:

"The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer." Civ. Code, § 1722.

Says the brief:

"Title to property which has no existence cannot be immediately transferred."

Respondents quote section 1730, which reads:

"Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not"

—as to which the brief says:

"Above section needs no comment."

It seems to us that this section should not be thus summarily disposed of. In note to this section, Kerr's Cyclopedic Civil Code, under the heading "Crops to be Grown may be Subject of Sale," we find cited: *Argues v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Callender v. McLeod*, 74 Cal. 376, 379, 16 Pac. 194; *Brown v. Anderson*, 77 Cal. 236, 19 Pac. 487; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Lemon v. Wolf*, 121 Cal. 272, 53 Pac. 801. Said the court in *Lemon v. Wolf*, supra:

"Whether a chattel mortgage upon a crop yet to be planted is valid is a question which has not received a uniform decision. See *Pingree on Chattel Mortgages*, § 217 et seq. Whatever may be the law in other states, the right to make a chattel mortgage upon a crop to be raised before the same has been planted was affirmed in *Argues v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, and has become an established rule of property in this state."

In *Shoemaker v. Acker*, 116 Cal. 239, 245, 48 Pac. 62, 64, the court said:

"Contracts for the purchase and sale of future crops running through a series of years have been recognized as valid (Civ. Code, 1768; *Blackwood v. Cutting Co.*, 76 Cal. 212 [18 Pac. 248] 9 Am. St. Rep. 199; *Brown v. Anderson*, 77 Cal. 236 [19 Pac. 487]); and actions have frequently been maintained for damages for the destruction of growing crops, although, of course, there was no absolute certainty that they would have matured (*Sutherland on Damages*, § 120, and cases there cited)."

Section 1768 of the Civil Code seems to contemplate the sale of merchandise not in existence. And in *Blackwood v. Cutting Co.*, supra, the court said:

"Future crops of fruit come under the head of merchandise not then in existence."

So also, we think, would beans.

[2] Respondents contend that the contract was an agreement to sell, and does not import a sale, and hence title did not pass. Relying, we assume, upon the fundamental difference between a sale, properly so-called, and an agreement to sell, which is that in the former the title passes, while in the latter case it does not, respondents cite *Blackwood v. Cutting Packing Company*, quoting from *Benjamin on Sales*, as follows:

"Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state into which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

In considering the contract in that case the court said:

"It seems well settled that the question as to whether the title has passed is one as to the intention of the parties. And such intention is,

as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances."

The court found that there were certain enumerated things to be done connected with the contract which had a controlling force indicating that it was not intended to mean a sale.

In the present case we cannot discover that Klinke was to do anything which he would not naturally or ordinarily be required to do in case of a sale. Besides, to make his intention unmistakable, the following was made part of the contract:

"It is mutually understood that this contract * * * constitutes an absolute sale."

And until a bill of lading or warehouse receipt "covering the beans" is received by the vendee, Klinke, the vendor, agrees to assume "all risks of loss or damage to said beans." As to this latter provision, as bearing upon the question, appellant says in his brief:

"In the *Elgee Cotton Cases*, 22 Wall. 180, 22 L. Ed. 863, the courts say, in discussing the case of *Martineau v. Kitching*, L. R. 7 Q. B. 436: "There it was stipulated that the goods should remain at the risk of the sellers, and Lord Cockburn asked: "If the property in the goods had not passed to the buyers, why was it said the goods should remain at the risk of the seller?" Adding further: "What would be the necessity, what would be the object and purpose, of such a stipulation, if the property still remained in them. Of course it would be at their risk."'"

So here we may ask: Why did Klinke "assume all risks of loss or damage to said beans," if it was not intended that the title passed to the vendee?

[3] In the case of *Dickey v. Waldo*, 97 Mich. 255, 58 N. W. 608, 23 L. R. A. 449, the question was whether or not a crop not in being was the subject of a sale. In the course of an exhaustive opinion the case of *Argues v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, was cited and the court said:

"In the legal sense things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence. The following rule appears to be well established both by reason and authority, viz. that, when one owns property from which such product naturally arises, such product may be the subject of sale and mortgage."

As between the parties a sale may be completed without either delivery or payment of the consideration. That a sale may be consummated without delivery was decided in *Johnson v. Dixon Farms Co.*, 29 Cal. App. 52, 155 Pac. 134, 138. Section 1721, Civil Code, provides:

"Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."

It was said in *Borland v. Nevada Bank*, 99 Cal. 89, 93, 33 Pac. 737, 738 (37 Am. St. Rep. 32):

"It is, however, the agreement to pay a price, rather than the actual payment of the price, which is the essential element of a sale."

[4] Some other questions are presented, but it seems to us that the foregoing is the basic question involved, and on its correct solution the judgment must stand or fall. If as we think is true, a sale was intended, plaintiff succeeded to Klinke's interest as cotenant with the latter's wife, subject to Hatton's lien as mortgagee of the interest of both Klinke and wife. In the adjustment of the property rights of the parties, plaintiff's interest should have been considered; whereas, by the findings and judgment of the court, it was determined that plaintiff has no interest whatever in the property.

The court found that the beans in question were grown upon a tract of land owned by Klinke and wife as tenants in common, and that the beans were the result of their joint effort, and were owned by them jointly, each one-half thereof, and that the beans were grown "on about 39 acres" of a certain 40-acre tract of land of which, as we understand, it is not disputed, the 30 acres referred to in said contract as Klinke's "own ranch" was a part; that the beans grown on this land were stored in the name of mortgagee Hatton, and when taken by plaintiff were in the possession of Hatton and Klinke and wife. Whether or not the call in the contract for 30 acres would limit plaintiff's right to the beans grown on that proportion of the 39 acres, the fact that the 294 sacks included beans harvested from the entire tract, including this 30 acres, should not, it seems to us, deprive plaintiff of the right, at least, to the possession of Klinke's interest in the beans grown on 30 acres of the land, as tenant in common with mortgagee Hatton and Klinke.

The point that the findings are inconsistent must be held well taken, if, as we hold, there was a sale. Finding II is that the contract sued upon was entered into, and finding III is that defendant Klinke did not sell any beans to Hamilton & Menderson by that contract, and finding VI is to like effect, while finding IV is that there was no consideration for the execution of the contract. Findings II and III are not only inconsistent, but repugnant. Findings II and IV are inconsistent, as we have seen there was a consideration, and the contract shows that the consideration for the promise was a "good consideration," under the definition given in section 1605 of the Civil Code.

It is not necessary to consider appellant's

second point, that the court failed to find upon material facts.

Because of what we deem to have been an erroneous meaning given to the contract in question by the court, the judgment must be reversed; and it is so ordered.

We concur: HART, J.; BURNETT, J.

PEOPLE v. DIAMONDSTEIN. (Cr. 662.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. LARCENY \Leftrightarrow 7—OWNERSHIP OF PROPERTY—COUNTIES.

Pen. Code, § 484, defining "larceny" as stealing the personal property of another, applies to stealing such property from any ownership, as that of a county, though a county is not strictly a corporation, which by provision of section 7 is included in the word "person."

2. LARCENY \Leftrightarrow 32(1)—INFORMATION—OWNERSHIP OF PROPERTY.

Alleging in information for larceny ownership in the county, even if it should be laid in the taxpayers, is within Pen. Code, § 956, providing that when an offense involves commission of private injury, and is otherwise described with sufficient certainty to identify the act, an erroneous allegation as to person injured is immaterial.

3. LARCENY \Leftrightarrow 60—OWNERSHIP OF PROPERTY—EVIDENCE.

Evidence in larceny held sufficient to show that ownership of the electric motor stolen was in a certain county, as alleged in information.

4. LARCENY \Leftrightarrow 64(7)—PARTICIPATION—SUFFICIENCY OF EVIDENCE.

Evidence of defendant's presence in the neighborhood the night of the theft, his possession of the property the day after, employment of his truck in moving it, his active participation in selling it, and his interest in the proceeds, held sufficient to connect him as a participant in the theft.

5. LARCENY \Leftrightarrow 79—INSTRUCTIONS—DEFINING GRAND LARCENY.

Defendant convicted of grand larceny was not harmed by failure of instructions to give Code definition of it, the portion of the section showing the difference between it and petit larceny being given, and there being no dispute but that the property was stolen or but that its value was such as to make the crime grand larceny.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Meyer Diamondstein was convicted of grand larceny, and from the judgment and an order denying motion for new trial he appeals. Affirmed.

Frank Dominguez and Paul W. Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. Appellant was convicted of the crime of grand larceny, the charge being particularly that he feloniously took and carried away one electric motor, the property of the county of Ventura, of the value of \$75. He appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] It is first contended that the information was insufficient in its allegation as to the ownership of the property alleged to have been stolen. The language of the information was that the property was the property of "Ventura county, a political corporation in the state of California." The contention of appellant under this head is that, as the Penal Code, § 484, defines larceny as "the felonious stealing, taking, carrying, leading or driving away the personal property of another," it is not sufficient to show ownership in a county. As defined by section 7, Penal Code, the word "person" includes a corporation as well as a natural person. While the political subdivision of the state denominated "county" is not in strictness a corporation, at the same time it requires no stretching of the plain intent of the criminal statute to say that it was designed to make punishable the stealing of personal property from any ownership whatsoever, regardless of the kind. Appellant's counsel argue that the ownership should have been alleged to be in the taxpayers of the county. If, indeed, it may be said that the taxpayers in their collective capacity do hold the ownership of property used in the conduct of the county government, then we may at once answer that the charging of such ownership as being in the county itself is no different from charging it in the manner suggested, for the term would then mean the same thing. We are only conceding for the sake of the argument that the taxpayers collectively may be said to own the county's property, but think that this is not true as a legal proposition—we think it is not more true that the ultimate ownership resides in the taxpayers than that it may reside in the electorate. Furthermore, unless there is a material variance between the ownership charged and that proved, the manner in which such ownership is alleged is not important, further than to show that the property taken was not the property of a defendant charged with larceny. Section 956, Penal Code, provides that—

"When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous al-

legation as to the person injured, or intended to be injured, is not material."

Respondent cites a case which is directly in point and in which this subject is given extended discussion, that being the case of *People v. Prather*, 120 Cal. 660, 53 Pac. 259.

[3] The second point made by appellant is that, conceding the allegation of ownership of the property to have been sufficiently made in the information, the evidence is insufficient to show that the ownership was so held; in other words, the claim of appellant is that there was not evidence tending to show that the property taken was the property of the county of Ventura. While the testimony of none of the witnesses in words was of the direct import that the motor charged to have been stolen belonged to the county of Ventura, there was testimony from which the jury was authorized to conclude, and naturally conclude, that the ownership was as charged. The motor alleged to have been stolen was a small electric machine which was installed at a crossroads in the county of Ventura, near the town of Oxnard, for the purpose of raising or handling water used for the sprinkling of the public roads. One Roussey, a supervisor of Ventura county, testified that he was supervisor of a certain district, which included a certain road district. He was asked what was the nature of the sprinkling system just north of the city of Oxnard during the month of September, 1918, and he replied:

"Well, we had a sprinkling system there, some electric motors, some windmills, and also one gas engine in my district. * * * We had one motor located just, I guess it is, 30 feet off the Saviers Road on the Gonzales Road, three-quarters of a mile north of the city limits of Oxnard. * * * Underneath the tank there was a little motor house, a wooden house, and the motor was inside of that motor house. * * * In the early part of September, I was notified it was gone, and I went there to see and it was gone. The wires had been cut and the bolts unscrewed and the motor was removed."

The witness Peckstein testified that in the month of September he was employed by the county of Ventura to sprinkle roads under Supervisor Roussey, and that a sprinkling system was in use, and that electric motors were used; that one of these was located at what is known as the "Carr" corner; that he visited the motor house nearly every day; that on the 11th day of September, 1918, he found that the motor was gone. We point to this testimony as being sufficient to show that the motor which was removed from the motor house at the place mentioned by the supervisor and the witness Peckstein was the property of the county of Ventura. It was not necessary that any witness should in words have declared the ownership to be in the county; the inevitable inference from the statements made by the witnesses referred to would lead to that conclusion.

[4] The next contention urged on behalf of appellant is that, admitting that the larceny was committed by some one, the evidence is insufficient to prove that the appellant was a participant in the commission of that crime. Under this contention it is, of course, our duty to consider the testimony introduced by the prosecution in its strongest light, disregarding the evidence offered in defense; for if there was any substantial showing which tended to connect the defendant with the commission of the alleged crime the jury's verdict would not be disturbed. The facts, in substance as illustrated by such testimony, were these: On the 11th day of September, 1918, the appellant, in company with a man named Silverstein, who was his brother-in-law, appeared at an electrical merchandising place in the city of Los Angeles. They had a motor truck which was being driven by the appellant. On this motor truck there were two electric motors, one of which admittedly was that described in the information as having been stolen from the county of Ventura. These motors were offered for sale, Silverstein doing most of the negotiating. One of the merchants to whom they applied offered \$35 for the motors, and this appellant stated that they could get more for them at "Brolls' Place," and the two men left. They later appeared at the store of one Falck, to whom they sold the two motors for \$50. At this place Silverstein again did the bargaining with the proprietor until the deal was concluded. A check was given in payment for the motors and the proprietor inquired as to whether he should O. K. the check, or the indorsement; Silverstein stating that it was not necessary. At this juncture this appellant intervened and stated that it was advisable to have the check O. K.'d, as he (the appellant) needed some money. Up to this point, then, we have a case presented where the appellant was found in possession of stolen property; that he was driving the truck upon which the same was loaded; and that he participated in negotiating the sale of the motors to the extent we have described. Other testimony showed that on the night previous appellant and his truck were seen in the city of Ventura, and that late in the evening he was seen to drive away through the streets of the city in company with Silverstein. A brief reference may be made to the testimony offered in defense. It was, in effect, that Silverstein, finding his brother-in-law in the city of Ventura on other business—that of collecting or transporting some junk—impressed him and his truck into service to convey the two motors to the city of Los Angeles to be sold. Silverstein, who had previously pleaded guilty to the charge, testified that he alone had stolen the motors, and that he had told appellant that he had obtained them from a sugar company at Oxnard. While it is true under our law that a defendant charged with larceny

may not be convicted upon proof of possession of the stolen property alone, the jury had before it here other circumstances noted, that of appellant having taken an active part in the sale of the motors and giving evidence that he was interested in the proceeds. His presence in the city of Ventura and employment of his truck in the business of transporting stolen goods were all proper to be considered with all the attendant circumstances. And we think such facts and circumstances were sufficient to establish a good case for the prosecution. It is the unusual case, indeed, in which evidence is at hand to show that a thief found in possession of stolen property was also seen to actually abstract it. The prosecution necessarily in such cases must rely upon circumstances of an incriminating nature, large or small, to support the main incriminating incident.

[5] Some complaint is made as to the instructions given by the court being improper and unfair to the defendant. It is first urged that the court failed to define the crime of grand larceny, and that the jury, therefore, had no standard by which to weigh the alleged case of appellant. The court did not give the Code definition of "larceny," but did give that portion of the Code section showing the difference between grand and petit larceny. In so far as the particular property alleged in the information to have been stolen is concerned, there was no dispute, either that that property was actually stolen, or that its value was such as to make the crime grand larceny. This was proved by the defendant's witness Silverstein, who admitted that he had taken the motor from the place where it was installed, and that he was at the time of the trial under commitment to the Preston School of Industry after plea of guilty to a like charge. This witness endeavored to exculpate the appellant here by taking all blame in the matter upon himself. Pursuing the argument further along the same line, appellant's counsel contend that the court, in effect, advised the jury that, if the defendant was shown to have been in possession of the stolen property after the commission of the alleged crime, he should be convicted. The instruction carefully considered did not bear that import. The court's instruction was, referring to the taking, that if the jury found that appellant "feloniously" took the property described in the information, or aided or abetted in the taking of the property, the jury should find him guilty. The instruction upon the question of the possession of stolen property as an incriminating fact was full and fair. The instructions upon reasonable doubt were complete, as were also those referring to proof of circumstances relied upon by the prosecution. In fact, the entire charge, to our minds, was as complete and fair as the defendant was entitled to have given. No

claim is made that in any of the instructions offered by the defendant and refused any essential advice was contained which was not included within the instructions as given.

We find no error entitling appellant to a judgment of reversal.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; SHAW, J.

PEOPLE v. LUTTRELL. (Cr. 668.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. HOMICIDE §300(3) — INSTRUCTIONS ON SELF-DEFENSE SUFFICIENT.

In a prosecution for murder, wherein defendant set up self-defense, instructions on such issue, fully advising the jury that, if defendant as a reasonable man believed he was about to suffer great bodily injury at the hands of decedent, he was justified in using his deadly weapon, and killing decedent, *held* sufficient.

2. HOMICIDE §282—WHETHER OFFENSE WAS MURDER OR MANSLAUGHTER QUESTION FOR JURY.

In a prosecution for homicide, it was for the jury to determine the degree or character of the crime, if any, whether murder or manslaughter, which had been committed.

3. HOMICIDE §254—EVIDENCE SUFFICIENT TO SHOW MURDER IN SECOND DEGREE.

In a prosecution for murder, defendant setting up self-defense, evidence held to justify verdict of guilty of murder in the second degree, in that decedent was in retreat and was going away and had abandoned his quarrel with defendant when he was shot and killed.

4. HOMICIDE §45 — KILLING ON SUDDEN PASSION AUTHORIZES CONVICTION OF MANSLAUGHTER.

If defendant shot decedent upon a sudden and unpremeditated impulse of passion caused by decedent's vilification, abuse, and threats, a verdict of guilty of manslaughter might have been rendered against defendant.

5. CRIMINAL LAW §829(1) — REFUSAL OF REPETITION OF INSTRUCTIONS GIVEN, PROPER.

The refusal of instructions containing matter sufficiently covered by the charge given by the court was not erroneous.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Thomas F. Luttrell was convicted of murder in the second degree, and, from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Farnsworth, McClure & Burke, of Visalia, for appellant.

U. S. Webb, Atty Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of murder in the second degree. The appeal is taken from the judgment of imprisonment which followed the conviction, and also from an order denying defendant's motion for a new trial.

On the 10th day of December, 1918, at the town of Lemon Cove, county of Tulare, an altercation occurred between defendant and Vernon French, a young man about the age of 21 years. French was killed by being shot by appellant. At least three bullets were fired into the body of French. French at the time was unarmed. From this brief preliminary statement it might be inferred that the shooting of French by appellant was an act of wanton and deliberate murder. But from what will be stated immediately hereinafter it will appear that the appellant only acted after he had been annoyed, abused, and cursed upon his own premises; that he had sought to avoid a physical encounter with French, who was there with the evident purpose of provoking and engaging in a fist fight with appellant; that the deceased not only abused and vilified the appellant, but, after challenging him to a fist fight, called him a coward and dared him to shoot. To this further statement we may here add, after carefully examining the testimony introduced at the trial, that had this court the duty to try the question anew upon the evidence we would be most apt to conclude that defendant's crime, considering the extreme provocation under which he acted, was not greater than that of manslaughter. However, we have no function to perform in the way of re-examining the facts, except in so far as it may be necessary to consider them in determining the matters of law which are the only subjects entitled to be reviewed on this appeal.

The main points urged on the part of the appellant are that the refusal of the court to give certain offered instructions was error. It will be appropriate to make a further statement more fully showing the facts affecting the circumstances of the shooting: The appellant at the time of the alleged homicide resided at the town mentioned with his family; he was engaged in operating stages from that point to the Sequoia National Park. In the operation of this business he used automobiles and carried passengers and mail. The deceased, French, had been employed by him, but on the day preceding that of his death had refused, during the absence of appellant, to convey three passengers who desired transportation to a grading camp. For that reason appellant had discharged him the following

morning, through the mouth of another person to whom he gave the wages due to French and which were apparently delivered by the messenger. Some days prior, while making change with a customer, appellant had borrowed 50 cents from French. On the morning of the tragedy appellant brought a truck into the barn or garage used and owned by him, for the purpose of having a mechanic make some small repairs thereon. This mechanic operated a garage near by and had just returned to appellant's place with another machine upon which he had been working. Up to this point there appears to be no dispute in the facts—there is little dispute made at all in the case, except as to the final actions of French immediately before he was shot. To that matter we will advert later. The main story, as told by an eyewitness, was that, after appellant came in with the truck and dismounted therefrom, French appeared inside the door of the building; that appellant approached him; and that French said to appellant, "When are you going to pay me that four bits"; that appellant asked, "What four bits?" and was then reminded of the 50 cents which French had loaned to him; that appellant immediately replied he had forgotten that, that he would pay it; without more ado French, after the introductory question, "You know what I think of you?" began to curse appellant and to apply to him the vilest epithets which his vocabulary afforded, and it appeared that his command of language was not at all restricted in that direction; French advanced toward appellant, whereupon appellant drew a revolver and pointed it at French and retreated from him; French took off his coat, laid it down, and dared appellant to come outside and fight; the challenge to fight was repeated, and he followed after appellant, who retreated toward the rear of the building, pistol in hand, until he reached the wall; he went through a rear door, which was a swinging contrivance, and disappeared from the sight of the eyewitness within the building; French hesitated a moment and followed after him, but nothing more was heard outside. By appellant's testimony it appears that he went home and procured from his wife the 50 cents owing to French and returned with it; at any rate, the eyewitness soon saw French reappear at the front door and shortly thereafter appellant came in and offered him the fifty cents; again French entered upon his tirade of cursing the appellant, calling him again vile and unmentionable names, and again appellant drew his pistol, which he pointed at French. This time, it can be gathered that appellant moved toward French and that French moved toward and through the front door of the building. While these actions were being performed appellant was telling French that he wanted him to go

away, that he wanted nothing to do with him and wanted him to leave his premises. It may be here said, too, that appellant had, before retreating through the rear door, requested French to leave; also that, when being cursed by the deceased, he had returned the compliment by calling him names of similar character to those first used by French. As the eyewitness observed, after French had retreated through the door, his general action was to move away from appellant; that after he got through the door he dared appellant to shoot, telling him that he was afraid to shoot, that he had "a streak of yellow" in him. Thereupon the appellant, standing at the door, declared that he was not afraid to shoot and that he would shoot, and thereupon he fired several shots, at least three, all of which apparently took effect in the body of French, as a result of which wounds he died in a hospital not long after. The only substantial difference in the testimony as between the witnesses for the prosecution and the defendant was that the defendant testified that after French had retreated through the front door he again advanced upon him (appellant) in a threatening manner and that he (appellant) believed that French was again about to attack him; that, so believing, he fired the fatal shots.

[1-5] The appellant relied for his exoneration upon the claim that he acted in necessary self-defense. This claim was given very full presentation to the jury by instructions as read by the court. We have made a particularly close examination of those instructions, and we think that they were not only fair, but exceedingly full, and prepared with a view to thoroughly cover the case. As we read them, they present a full exposition of the law touching the manner of self-defense. Instructions were not wanting in the advice to the jury that, if the defendant believed as a reasonable man that he was about to suffer great bodily injury at the hands of French, he would be justified in using his deadly weapon and killing his antagonist. The crime of murder and its degrees were carefully analyzed by the court, as was the offense of manslaughter included therein. To say that the jury would have been altogether justified under the evidence in returning a verdict of guilty of manslaughter, instead of murder of the second degree, does not help the case of appellant on this appeal at all. It was for the jury to determine the degree or character of crime, if any, which had been committed. Evidently it concluded, as it had a right to do under the evidence, that French was in retreat and was going away and had abandoned the quarrel when he was shot and killed. There was evidence, as we have noted, to fully sustain such a verdict. On the other hand, had the jury concluded, as appellant insisted, that French was ad-

vancing upon him, threatening him with an assault, and that he feared great bodily harm at the hands of deceased, then a verdict of acquittal would have no doubt been rendered. If it had concluded that there was no deliberate intent involved in the act, but that appellant shot upon a sudden and unpremeditated impulse of passion, a verdict of manslaughter might have been rendered. We think it unnecessary to here repeat the text of the instructions given by the court in the lengthy charge delivered. It will suffice to state again that that charge seems to us to completely cover the case and to present fully all of the propositions important to the appellant's defense. The instructions refused and for which error is claimed either contained matter sufficiently covered by the charge given by the court, or contained matter not clearly material to a sufficient exposition of the law as applied to the case.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

TITLE INS. & TRUST CO. v. LOS ANGELES COUNTY et al. (Civ. 2893.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1919.)

HIGHWAYS §68 — WHERE DESCRIPTION IN JUDGMENT FOLLOWS NEITHER COMPLAINT NOR ANSWER, VARIANCE FATAL.

In an action by a bank to enjoin a county from constructing a roadway on its land, in view of the descriptions of the land as found in the pleadings, a resolution of the board of supervisors of the county declaring a certain road a public highway held inadmissible as constituting a material variance.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Title Insurance & Trust Company, a corporation, against the County of Los Angeles, a municipal corporation, and others. From judgment for defendants, and an order denying motion for new trial, plaintiff appeals. Judgment and order reversed.

Chas. H. Brock and J. N. Hastings, both of Los Angeles, for appellant.

Robert B. Murphy, A. J. Hill, County Counsel, Charles E. Haas, and Lucretia H. Norman, all of Los Angeles, for respondents.

THOMAS, J. This is an action for injunction. From the complaint it appears that plaintiff claims that on the 25th of April, 1915, it "was and is the owner and possessed of" certain lands described therein; that,

while so possessed, the defendants, "on or about said date," and on divers other days between said date and the commencement of said action, acting by and through their agents, etc., "wrongfully, unlawfully, and without right, permission, or authority, broke into and entered upon said tract of land, and began and continued, from a day on or about the 23d day of April, 1915, to the date of the commencement of this suit, the construction of a roadway on, over, and across said tract of land, and in and about the construction of said roadway defaced the said land by cuts and fills and displacement of rocks and the soil thereof, and destroyed valuable growing timber thereon, and obstructed and filled up a stream of water flowing thereon, and thereby and otherwise committed great damage, waste, and injury to said tract of land, all without the knowledge or consent of plaintiff, and to the great and irreparable damage and injury of plaintiff." After describing the natural beauty and the peculiarly inviting characteristics of the land which tend, in the mind of the pleader, to enhance the value of the same, it is further alleged:

That defendants, as hereinbefore set forth, "broke into and entered upon said tract of land with a large force of laborers, to the number of 50 or upwards, with tools, machinery, and teams; that the said laborers are now encamped and congregated in the immediate vicinity of said tract of land, with a large number of work teams and with a large quantity of tools and machinery; that large quantities of tools and machinery are now in said canyon on said land; that, in the construction of said roadway as aforesaid, said laborers, acting under the direction of defendants herein, removed the fence and gate constructed across the mouth of said canyon, and said laborers, under the direction of the defendants herein, have already proceeded and carried their work of construction of said roadway to a distance of approximately one-eighth of a mile up said canyon; that the said defendants are about to, and will, unless restrained by this court, commit further injury and damage to said land of plaintiff in this: that they will continue the construction of said roadway up and through the said canyon, and in such work of construction will cut down valuable growing timber, displace rocks and soil, fill up or divert the stream of water flowing in said canyon, and deface and mar said lands and the natural beauty of said canyon with cuts and fills, and will otherwise damage and injure said lands by such construction work, all to the great and irreparable injury and damage of plaintiff."

The answer of defendants, except for the formal parts, denies all the material allegations of the complaint; and, while admitting the ownership and possession of the land in plaintiff, they insist that—

The ownership and possession "is now and was at all times mentioned in plaintiff's complaint subject to a certain roadway known as the Tuna or Tunis Canyon Road, * * * and

which was at all times stated in said complaint, and is now, a duly existing, recognized, used, and accepted public highway."

Defendants admit:

That they "entered upon that certain public roadway known as Tuna or Tunis Canyon; * * * that laborers in the employ of said defendant [the county of Los Angeles] were, at the time mentioned in plaintiff's complaint, encamped and congregated in the immediate vicinity of said tract; * * * and that said laborers, * * * under direction of the defendants herein, have proceeded and carried their work of construction of said roadway to a distance of approximately one-eighth of a mile up said canyon."

It is further alleged, and set forth by proper allegation in the answer:

That during all the time mentioned in the complaint, and for more than ten years prior to the commencement of this action, the alleged road "was a duly used and recognized public highway, and has been used and recognized as a public highway for many years last past, to wit, for over ten years continuously; that on Tuesday, February 14, 1911, the board of supervisors of the county of Los Angeles, in and by a proper resolution duly passed, accepted and laid out said Tuna Canyon Road as a public highway, and so declared it to be, which said resolution is duly recorded" (then following the resolution, in extenso, purporting to contain a description of the road); and "that said Tuna Canyon Road has never been discontinued or ceased to be a public highway by order of the board of supervisors of Los Angeles county, or otherwise; that said Tuna Canyon Road was and is the same in extent, width, and direction at all times mentioned in plaintiff's complaint herein as dedicated and declared in the said order."

The strip of land involved in this action extends about six miles north of the city of Santa Monica, and begins at the southern entrance of what is known as Tuna, or Cactus, canyon, which entrance is upon the shore of the Pacific Ocean. From this place of beginning it runs for some distance along the side of the canyon, which is very narrow, and thence meandering up into the Santa Monica mountains to a settlement in the highlands. Along the bed of the canyon, during the rainy season of each year, a stream of water flows. The "road" in question here practically parallels that stream for quite a distance, and then crosses the bed of the canyon in a northwesterly direction. In some form or another this "trail," "road," "public highway," or whatever designation may suit the person interested, has been used since the year 1883, at first by "a few settlers" and those visiting, working for, or having business with them; and, with the advance of years and the increase of population, the numbers who have so used it have increased until it has become, as contended by defendants, "a splendid automobile high-

way," this latter condition being brought about by the defendant county following the decision of the trial court herein, that court having found for the defendant and having denied the injunction prayed for.

It is conceded that, so far as the present action is concerned, in its final analysis there is but one question involved, and that question is whether or not there was a dedication of the alleged road. As already intimated, the trial court has answered this question in the affirmative. There was a motion for a new trial, which was denied. The appeal here is from the judgment and from the order denying said motion.

Appellant urges consideration by this court of eight assignments of error, by the second of which it is urged "that the evidence is insufficient to support said findings of fact and conclusions of law." Assignment No. 5 is as follows:

"The court erred in making its order denying plaintiff's motion for a new trial because of error on the part of the trial court in admitting in evidence the resolution of the board of supervisors of Los Angeles county adopted three days before the trial of this action, as no supplemental answer had been filed alleging the adoption of said resolution."

If these two assignments of error are not well taken, then there is nothing in this record that needs our consideration.

On the trial of the case, the court permitted the defendants, over plaintiff's objection, to introduce defendant's Exhibit C which is a resolution by the board of supervisors of Los Angeles county declaring "Tuna Canyon Road, also known as Cactus Canyon Road, a public highway," which resolution was adopted on July 12, 1915—a long time after the commencement of this action and the joining of issues herein, and only three days before the trial. Exhibit C is a very lengthy resolution, purporting to describe in detail, by metes and courses, a strip of land, which respondents claim is the road here involved. This description was adopted by the court and is incorporated in the judgment. Appellant argues very vigorously that the ruling of the court here was error; that said resolution was inadmissible as evidence; and in this contention we think it correct. We find nothing in the language of the pleadings, the franchise of September 28,

1891, the resolution of February 14, 1911, or in defendant's Exhibit C, which ties the latter up to the "road" described in the former. We have no hesitation in saying that it is a physical impossibility to reconcile the description contained in the judgment with either the description as alleged in the complaint or with that alleged in the answer. Nor does the record contain any evidence—and we have read the entire voluminous record—which would even tend to prove that the "road" described in the judgment is the land referred to in either the complaint or the answer. There is nothing from which this fact, if it be a fact, may be inferred. On the contrary, the record here shows affirmatively, we think, that such is not the case. In this respect the evidence does not justify the finding, which the court found as a fact, that the road referred to in plaintiff's complaint and defendants' answer, the franchise granted by the board of supervisors of Los Angeles county on September 28, 1891, to operate a wagon road or steam road to the Ocean Shore and Calabasas Toll Road and Steam Railroad Company, and in the resolutions of the board of supervisors of Los Angeles county dated February 14, 1911, and July 12, 1915 (defendant's Exhibit C) was, and is, the said Tuna Canyon Road. No useful purpose can be served by a lengthy discussion of this point. We think the conclusion that there is a material variance between the allegation and the proof must now be obvious. Certainly no stranger, taking this record and comparing the descriptions of the land involved here, as found in the pleadings, with that found in the judgment—and the judgment follows exactly the description found in said Exhibit C—could say it described the same strip of land.

In view of the fact that there was no supplemental pleading which would justify the reception of the proffered evidence, we think it was error to overrule plaintiff's objection and to permit said resolution to be received in evidence. But notwithstanding this, were it not for the variance referred to above, and which we think fatal to the judgment here, the judgment might have been sustained.

The judgment and order appealed from are reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

Ex parte RANKIN. (Cr. 860.)

(District Court of Appeal, First District, Division 1, California. July 15, 1919.)

1. INDICTMENT AND INFORMATION §71—CERTAINTY.

If the facts stated are not capable of two constructions, and are such as to plainly show to a person of common understanding a crime has been committed, the information or indictment will be held sufficient.

2. INDICTMENT AND INFORMATION §110(3)—WORDS OF STATUTE.

Indictment or information is sufficient, where crime is substantially alleged in the words of the statute, or their equivalent.

8. INDICTMENT AND INFORMATION §110(25)—WORDS OF STATUTE—SODOMY.

Information charging attempt to commit the infamous crime against nature in the words of the statute (Pen. Code, § 286) denouncing such crime *held* sufficient, as against objection that the terms of the statute are unintelligible, uncertain, ambiguous, and general, since every person of ordinary intelligence understands what the crime against nature with a human being is.

In the matter of the application of Nathan Rankin for a writ of habeas corpus. Denied.

Nathan Rankin, in pro. per.

WASTE, P. J. From the petition filed in the above-entitled matter, it appears that the petitioner is confined in the state prison of the state of California at San Quentin, after conviction upon a charge of attempt to commit the infamous crime against nature, under section 286 of the Penal Code. While the document is denominated "A Petition for a Writ of Habeas Corpus and Certiorari," it amounts to nothing more than a petition for a writ of habeas corpus.

While the petition does not contain allegations of fact sufficient to warrant the issuance of such a writ, we are able to ascertain from its averments, and from the petitioner's brief, filed herein, that the gravamen of the petitioner's complaint is that the terms of said section 286 of the Penal Code are unintelligible, uncertain, ambiguous, and general, and that an information charging the commission of the crime in the words of the statute, or their equivalent, fails to state an indictable public offense, or any offense, in legally sufficient terms.

Defendant was prosecuted under section 286 of the Penal Code, which reads as follows:

"Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."

[1, 2] "The section does not define the crime, nor state in what it consists, but de-

nominate it 'the infamous crime against nature.' At common law, the crime attempted to be charged was called sodomy. * * * The crime is now, and has been since the days of Blackstone, designated by law writers and judges as 'the infamous crime against nature' [citing cases], and it is so designated in the Penal Code. * * * If the facts stated are not capable of two constructions, and are such as to plainly show to a person of common understanding that a crime has been committed, the information or indictment will be held sufficient. It will also be held sufficient where the crime is substantially alleged in the words of the statute or their equivalent." *People v. Carroll*, 1 Cal. App. 3, 81 Pac. 681.

[3] "Every person of ordinary intelligence understands what the crime against nature with a human being is." *People v. Williams*, 59 Cal. 397, 398.

The writ is denied.

We concur: **RICHARDS, J.; BARDIN**, Judge pro tem.

TRULSSON v. SOUTHERN PAC. CO.
(Civ. 2853.)

(District Court of Appeal, First District, Division 1, California. July 26, 1919. Rehearing Denied by Supreme Court Sept. 22, 1919.)

1. APPEAL AND ERROR §843(2) — WHERE CONTRIBUTORY NEGLIGENCE DEFEATS RECOVERY, WHETHER PLAINTIFF WAS PASSENGER IMMATERIAL.

On an appeal in personal injury action, it is not necessary to determine whether plaintiff was still a passenger of defendant carrier, when injured while on its tracks, where plaintiff was guilty of such negligence proximately causing his injuries as must prevent his recovery.

2. CARRIERS §333(1) — PASSENGER MUST USE ORDINARY CARE IN LEAVING TRAIN.

The fact that a carrier may owe its passengers the highest degree of care in safeguarding their exit from the carrier's premises after leaving its trains does not absolve the passenger from the duty of using ordinary care.

3. CARRIERS §333(10)—PASSENGER GUILTY OF CONTRIBUTORY NEGLIGENCE BARRING RECOVERY.

Where plaintiff, alighting from defendant's train at an unusual place stepped upon another track after looking down it only a short distance in the direction from which trains would come, because of his view being obstructed by the departing train, walked with his back toward the approaching train without noticing the same until too late to step from such track, his negligence precluded recovery.

Appeal from Superior Court, Santa Clara County; **P. F. Gosbey**, Judge.

Action by Pehr Trulsson against the Southern Pacific Company. From a judgment for defendant after granting a motion for nonsuit at the close of plaintiff's case, plaintiff appeals. Affirmed.

John D. Willard and E. A. Douthitt, both of San Francisco, for appellant.

Louis Oneal and James P. Sex, both of San Jose, and Roy G. Hillebrand, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the defendant's favor after the granting of a motion for nonsuit at the close of the plaintiff's case.

The action was one to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendant. The facts of the case are these: The plaintiff, who at the time of the injuries complained of was, and for a period of between two and three years prior thereto had been, a resident of Palo Alto, had, on the 18th day of March, 1917, purchased a commutation ticket book, which entitled him to a first-class daily passage upon the trains of the defendant to San Francisco and return. Thereafter, and up to the 21st of March, 1917, the plaintiff had made six trips between said points upon his commutation book. On the last-named date, at about 4 o'clock p. m., the plaintiff presented himself as a passenger at the San Francisco depot of the defendant, and exhibited his book to the gatekeeper at one of the then open gateways which were there maintained leading to outgoing trains. The gatekeeper admitted him, and the plaintiff boarded a train then loading with passengers, and apparently about to start on the way to his desired destination. The train presently started, the conductor began his round collecting tickets, the plaintiff presented to him his book, from which the conductor took one of the tickets representing that day's trip without comment, and returned the book. The plaintiff presently noticed that the train was not stopping at stations to take on or discharge passengers, and inquired of a brakeman the reason thereof, by whom he was then informed that the first stop of that particular train was at San Jose, which was about 20 miles beyond Palo Alto. Plaintiff thereupon demanded that the train be stopped at the Palo Alto Station, and that he be let off there. The brakeman referred him to the conductor, upon whom he made the same demand. The conductor refused to stop the train at the passenger depot at Palo Alto for the reason that the train, being a through train, was not scheduled to stop at Palo Alto. The plaintiff's commutation book of tickets contained the following provision:

"It is hereby understood that if this book is used on a train that does not stop at destination of coupons the holder will detrain at some

point short of destination of coupons, or, if he elects to travel beyond such destination, he will pay conductor ticket fare from such destination to point at which he detrains."

The plaintiff, however, still insisting upon being let off at the Palo Alto Station, the conductor finally consented to stop the train in the switch and freightyards, about 1,200 feet beyond the regular station at Palo Alto, and allow the passenger to alight there. This he did; and the plaintiff, going at the conductor's request to the rear platform of the train, alighted on the west side of the train, which immediately moved off. The place where the plaintiff thus left the train was about 50 yards south of Forest avenue at the point where it crosses the defendant's tracks. There was a smooth and traveled pathway leading along the side of the track from the point where the plaintiff alighted back to the Palo Alto Station, but otherwise the ground within the switch yards was graveled and rough, and the rails stood their width above the ties so as to render walking across the tracks difficult. There is some question as to whether the plaintiff noticed the traveled walk leading back to the station, but whether or not he did so he did not wish to go that way, but rather to cross obliquely to the east side of the several tracks of the defendant in order to reach Forest avenue at that point on his way to his home, which was to the eastward of the point where he had alighted from the train. While so proceeding obliquely across the rough ground and raised rails of the defendant's switchyards he was struck by a north-bound train of the defendant coming swiftly upon an adjacent track to that on which the former train was departing, without giving warning of its approach. For the injuries thus inflicted he brought this action.

[1] The plaintiff's first contention upon this appeal is that he was a passenger of the defendant while upon its train, and that he continued to be such passenger after he alighted from the defendant's train under the circumstances above set forth and up to such time as he would have made his egress from the defendant's premises had he not been struck by its train; and that, being such passenger, the defendant owed him the highest degree of care, and was bound to give him warning of its approaching train, and that, not having done so, it is responsible for his injuries. Conceding, though not deciding, that the relation of carrier and passenger continued to exist between the plaintiff and the defendant after he had passed the station to which his ticket entitled him to ride, and after he had insisted upon being let off at said station notwithstanding the terms of his commutation contract above quoted, and after he had consented to leave and had left the defendant's train at the

place and under the circumstances above detailed, we are still of the opinion that the plaintiff's own undisputed evidence shows him to have been guilty of such negligence proximately causing his injuries as must have prevented his recovery in this action.

[2] The fact that a carrier may owe to its passengers the highest degree of care in safeguarding their exit from the carrier's premises after leaving its trains does not absolve the passenger from the duty of himself using ordinary care under the circumstances attending his departure from the carrier's train and grounds. *Holmes v. S. P. Ry. Co.*, 97 Cal. 161, 31 Pac. 834.

[3] The undisputed evidence, as presented by the plaintiff himself, discloses that, however much or little the defendant's agents may have been at fault in permitting the plaintiff to gain access to and to take passage upon a train which was not scheduled to stop at his station, he did in fact, and without inquiry on his own part, board such a train, and, being so on board and evidently not desiring to be carried to its first regular place of stoppage at San Jose, conformably to the stipulation of his ticket book, he demanded that the officials of the defendant in charge of said train should depart from its schedule and violate their instructions by stopping the train at the Palo Alto Station; and when the conductor, declining to comply with this demand, finally agreed to halt the train momentarily in the freightyards of the defendant, some 1,200 feet or more beyond said station, the plaintiff consented to alight at said place, and did so; and, having done so, found himself standing by the west side of one of the defendant's several tracks about 50 yards from a street crossing to which, along the rails by which he stood, ran a smooth pathway to said street, and beyond it back to the station. He either did not see or did not choose to take said pathway, but started obliquely across the rough grounds and raised tracks, where no pathway or crossing was, on his way to the east side of the several tracks of the defendant at their point of intersection with said street. The plaintiff had lived in Palo Alto for several years, and must have known that trains of the defendant passed frequently through that city. Being upon its tracks at a point other than the regular station or stopping place of such trains, and at a place where persons, whether or not they held the relation of passengers of the carrier, were not expected to be, and where trains were not accustomed to stop, and, being minded to cross said tracks where no pathway was, it was plainly the duty of the plaintiff to walk cir-

cumspectly and to watch for approaching trains before essaying to cross the tracks of the defendant in the manner and direction which he chose to go. Had he done this he could not have failed to observe the rapidly approaching train coming from the southward along a straight track and visible for at least half a mile. If his view in that direction was obstructed by the departing train from which he had just alighted, it was all the more his duty to proceed cautiously, but, instead of doing so, according to his own testimony, he started, as soon as he was clear of the rear end of said departing train, and with only a glance in its direction, which gave him a view of but 40 or 50 feet of the adjacent north-bound track, to walk diagonally to the northward, with his back partially at least in the direction from which the north-bound train was coming, and without another look in that direction until said train was so close upon him that, although he was not yet upon the track on which it was approaching, he could not, by stepping backward, avoid being struck by it as it went by.

Under the circumstances of this case as thus summarized from the plaintiff's own testimony, we think that he was clearly guilty of such negligence as a matter of law as must have prevented his recovery in this action. The language of the case of *Holmes v. S. P. Ry. Co.*, supra, is particularly applicable to the case at bar because of the similarity of its facts, and also because the plaintiff in that case, as it is claimed in the instant one, occupied the relation of a passenger to the defendant. The court said:

"A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion and who is possessed of ordinary intelligence that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person so situated with reference to the railroad track to exercise such care and watchfulness, and to make use of all his senses, in order to avoid the danger incident to such situation, is negligence per se."

It may be said, in conclusion, that the doctrine of "last clear chance," invoked for the first time by the appellant at the oral argument and in the briefs filed subsequent thereto, has no application to the facts of the case at bar.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

ETIENNE v. ETIENNE. (Civ. 2806.)

(District Court of Appeal, First District, Division 2, California. July 28, 1919. Rehearing Denied by Supreme Court Sept. 25, 1919.)

1. CONTRACTS ⇨172—AGREEMENT TO DELIVER BONDS—BREACH—MATURITY OF CAUSE OF ACTION.

Where a man breached his contract with his wife to deliver bonds which he was to redeem for a specified sum within five years, failure to make such deposit of the bonds converted the agreement into an absolute promise for the payment of the money, and a right of action for recovery thereof matured upon such breach; demands for such delivery having been previously made.

2. CONTRACTS ⇨314—RENDERING PERFORMANCE IMPOSSIBLE.

Where defendant made a contract before divorce for a property settlement, agreeing to deliver certain bonds to his wife to be redeemed by him at a fixed price within five years, and delayed delivery until performance became impossible, his conduct was equivalent to a breach of contract, although the time for redeeming the bonds had not arrived, and the plaintiff could then maintain an action for the breach.

3. CONTRACTS ⇨172—BREACH BY FAILURE TO DELIVER BONDS.

In an action for breach of contract by failure to deliver corporate bonds, which were to be later redeemed, the objection that damages must be based on the value of the bonds at time of breach, and that no proof thereon is contained in the record, is not well taken, where it is shown that defendant appellant construed the contract as requiring immediate deposit of the bonds, and the contract provides that the "bonds are taken" "as being the equivalent of \$60,000."

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Annie T. Etienne against Victor Etienne, Jr. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. Williams and Leo R. Friedman, both of San Francisco, for appellant.

F. B. Clarke and J. J. Dunne, both of San Francisco, for respondent.

HAVEN, J. Defendant appeals from a judgment rendered against him in the sum of \$60,000, with interest, found to be due to plaintiff under the terms of a written contract between the parties. Plaintiff and defendant were husband and wife. On October 22, 1913, while an action for divorce filed by plaintiff was pending, a property settlement was made between them, evidenced by a written contract, upon which this action is based. For a proper understanding of the facts involved in the appeal it is necessary to set forth in full two paragraphs

of this contract. The defendant is the party of the first part and the plaintiff the party of the second part therein referred to. These paragraphs are as follows:

"Second. That said party of the first part agrees to immediately execute a grant, bargain and sale deed conveying to the said party of the second part all his right, title and interest in and to the above-described property, and also to deliver to said party of the second part sixty (60) General Petroleum bonds, and all of the household furniture now in the premises at 770 Dolores street.

"Third. Said party of the first part agrees that on or before five years, he will redeem at par the said sixty General Petroleum bonds for the full face value of said bonds, namely for sixty thousand dollars, and that in the meantime, and until said bonds are redeemed for said sixty thousand dollars, he guarantees that said bonds will give a net income of three hundred dollars per month payable on the interest payment dates of said bonds, and in case said bonds do not bring a net income of three hundred dollars per month, the party of the first part agrees to make up any difference between the amount earned on said bonds and the said sum of three hundred dollars; it being distinctly understood by and between the parties hereto that the said General Petroleum bonds are taken in this agreement as being the equivalent of sixty thousand dollars, and it is the intent and purpose of the party of the first part to give said party of the second part the sum of sixty thousand dollars by means of said bonds, and said party of the first part, not being in a position at this time to turn over said sixty thousand dollars to said party of the second part, agrees that he will leave with said party of the second part said bonds, with the guarantee that on or before five years they shall be redeemed for the sum of sixty thousand dollars; and it being further understood that it is the intent of this agreement that a monthly income of three hundred dollars shall accrue to said party of the second part from said bonds, or failing to accrue from said bonds, then from said party of the first part until redemption of said bonds by said party of the first part."

Defendant partly performed his obligations under the above contract by executing and delivering to plaintiff a deed for the real property therein referred to, and also by delivering to her the household furniture. He has never delivered to her the described bonds nor paid the sum of \$60,000. This action was prosecuted for the recovery of this latter sum, and judgment therefor was rendered against the defendant.

It is agreed by both parties that the primary obligation of defendant under the terms of the contract was to pay to plaintiff said sum of \$60,000. Appellant contends, however, that this sum was not payable until five years after the date of the contract, to wit, October 22, 1918, and that this action, having been filed on April 17, 1917, was prematurely brought. It is further argued that, while appellant's failure to de-

liver the bonds specified in the contract or to make payment of the sum of \$60,000 constituted a breach of such contract on his part, plaintiff's remedy was limited to one of two causes of action—either to compel the delivery of the bonds, in specific performance of the contract, or for damages for failure to make such delivery; and, further, that, in the latter action, the value of the bonds was a material element in computing the damage, and that no evidence of such value was offered. The contention is that no time for the payment of the sum of \$60,000 is specified in the contract, and therefore that the only obligation incurred by defendant was for delivery of the bonds with the accompanying guaranty that he would redeem the same at their face value within five years from the date of the contract. It is asserted, therefore, that defendant was not liable for the cash payment until the expiration of the five-year period. His answer pleads his intention of making payment at that time.

Respondent, on the other hand, contends that the terms of the contract are equivalent to an agreement on the part of defendant to pay to plaintiff the sum of \$60,000, in bonds of the General Petroleum Company, and that the five-year period is specified solely as a time of redemption, and can have no bearing upon the liability of defendant unless and until the bonds were delivered; that the obligation of defendant was to deliver the bonds immediately upon the execution of the contract, or at least within a reasonable time thereafter; and that, upon the breach of that obligation, defendant became liable to plaintiff in the sum mentioned as damages suffered by plaintiff by reason of such breach.

[1] In *Beckwith v. Sheldon*, 168 Cal. 742, 746, 145 Pac. 97, 99 (Ann. Cas. 1916A, 963) the Supreme Court construed a contract which provided "that there shall be paid to Beckwith 'the sum of fifty thousand dollars * * * in bonds of the * * * company, at par,'" and held that, upon the refusal of the promisor to deliver the bonds in payment, the promise became an absolute money obligation, and that the payee had an immediate right of action for recovery of the money without alleging or proving the value of the bonds. Many authorities are cited to sustain the doctrine that, when a contract is made to pay a sum of money in specific articles, upon the failure of the payer to deliver such articles within the time provided, the contract becomes an obligation to pay the sum of money itself. The proper construction of the contract here involved brings it within the rule of the above case. Said contract provides:

part the sum of sixty thousand dollars by means of said bonds."

This is equivalent to a promise to pay \$60,000 in the bonds referred to. It is true that the contract discloses that the defendant was not in position at the time of its execution to make such payment, and that, for the purpose of securing the payment, the bonds were to be delivered to the plaintiff and retained by her, under the defendant's guaranty of a stable income therefrom and ultimate redemption in cash within five years. It is not contended by appellant that plaintiff was obliged to wait five years, without complaint or cause of action, upon the failure of defendant to either deposit the bonds or pay the money. In other words, it is admitted that, at the time this action was brought, defendant had been guilty of a breach of his contract obligations. It is insisted, however, that during the five-year period provided for redemption of the bonds the only obligation of the defendant was to make the deposit as security, and that therefore plaintiff's remedy was limited to the specific performance of that obligation, or to the recovery of damages for failure to make such deposit. Under the rule stated in *Beckwith v. Sheldon*, supra, the failure of the defendant to make the stipulated deposit converted his agreement into an absolute promise for the payment of the money, and a right of action for recovery thereof matured upon the breach of the covenant of the contract. The only element in the contract here involved, which is urged as distinguishing this case from the doctrine announced in the above cited case, is that the deposit here provided for was to be made as security for the performance of the promise to pay the money, while in the cited case, and authorities therein referred to, the promise was to pay in bonds, or other articles, and not to secure a future payment. Construed as a whole, this contract evidences a primary obligation to pay the sum specified in bonds, with a secondary obligation to redeem the bonds in cash within the five-year period. The addition of the second promise did not alter appellant's obligation upon the first, nor take the case without the rule above referred to. Nor can the contract be construed to mean that the time of payment was postponed for five years without the deposit of the security. The only mention in the contract of the five-year delay is in connection with the redemption of the bonds. Until such bonds had been deposited, the question of redemption, or the time therefor, could not arise. There may be some uncertainty as to whether the word "immediately" at the commencement of the second paragraph of the contract refers to the delivery of the bonds as well as to the execution of the deed. If it does not, the contract is silent

"It is the intent and purpose of the party of the first part to give said party of the second

as to when the bonds should be delivered. Under that construction of the contract it must be held that the bonds were to be delivered within a reasonable time or upon demand of the plaintiff. The evidence discloses frequent demands for such delivery, and also a demand for payment of the money, if the bonds could not be delivered. It is conceded that, upon such demand and failure upon the part of the defendant to either deliver the security or make the payment, a breach of the contract resulted. Upon such breach plaintiff was entitled to recover the sum of \$60,000, the payment of which is conceded to have been the primary obligation of the defendant.

[2] The same result is reached from a consideration of other facts appearing in the record. In an interview between defendant and plaintiff's attorney, prior to the commencement of the suit, defendant admitted that the bonds should have been delivered when the agreement was signed, but that he refrained from doing so by reason of a feeling of animosity toward the plaintiff's former attorney. He further stated that he expected to be compelled to put them up, and that—

"I am sorry now that I did not do so; now I cannot. I am sorry that I cannot."

At a later interview between the same parties, when a further demand was made for the deposit of the bonds or payment of the money, defendant criticized the plaintiff's act in recording the deed to the house and stated the result of that action was that "everybody came on me and they took everything I had; now I can't do anything." It thus appears that defendant construed the contract as obligating him to make an immediate delivery of the bonds; that he did not do so for reasons personal to the attorney then representing the plaintiff; and that before the interview referred to his ability to perform the contract had ceased. This brings the case within the rule:

"That if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract although the time for performance has not arrived." *Roehm v. Horst*, 178 U. S. 1, 8, 20 Sup. Ct. 780, 44 L. Ed. 963; *O'Neill v. Supreme Council, etc.*, 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422; *Wolf v. Marsh*, 54 Cal. 228, 232; *Poirier v. Gravel*, 88 Cal. 79, 88, 25 Pac. 962; *Cabrera v. Payne*, 10 Cal. App. 675, 678, 103 Pac. 176.

In view of the provisions of the contract and defendant's testimony, it must be assumed that he had the ability at the time of the execution of the contract to make the deposit of bonds therein provided for; that he voluntarily delayed doing so, and thus

disabled himself from performing his contract obligation. Defendant's answer contains allegations to the contrary, but no evidence was offered to support them and the findings negative their truth. Under the doctrine of the above cases, plaintiff had the right to treat the contract as terminated with regard to such obligation and to maintain an action at once for the damages occasioned by such breach of contract. Appellant's contention that this rule applies only "in those instances where the refusal to perform, or the renunciation of the contract is absolute and unequivocal and goes to the whole contract," is not sustained by the authorities. In the case relied upon by appellant in support of that position, it is said:

"To justify such a course of procedure there must be a failure in some substantial particular, which goes to the essence of the contract, and renders the defaulting party incapable of performance, or makes it impossible for him to carry out the contract as intended." *Krebs Hop Co. v. Livesley*, 51 Or. 527, 533, 92 Pac. 1084, 1086, affirmed in 59 Or. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758.

The failure of defendant to deposit the bonds was a failure in a substantial particular which went to the essence of the contract. His delay in making such deposit, and resultant inability so to do, made it impossible for him to carry out the contract as intended. The authorities also sustain the position that an act of the promisor which disables him from making performance, as well as a formal renunciation of the contract, is within the rule above stated.

[3] The contention of appellant that plaintiff's cause of action was limited to the recovery of damages for failure to make the deposit of the bonds does not justify the conclusion that the recovery herein was unwarranted. The argument is that in such an action the damages must be based upon the value of the bonds at the time of the breach, and that no proof of such value is contained in the record. Under the language of the contract, as construed by appellant, the deposit of the bonds should have been made immediately upon the execution of the contract, and the failure to do so constituted a breach at that time. Paragraph third of the contract, which by special reference is made a part of the complaint, provides that it was distinctly understood between the parties that the "bonds are taken in this agreement as being the equivalent of sixty thousand dollars." This agreement furnished evidence of the value of the bonds at the time of the breach. The complaint contains allegations of failure on the part of defendant to deliver the bonds, and of damage in the sum of \$60,000. These allegations may be regarded as stating a cause of action for damages arising from the failure of defend-

ant to make the deposit of bonds. Under that theory the evidence is sufficient to support the judgment. *Henry v. North American Railway Construction Co.*, 158 Fed. 79, 85 C. C. A. 409.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

ELLIOTT v. McINTOSH et al.
(Civ. 2829, S. F. 8665.)

(District Court of Appeal, First District, Division 1, California. June 26, 1919. On Rehearing in Supreme Court in Bank, Aug. 25, 1919.)

1. BOUNDARIES \S 20(2)—ON DEDICATION OF STREET SALES BY LOT CARRY TITLE TO MIDDLE OF STREET.

In order that a conveyance by lot number with reference to a recorded map should carry title to the center of the street shown, it is necessary that there be first a valid dedication and acceptance of the street; but, there having been a dedication, sales by number of lots abutting on the street carry title to its center.

2. DEDICATION \S 19(1) — DESIGNATION OF STREET BY RECORDING PLAT IF ACCEPTED IS IRREVOCABLE.

When an owner of a tract of land plats it upon a map designating certain portions as public streets or highways, and thereafter records the map, he is deemed to have made an offer to dedicate the indicated streets to the public for highway purposes, and if such dedication is accepted it becomes irrevocable.

3. DEDICATION \S 31—ON FAILURE TO ACCEPT DEDICATION BY PLAT STREET REVERTS TO ABUTTING OWNER.

Where the owner of land plats it on a map designating streets or highways, and records the map, thereby offering to dedicate the streets to the public, by such dedication alone the owner does not part with title to the land occupied by the streets, but grants the public merely an easement for travel, and on failure to accept the dedication the easement expires and full title reverts to the owner of the adjoining land.

4. DEDICATION \S 35(1)—FILING OF MAP IS NOT ACCEPTANCE OF DEDICATION.

The mere filing of a map designating certain portions of a tract as streets does not constitute acceptance of their dedication.

5. DEDICATION \S 34—OWNER CAN REVOKE DEDICATION NOT ACCEPTED IN REASONABLE TIME.

Acceptance of a landowner's offer to dedicate streets indicated by the map or plat recorded by him must be evidenced within a reasonable time after the offer, and, if not, the owner may resume possession and revoke his offer.

6. DEDICATION \S 35(1), \S 37—ACCEPTANCE OF DEDICATION MAY BE ACTUAL OR IMPLIED.

Acceptance of streets offered to be dedicated by recordation of the owner's map or plat may be either actual or implied, by the formal act of the public authorities having jurisdiction, or by mere user on the part of the public long enough to evidence its intention to accept.

7. DEDICATION \S 41—ON SALE OF LOTS WITH REFERENCE TO RECORDED MAP PRESUMED IRREVOCABLE.

If an owner, having recorded a map showing streets laid out, sells the lots designated thereon by specific reference to the map, he is presumed to have made an irrevocable dedication of the streets.

8. DEDICATION \S 39—ON SALE OF LOTS BY RECORDED MAP OWNER ESTOPPED TO DENY DEDICATION.

If lots are sold by number, and not by metes and bounds, reference being made to a map previously prepared by the owner showing streets and alleys, and recorded, the owner, original dedicator of the streets, is estopped to deny that the portions designated as streets on the map were in fact dedicated to or accepted by the public.

9. EJECTMENT \S 10—WHEN NEITHER PARTY CLAIMS BY DEED PLAINTIFF CAN RECOVER BY POSSESSION.

Plaintiff in ejectment, who, with her husband, was in actual possession of the premises in dispute for more than 29 years until ousted by defendants' immediate predecessor, during all of which time the premises had been occupied and cultivated by plaintiff's husband, as against defendants was in actual prior and lawful possession, entitled to maintain ejectment, since where neither party relies on a paper title prior actual possession will support the action.

10. ADVERSE POSSESSION \S 94—FAILURE TO PAY TAXES WHEN NONE ARE LEVIED IMMATERIAL.

Failure to pay taxes where none are levied does not defeat a claim of adverse possession under Code Civ. Proc. \S 325.

11. ADVERSE POSSESSION \S 113—DEEDS AND MORTGAGES NOT ADMISSIONS AGAINST INTEREST INADMISSIBLE.

In ejectment, deeds and mortgages covering lots adjoining the one in dispute, merely what they purported to be, and not admissions against interest on the part of plaintiff's predecessor, held inadmissible.

Appeal from Superior Court, Napa County; Henry O. Gesford, Judge.

Action by Agnes Elliott against John O. McIntosh and others. From judgment for defendants, plaintiff appeals. Reversed.

Clarence N. Riggins and Wallace Rutherford, both of Napa, for appellant.

Harry L. Johnston, L. E. Johnston, and Nathan F. Coombs, all of Napa, for respondents.

NOURSE, Judge pro tem. Appeal from a judgment in favor of defendants in an action by plaintiff to eject defendants from a strip of land lying between the lands of the parties hereto, and being a portion of what was formerly laid out on a map as a street, but which was never accepted or opened for travel. The said tract was platted in 1873 and lots sold therein to predecessors of the parties hereto, Samuel Elliott, the husband of appellant, having acquired his title in October, 1883, the defendants having acquired theirs in May, 1917, just prior to the commencement of this action.

Samuel Elliott, the husband and immediate predecessor in interest of the appellant, planted the lots which he thus acquired in an orchard, which orchard extended over the lines of the disputed street, as indicated upon the map of the tract, and up to a fence which was built by one Riordan, a lessor of respondents' predecessor, as early as 1906. All of the land here in dispute was planted in orchard and cultivated by Samuel Elliott for at least 29 years before the action was commenced. The fence erected in 1906, apparently with the consent and approval of appellant and her predecessor, marked the line of their cultivation and occupancy from that date until it was torn down 10 years later by Morgan, the immediate predecessor of respondents. When this fence was torn down, in 1916, a new fence was erected by Morgan on the center line of what appeared on the map as Cedar street, over the objection of appellant. The strip between the old fence erected by Riordan in 1906 and the fence erected by Morgan in 1916 is about 22 feet wide and includes one row of orchard trees planted by Elliott. On May 22, 1917, Morgan conveyed lots 2 and 3 of block B to respondents, and they continued the fence erected by Morgan, and claimed title to the premises on the theory that their deed to the lots carried their title to the center of the street.

[1] As far as respondents' case is concerned, the only evidence of title produced by them is their deed from Morgan, dated May 22, 1917. This deed does not purport to convey any right to the disputed land, but covers the two adjoining lots only. Thus the only claim of title on the part of respondents is based upon the theory that the conveyance by lot number with reference to the recorded map carries title to the center of the street. In order that this may be so, it is necessary that there be first a valid dedication and acceptance of the street. The only evidence of dedication is the record of the map filed in 1873. It is conceded that there was no formal acceptance and no user.

[2, 3] When an owner of a tract of land plats it upon a map, designating certain portions as public streets or highways, and thereafter records the map, he is deemed to have thereby made an offer to dedicate the indicated streets to the public for highway pur-

poses. If such dedication is accepted it thereupon becomes irrevocable. By such dedication alone he does not part with the title to the land designated as streets, but grants to the public an easement only for highway purposes. Upon the failure to accept the offer of dedication the easement expires, and the full title reverts to the owner of the adjoining land.

[4-7] The mere filing of a map designating certain portions of the tract as streets does not constitute an acceptance. *Hayward v. Manzer*, 70 Cal. 478, 480; 13 Pac. 141; *Niles v. Los Angeles*, 125 Cal. 572, 577, 58 Pac. 190. Acceptance of the offer of dedication must be evidenced within a reasonable time after the offer, and if this is not done the owner may resume possession, and thereby revoke his offer. *Niles v. Los Angeles*, supra. Such acceptance may be either actual or implied. It may be done by the formal act of the public authorities having jurisdiction over the premises. It may be done by the use on the part of the public for such a length of time as will evidence its intention to accept the dedication. *Hayward v. Manzer*, supra. Again, if an owner, having recorded such a map, sells the lots designated thereon by specific reference to such map, he is presumed to have made an irrevocable dedication of the streets, which dedication thereby becomes accepted by use of the public. *San Leandro v. Le Breton*, 72 Cal. 170, 175, 13 Pac. 405; *Berton v. All Persons*, 176 Cal. 610, 615, 170 Pac. 151; *Davidow v. Griswold*, 23 Cal. App. 188, 192, 137 Pac. 619.

[8] Proceeding from this proposition it must follow that if lots are sold by number and not by metes and bounds, reference being made to such a map, the original dedicator is estopped to deny that the portions designated as streets on the map were not in fact dedicated or accepted. Furthermore, conveyances of such a character carry title to the center of the street. *Colegrove U. Co. v. Hollywood*, 151 Cal. 426, 431, 90 Pac. 1053, 13 L. R. A. (N. S.) 904; section 1112, Civ. Code. But this, of course, is not the case if the portion claimed as a street is not such in fact. *Sanchez v. Grace Meth. Church*, 114 Cal. 295, 299, 46 Pac. 2.

In the case at bar it is conceded that Cedar street was never accepted by the county and was never opened or used as a public street or highway. The record fails to disclose any conveyance on the part of the dedicator of the lots delineated on the map which would effect an implied acceptance under the rule of the *San Leandro Case*, supra. Certain deeds were offered in evidence showing conveyances by predecessors of the parties to this litigation, and such deeds refer to the lots shown upon the map filed in 1873; but it does not appear that Cedar street was not abandoned long prior to their execution. The admitted fact that the street was never formally accepted and never opened or used as a high-

way supports the presumption that it was never even impliedly accepted, and that the land so designated as Cedar street had fully reverted to the owner before any of these deeds were executed.

Such being the case, the respondents cannot claim that by the deed of May 22, 1917, they procured title to the center of the street. This deed, therefore, was not relevant to the issues, as it did not cover the property in suit, and the trial court should have sustained the objection to its introduction in evidence. This leaves the respondents as mere trespassers without any color of title or right to possession.

As the title to the land embraced within the lines of Cedar street reverted to the original dedicator upon failure to accept his offer of dedication, the question remains whether appellant obtained any title or right to possession which would entitle her to maintain this action. She urges in support of her claim actual possession as sufficient against any one who cannot show a better right, and adverse possession for over five years by herself and her predecessor.

[9] It is not disputed that appellant, with her husband, was in actual possession of the premises for more than 29 years and until ousted by the immediate predecessor of respondents in September, 1916. During all this time the premises had been occupied and cultivated by Elliott. As respondents had no record title, but were mere trespassers, there is no evidence to support the finding of the trial court that they were the owners and entitled to the possession. As against them, appellant was in actual prior and lawful possession, and thus entitled to maintain this action. "Where neither party relies upon a paper title, prior actual possession is sufficient to support an action in ejectment." *Hart v. Cox*, 171 Cal. 364, 367, 153 Pac. 391, 392. Respondents having failed to show any right, judgment should have gone to appellant.

[10] Furthermore, from 1906 to 1916, appellant and her predecessor had been in open and notorious possession of the premises, during all of which time they were inclosed by a fence. Prior to that time, and for a period of 29 years at least, they had been in possession and occupancy of the premises, having planted them in orchard, cultivated and withdrawn the profits therefrom. They had thus met all of the requirements of section 325, Code of Civil Procedure, and section 1006 of the Civil Code, except that they had not paid any taxes upon this strip. This ap-

pellant excuses upon the ground that no taxes were levied, and hence none were paid by anyone. That failure to pay taxes where none are levied does not defeat a claim of adverse possession there can be no doubt. *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828; *Oneto v. Restano*, 78 Cal. 374, 379, 20 Pac. 743.

[11] Respondents attack appellant's claim of adverse possession by evidence of certain deeds and mortgages covering the adjoining lots. These were offered in evidence on the theory that they constituted admissions against interest on the part of appellant's predecessor. They were, however, no more than what they purported to be. They did not cover or relate to the premises in dispute, and should have been excluded.

There is also some evidence of statements made by the appellant's predecessor to the effect that there was some dispute or uncertainty as to the ownership of this strip; that he did not work some of this land as he did the other; and that there would be trouble for anyone who took the adjoining land. These conversations merely show that there was doubt in the mind of the occupant as to the character of title claimed to the strip of land in dispute. They do not negative the fact that Elliott was the actual adverse possessor, to the exclusion of all others, for some 20 years before the first conversation is alleged to have taken place.

There is no conflict in the evidence upon the fact of the possession, occupancy, or cultivation. There is therefore no evidence to support the finding in this respect against the appellant.

Other points raised in the briefs do not require attention.

For the reasons given the judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court denying rehearing:

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

We base our denial entirely upon that part of the opinion relating to the matter of adverse possession, and our denial of the application is not to be taken as an indication of our views as to any other part of the opinion.

All concur.

SQUIRES v. SOUTHERN PAC. CO.
(Civ. 2146.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919.)

1. CARRIERS ↔264—PASSENGER CANNOT REVERSE ROUTE SPECIFIED IN TICKET.

A railroad's passenger was clearly in the wrong in insisting to the conductor on riding from V. to S. on a ticket reading from S. to V., unless he himself was not at fault in the matter of the mistake in the ticket.

2. FALSE IMPRISONMENT ↔3—UNWARRANTED ARREST OF PASSENGER CONSTITUTES FALSE IMPRISONMENT.

A state policeman's assault upon a railroad passenger who had not paid his fare and the taking of him into custody for evading his fare, having been unwarranted, constituted false imprisonment, or some wrong other than malicious prosecution.

3. MALICIOUS PROSECUTION ↔16 — NOT MAINTAINABLE WITHOUT MALICE AND WANT OF PROBABLE CAUSE.

There can be no recovery as for malicious prosecution in the absence of evidence to show the prosecution by defendant was malicious, and without probable cause.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Lewis J. P. Squires against the Southern Pacific Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. B. Holley, of Long Beach, for appellant.
W. I. Gilbert, of Los Angeles, for respondent.

SLOANE, J. The plaintiff is prosecuting this appeal from a judgment denying his prayer for damages in an action against the Southern Pacific Company for malicious prosecution.

The complaint charges that defendant, through one of its agents, procured plaintiff's arrest and instituted, in the justice's court of the city of Santa Barbara, a criminal action against him, and that said action was begun and prosecuted against him, by and through the defendant, maliciously and without probable cause.

The circumstances leading up to the arrest and criminal prosecution grew out of the fact that plaintiff through some mistake—the blame for which is not clearly accounted for in the evidence—boarded a train of the defendant company at Ventura, on his way to Santa Barbara, and presented for his passage a ticket reading from Santa Barbara to Ventura. The conductor refused to accept the ticket, and demanded that plaintiff pay his fare. This plaintiff refused to do. There was some altercation between him and the conductor, but he was permitted to ride to

Santa Barbara. On reaching that city, the conductor pointed out the plaintiff to one William Beck, apparently a police officer on duty at the station, with the statement that plaintiff was the man who refused to pay his fare, and to see if he could get the fare out of him. This ended the conductor's part in the matter. Some controversy arose between plaintiff and the officer, and the plaintiff testifies that the officer struck him, and then arrested him and carried him off to jail, where later the criminal charge of disturbing the peace was sworn to by the officer, Beck. Subsequently the criminal action was dismissed, without coming to trial. Later plaintiff brought this action for malicious prosecution, against the railway company, and on the trial, at the close of the plaintiff's evidence, the court granted a nonsuit.

[1-3] The appeal is taken under the alternative method. It seems to have been quite a prevailing opinion among members at the bar, since this alternative method of appeal was enacted, that about all that was required was to furnish the appellate court with a typewritten transcript, and leave the members of the court to hunt through the record for any errors they might find. In this case, plaintiff's counsel makes no specification of errors, cites no authorities, and points out no parts of the evidence which he may wish to call to the attention of this court. Even in going through the transcript, we are unable to find on just what part of the proceedings plaintiff bases his cause of action. He seems to have had an unfortunate time of it, and is deserving of sympathy, but apparently is not entitled to legal redress. He was clearly in the wrong in insisting upon riding to Santa Barbara on a ticket that was intended to carry him in the opposite direction, unless he can show that he himself was not at fault in the matter. If the mistake in his ticket was the fault of the railway company, he had his redress for that wrong, but could not demand of a conductor, who had no knowledge of the facts, that he be carried on the insufficient ticket, without showing that his possession of an insufficient ticket was the fault of the railway company. But, in any event, the conductor of the defendant company did not molest him. The conductor committed no wrong in pointing him out to the officer as a passenger who had refused to pay his fare. He did not direct or advise his arrest. Beck, the officer, though shown to be in the pay of the railway company, seems to have been a state officer detailed for that service; and the evidence does not show that he was directed by the company, or had any authority to make arrests in its behalf. His assault upon the plaintiff, and the taking of him into custody, if it was for evading his railroad fare, was unwarranted, and constituted false imprisonment, or some

other wrong than malicious prosecution. The complaint that Beck subsequently swore to, charging disturbance of the peace, is not contained in the record; and it does not appear whether the ground of the complaint was plaintiff's conduct on the train, or the controversy which took place with the officer after he ceased to be a passenger of the railway company. Moreover, there is no evidence to show that the prosecution was malicious or without probable cause. The burden was on the plaintiff to establish both of these elements of his case.

The trial judge was justified in granting the motion for a nonsuit.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

UNITED STATES FARM LAND CO. v. DARTER. (Civ. 1915.)

(District Court of Appeal, Third District, California. July 19, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. BROKERS §10 — NOTICE NECESSARY TO BROKER OF CANCELLATION OF HIS CONTRACT.

Owner, to terminate land broker's contract for a period of indefinite duration, must give broker notice of its cancellation.

2. BROKERS §44 — EXECUTORY CONTRACT OF BROKER SUBJECT TO REVOCATION.

While a contract of employment between a landowner and a real estate broker to sell land on commission remains executory, the principal may rescind it, but he must give notice of rescission to the broker before the latter has performed.

3. BROKERS §8(1) — PRESUMPTION IN FAVOR OF CONTINUANCE OF AGENCY.

The presumption is in favor of the continuance of land broker's contract for an indefinite period.

4. BROKERS §7 — UNACCEPTED OFFER OF MODIFICATION OF CONTRACT DOES NOT CHANGE ORIGINAL.

Owner's proposed modification of broker's contract for an indefinite period did not create a new contract between the parties, where the proposed modification was never accepted by broker.

5. BROKERS §40 — PROPOSED MODIFICATION OF BROKERAGE CONTRACT AFTER SALE DOES NOT AFFECT COMMISSION.

Where purchaser, procured by broker under broker's contract for indefinite period, had signed contract of sale, owner's subsequent proposed modification of the contract could not defeat broker's right to commission.

6. BROKERS §54, 64(1) — SUBSEQUENT INSOLVENCY OF PURCHASER DOES NOT AFFECT COMMISSION.

The services of a real estate broker are fully performed, and his commission fully earned,

when he has procured a purchaser ready and willing to enter into a contract of sale upon the terms fixed by the owner, and the subsequent insolvency of purchaser cannot defeat his recovery of commissions.

7. BROKERS §86(4) — EVIDENCE SUFFICIENT TO SHOW PROCUREMENT OF PURCHASERS.

In broker's action for commission, evidence consisting of correspondence held to show that broker procured purchasers, who entered into a contract of sale with owner.

8. BROKERS §64(1) — ENTITLED TO COMMISSION THOUGH PURCHASER DEFAULTED.

Where owner entered into a contract of sale with purchasers procured by broker, for price in excess of that specified in broker's contract, broker was entitled to commissions though purchasers afterwards defaulted.

9. BROKERS §57(2) — COMMISSION EARNED THOUGH VENDOR REDUCED PRICE.

When a principal makes a sale to a purchaser found by the broker, having availed himself of the broker's services, he is liable for commissions, though the sale was made at a lower price than originally proposed by him to the broker.

10. BROKERS §48 — HAVING ACCEPTED PURCHASER, COMMISSION IS EARNED.

If owner was dissatisfied with purchasers procured by broker, he should have notified broker, or have declined to enter into a contract with purchasers; but, having accepted purchasers without being misled by brokers, he is bound to pay broker's commission.

11. APPEAL AND ERROR §171(1) — THEORY OF CASE BELOW GOVERNS ON APPEAL.

An action tried in lower court on the theory that the relation between plaintiff and defendant was that of agent and principal, the theory that the relation of the parties was that of purchaser and vendor will not be considered on appeal.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the United States Farm Land Company against R. L. Darter. Judgment for plaintiff, and defendant appeals. Affirmed.

Ben Berry, of Stockton, for appellant.

Butler & Van Dyke, of Sacramento, for respondent.

BURNETT, J. The action was by a real estate broker against a landowner to recover \$5,000 commissions for procuring a purchaser for land under a written contract of agency. The answer admitted the execution of said contract, but "denied that in said contract in writing defendant promised and agreed to pay to plaintiff for said services of plaintiff in the event that the plaintiff procured and introduced to defendant a purchaser of said property all money realized in excess of the sum of \$35,000 (\$30,000?)

as defendant might sell said property to a purchaser procured by plaintiff and introduced by plaintiff to defendant, but, on the contrary, defendant alleges that, by the terms of said contract in writing, defendant agreed to pay plaintiff one-half of the said sum realized from such sale in excess of the sum of \$30,000 that defendant might sell said property to purchaser procured by plaintiff and introduced by the plaintiff to defendant." Defendant furthermore alleged in the answer "that on the 22d day of June, 1915, he terminated and canceled the aforesaid agreement entered into between plaintiff and defendant on the 4th day of December, 1914," and denied that plaintiff obtained a purchaser for the premises who "was able or willing to purchase from said defendant said property or any property for the sum of \$35,000."

Defendant admitted that plaintiff introduced a Mr. Neergard to defendant, but denied "that said Neergard or any other person purchased said property, or any part thereof, for the sum of \$35,000, or for any other sum of money or at all." Defendant, however, alleged that "subsequent to the termination and cancellation of the agreement, dated December 4, 1914, entered into between plaintiff and defendant, to wit, July 2, 1915, defendant entered into a contract of sale with the said Mr. Neergard and W. F. Noble, by the terms of which he agreed to sell to said Neergard and Noble the property described in plaintiff's complaint for the sum of \$35,000, which purchase price was to be paid in installments extending over a period of years; that, subsequent to the termination and cancellation of the aforesaid agreement entered into between plaintiff and defendant, defendant agreed that, in the event that the said Neergard and Noble paid the installments provided in said contract of sale to be paid, he would pay plaintiff the amount agreed to be paid by the terms of the agreement dated December 4, 1914, and terminated by defendant; that the said Neergard and Noble failed to pay any of the installments provided to be paid in said contract of sale entered into between defendant and said Neergard and Noble except the sum of \$2,500." We may add that there is no objection to the form of the complaint, and we have set out all the material parts of the answer. By the foregoing it appears that the only issues were whether the commission was to be the entire excess of the selling price over the sum of \$30,000, or one-half thereof, whether said contract for the payment of a commission was terminated, and whether within the contemplation of said contract plaintiff obtained a purchaser for the premises. The court found in favor of defendant as to the amount of commission and for the plaintiff on the other issues. The discussion of the case by appellant has

taken a wide range, and his counsel has displayed much learning and industry, but we think the determination of the merits is a comparatively simple matter.

The transaction between the parties is disclosed by correspondence, the managing agent of plaintiff residing in Los Angeles and defendant in Stockton. The material portions of the correspondence we shall set forth.

The first letter was written by defendant on December 4, 1914, to A. D. Kildahl, the representative of plaintiff. It opened with the statement:

"Referring to our conversation when you were in Stockton with reference to the dairy ranch, will say that there is 170 acres five miles east of the courthouse of Stockton."

It proceeded with a vivid description of the land and its improvements, and concluded as follows:

"Make you a price of \$30,000 net on this place. There is no unimproved land between this land and Stockton that can be bought below \$200 per acre. I will protect you on the difference between \$30,000 and what you ask for it. I will also allow you one-half of any commission should I make a sale to any one on this property or any other property."

To this Mr. Kildahl made answer on December 7th, stating:

"I have to-day received your favor of the 4th, with description of your dairy farm, just east of Stockton. I shall certainly bear this in mind, and make every effort to dispose of it for you, probably on the basis of about \$200 per acre, which would mean \$4,000 commission."

We may add that, admittedly, respondent advertised the property extensively, enlisted the services of other agents, and made quite an effort to secure a purchaser for it. The result was that one Mr. Neergard became interested in the property, and on May 1, 1915, plaintiff wrote to defendant:

"This will introduce to you Mr. Neergard, of Noble and Neergard, Compton, Cal. Mr. Neergard, who is an experienced dairyman, is looking for another location for his business, and our friend, Mr. E. L. Parke, has told them about your dairy ranch of 170 acres located close to Stockton. We would be glad if you will show Mr. Neergard the property, if not disposed of, when he reaches there. He will start North in a few days."

Two days later plaintiff wrote another letter, referring to the fact that it had written the letter of introduction of May 1st, and saying:

"Mr. Neergard will probably reach Stockton in the course of the next ten days or so, and if he does we will be very glad if you could show him your place, if not then sold. We understand that his firm is amply able to fulfill any obligation they undertake, and we hope that success will crown your efforts."

Mr. Darter replied to the letter on May 6th, saying:

"In reply to your favor of the 3d, will say that I am glad to note that Mr. Neergard is interested in the dairy. I have not sold this place yet, and hope I will be able to do some business with him when he arrives."

In answer respondent wrote:

"We have yours of the 6th with regard to the dairy ranch; please note that the price quoted to Mr. Neergard by the broker was \$35,000, including the stock and implements. We sent you a list some time ago, copies of which were sent to a number of agents and dealers here, and no doubt you have this list yet, and would probably refer to it before talking price to Mr. Neergard, but I thought best to write you and thus make sure that you understood the price that was quoted. We trust that you will be able to interest Mr. Neergard, as he seems to prefer an improved place."

On May 27th defendant wrote to Mr. Kildahl as follows:

"The parties you sent up to look at the dairy ranch came up and went out to look at the place and would be very glad to buy, but they are unable to raise more than four or five thousand dollars. He promised me that he would bring his father-in-law, and that they might get together and consider it. Hoping you will be able to do something with it," etc.

On June 21st respondent wrote:

"We understand that Mr. Noble or Neergard, or both, have decided to purchase your dairy ranch of 170 acres, close to Stockton. We have not heard from you in the matter, but presume you have the deal in escrow or as yet in an unfinished state. Please let us know how far you have progressed, and how long in your opinion it will take to close. The broker through whom we secured this prospect has to-day made request for his commission, and, of course, we would like to find out from you just what has been done before talking commissions to anybody. We wrote you on May 7th, calling your attention to the fact that the price quoted Mr. Neergard was \$35,000, and we sincerely hope that you secured this price for the ranch."

On the day that this last letter was written Mr. Darter prepared a written contract to be executed by himself as party of the first part, and A. F. Noble and F. C. Neergard, the parties of the second part, providing—

"That the said party of the first part, in consideration of the covenants and agreements upon the part of the said parties of the second part herein contained, agrees to sell and convey unto the parties of the second part, and the said parties of the second part agree to purchase, all that certain piece or parcel of land" (describing the land involved herein), and also the improvements and personal property as described in the letter authorizing respondent to act as appellant's broker.

Said contract further provided:

"It is hereby mutually agreed that the purchase price of the premises and personal property herein described shall be the sum of thirty-five thousand dollars, and the said parties of the second part, in consideration of the premises, hereby agree to pay to the said party of the first part the said sum in the manner following, to wit."

Then follows a statement of various installments that were to be paid extending over a period of nine years, deferred payments to bear 6 per cent. interest, the first payment of \$4,000 to be evidenced by a note due on or before November 15, 1915. It was further stipulated that the parties of the second part were to pay all taxes on the property after said date of November 15th, and "immediate possession" of the premises was agreed to be given to said parties of the second part. This agreement of sale was forwarded on said date to Neergard and Noble, who promptly executed the same and returned it to defendant. The latter executed it on July 2d. It may be added that Neergard and Noble paid only the sum of \$2,500 on said contract. They entered into possession of the property about the 25th of October, but afterward defaulted and surrendered it to the defendant.

On June 22d Mr. Darter replied to Mr. Kildahl as follows:

"Replying to your favor of the 21st regarding to commission on sale of the dairy ranch, will say that Mr. Noble was up and looked at the ranch. Now they have not got money to buy the ranch as you stated, they want to pay a payment of four thousand dollars. That is out of the question to think of deeding a man that place on that payment, they can not pay that until Nov. 15th. I may make a deal with them, if so at the time they make their payments and get a deed to the property then I will allow you a commission on the sale. I can not do as well by you as if they paid cash or a reasonable payment besides they will not consider the place unless I paint the house outside and also clean and paint the inside floors and do this at my own expense, also hold the place without interest and I have to keep men there to cut alfalfa and tend to the cows. He also wants all the hay. I will keep account of the whole expense and will do the best I can for you but there will be no money on commissions until they pay up enough to get a deed. I hope this will be satisfactory to you; if this is not satisfactory I would rather not close the deal."

The reply was dated June 24th, and contained this:

"We quite agree with you that it would be out of the question to give him a deed on a \$35,000 property, on payment of \$4,000. Our purpose in writing you before was to ask for information, the broker, Mr. Parke, having made demand on us for his share of the commission. We have written Mr. Parke to-day with a copy of your letter. In the latter portion of your letter, you stated that no money on commis-

sions will be paid until the purchaser gets a deed. Please write us as to how much you would require paid for a deed. Also let us know at what price you were figuring with Mr. Noble, and what portion of this price you would require in order to pay out the commission. You understand we want to be reasonable in the matter of this commission, but having secured this prospect through another broker, we want to do the right thing by the broker, and we would like to have you secure enough down so that you can pay out our commission, or at least the major part of it."

On June 26th Mr. Darter replied:

"Now as I explained to you in my letter of the 22nd, that Mr. Noble and Neergard has only about \$4,000 and they haven't that amount at the present time and that is all the money that they will be able to pay, that if the deal is closed at all. They are only taking an option to buy this property, and as explained in my letter of the 22nd that is if it is not satisfactory to you I would rather not close the deal. There has been no further developments in the deal up to the present time, and if I make the deal with them at all I will have to allow them ten years in which to pay for the property. While you were in Stockton, I stated to you that I wanted \$10,000 to \$12,000 payment. Since that time I have been losing money and the interest and entire expense of keeping the place, painting the buildings, etc., to November first will run from \$1,200 to \$1,500. Will say that you could not expect any commission, under about six years unless they are able to pay more than they think they will be able to, if they carry their deal through. Hoping this will be satisfactory," etc.

On June 28th Mr. Kildahl wrote:

"We note that in case of a deal you would have to give Noble and Neergard ten years time in which to pay the deferred installments. While we would not expect you to pay out the whole commission on a down payment from the purchasers if only \$4,000, yet we are quite surprised to hear that we would have to wait six years for a \$5,000 commission. In fact you estimate in your letter that we could not expect any commission at all until six years have passed by. If you sold the place at \$35,000 with \$4,000 down the annual payments would be \$3,100 in six years \$18,600, so that at the end of that period \$22,600 will have been paid you. Do you not think you could reasonably be expected to pay out a \$5,000 commission in less time than that? We are willing to be reasonable, but even with the larger amount of chattels included and the consequent risk we think you should pay out this commission in annual installments inside of the first three or four years. By the way, you have not as yet stated what the consideration would be in case of a deal. We are trying to get hold of the broker who was instrumental in sending us the prospect but he is out in the country and will not be back in time to find him by phone to-day. His attitude in the matter of commission will largely govern our action."

On the next day, June 29th, he again wrote:

"Referring again to your favor of the 26th, with regard to the Noble-Neergard deal, we may say that we have to-day talked with Mr. Parke, the broker in the transaction, and from what he has told us we gather that these people, if properly handled, are amply able to take care of the purchase. Mr. Parke will have all his time taken to-morrow and Thursday, but promises to see Mr. Noble and Mr. Neergard on Friday without fail. On that day we shall have a report as to what can be done. It is more than likely that the \$4,000 cash payment which you mentioned, can be materially increased."

On July 1st Mr. Kildahl wrote as follows:

"Mr. Parke, the broker in the deal with Mr. Noble found that he was able to interview Mr. Noble sooner than anticipated, and states to-day that he has seen a copy of the contract between yourself and Mr. Noble. It seems to me more like an actual straight agreement for sale than an option. We are at a loss to understand why you agreed to accept \$4,000 on November 15th next, as a down payment when you have been holding out for \$10,000 to \$12,000. If you had held out for the original down payment as outlined to the writer when in Stockton, we are quite confident that the \$4,000 down payment which is now covered by note could be doubled by next fall. At least Mr. Parke, from his knowledge of Mr. Noble's condition states that he is quite confident of securing \$8,000 if we had been advised by you as to the conditions. With regard to commission, of course, there can be no question as to the amount, as the contract between yourself and Mr. Noble gives the consideration at \$35,000 and your letter of December 4, 1914, distinctly states that you would protect us on the difference between \$30,000 and what we asked for the property. As to the manner of paying this commission, we want only what is fair and reasonable, and since you have agreed to sell to Mr. Noble with such a small payment down, we, of course, will not expect the whole commission to be now paid. However, we feel that in justice to both Mr. Parke and ourselves a portion of the down payment should be used toward the payment of commission. We certainly cannot wait six years (at which time Mr. Noble will have paid \$23,000) for this commission."

The next day Mr. Darter replied, saying:

"I am in receipt of your favor of July 1st and note what you have to say with reference to commission on the deal and I will say that I am very much disappointed in your demand under the conditions. I certainly thought that when you sent these people here that you would allow me to use my best judgment with reference to making the sale and that you would be satisfied with whatever I did and will say further that you will have to be satisfied, as the deal has been practically consummated. * * * As I stated before I will keep account of all the extra expense that I have been, and will render you statement of the same and will allow you a commission but will say that you had just as well forget about trying to get any commission out of the first payment of \$4,000. * * * I have just made arrangements this afternoon expecting to give Mr. Neergard and

Mr. Noble possession at any time that they are ready."

Two other letters passed between the parties, one of July 7th from Mr. Kildahl, complaining of the conduct of Mr. Darter in closing the deal without informing him, and stating that through Mr. Parke he could probably have secured \$8,000 in cash on the purchase. There was no modification of the demands for the commission, but the letter stated:

"We shall let the present deal rest until Noble and Neergard decide on how much they want to pay in the fall."

The other was written by Mr. Kildahl on August 6, 1915, in which he stated:

"We are writing you again in the matter of the \$5,000 commission in the sale of the dairy farm to Messrs. Noble and Neergard as the matter is not in very satisfactory shape as it now stands. We now ask that you make an indorsement on your copy of the contract to the effect that the United States Farm Land Company has a claim of \$5,000 against the contract together with interest since the date thereof, June 21, 1915. This can be made in the presence of a notary public or any one else who can certify to the facts. We are asking this partly because of the fact that Mr. Parke, the broker in the transaction, wants assurance that his claim will be taken care of, and partly because we want the thing fixed along business lines, in case of your death or other unforeseen circumstances."

[1] From the foregoing it is quite apparent there was no revocation or cancellation of the contract of employment. The contract of agency of December 4, 1914, was for an indefinite period, and to terminate it the duty was incumbent upon appellant to give notice of its cancellation. This he did not do.

[2] While a contract of employment remains executory the principal may rescind it, but the party claiming the right of rescission must give notice to the other party to the contract of the fact that he does withdraw, and this before the other party has performed. *Gaty v. Sack*, 19 Mo. App. 470; *Nolan v. Swift*, 111 Mich. 56, 69 N. W. 96; *Lloyd v. Matthews*, 51 N. Y. 124.

[3] The presumption is in favor of the continuance of the agency (*Hartford v. McGillicuddy*, 103 Me. 224, 68 Atl. 860, 16 L. R. A. [N. S.] 431, 12 Ann. Cas. 1083), and this is strengthened by the evidence to which we have referred. Not only did appellant fail to notify respondent of the termination of the agency, but in the correspondence which we have quoted he recognized the continued authority of respondent, and only sought to secure a modification as to the time and condition of payment of the commission.

[4] The proposed modification, however, was never accepted, and it cannot be said that there was a new contract between the parties, as there was no agreement upon the terms of any modification.

[5] Indeed, we may go further and say that the proposed modification came too late to affect plaintiff's claim, for the reason that the purchaser had already signed a contract binding him to purchase the property, and this, as far as the broker is concerned, is equivalent to a sale. *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105; *Pehl v. Fanton*, 17 Cal. App. 251, 119 Pac. 400.

It is admitted, indeed, by appellant that he could not repudiate the agency after he had entered into a contract of sale with the purchaser.

[6] The only real question left is whether respondent performed services which entitled it to the commission. The rule is that "the services of a real estate broker are fully performed, his commission fully earned, when he has procured a purchaser ready and willing to enter into a valid contract of sale upon the terms fixed by the owner. The subsequent insolvency of the purchaser so procured by the broker, after the sale of the real property has been completed cannot defeat the recovery of the broker's commissions." *Roor v. Greadwohl*, 20 Cal. App. 139, 128 Pac. 418.

[7, 8] There is no doubt herein from the foregoing correspondence that respondent procured Noble and Neergard as purchasers for the property; that appellant entered into a contract of sale with them for the consideration of \$35,000, and therefore the commission was earned, notwithstanding the purchasers afterward defaulted.

[9] Indeed, the rule is that "when a principal makes a sale to a purchaser found by the broker, having availed himself of the broker's services, he is liable for commissions, though the sale was made at a lower price than originally proposed by him to the broker." *Walker on Real Estate Agency*, § 302.

[10] If defendant was dissatisfied with the purchasers secured by plaintiff, he should at least have notified respondent to that effect, or have declined to enter into the contract of sale (*Cal. Land Security Co. v. Ritchie*, 180 Pac. 625); but having accepted them as worthy of confidence, without being misled in any respect by respondent, he is bound to pay for said service.

[11] Some contention is made in the opening brief of appellant that the relation between him and respondent was that of vendor and purchaser rather than of principal and agent. This view, however, is opposed to his admission in the pleadings and to the theory upon which the case was tried. This theory cannot, therefore, be regarded in the appellate court. *Blanc v. Connor*, 167 Cal. 719, 141 Pac. 217.

It may be added that there is no averment or proof of fraud, there is no pretense that respondent took any advantage of appellant, and it would seem that the only debatable question is whether respondent was not entitled to a judgment for \$5,000 instead of \$2,500. As to this, however, respondent has

not appealed, and therefore does not complain.

We are satisfied there is no legal ground for interfering with the conclusion of the lower court, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

NATIONAL SURETY CO. v. WILCOX et al.
(Civ. 2295.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1919.)

INDEMNITY §8—AGREEMENT TO INDEMNIFY SURETY COMPANY CONSTRUED.

Where a lumber company and defendants agreed to indemnify plaintiff surety company for any payments made under any bond issued at the request of the lumber company and defendants, defendants were not liable to indemnify the surety company on a bond issued at the request of the lumber company alone and without defendants' knowledge.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the National Surety Company against W. W. Wilcox and Dan Johnston. From judgment for defendants, plaintiff appeals. Affirmed.

Bennett, Turnbull & Thompson, of Los Angeles, and Rupert B. Turnbull (Albert J. Harno, of counsel), for appellant.

Barstow, Rohe & Jeffers, of Los Angeles, for respondents.

SHAW, J. In this action plaintiff, at the special instance and request and for and on behalf of Standard Lumber & Wrecking Company, whose property was attached in a suit brought against it by the Pacific Lumber Company, executed a bond under and by virtue of which the property so attached was, as provided by law in such cases, released therefrom. Thereafter judgment was rendered in favor of the Pacific Lumber Company and against Standard Lumber & Wrecking Company, defendant in said suit, for the sum of \$769.82, which the plaintiff herein, as surety upon said bond, paid, and, claiming the bond so given for the release of the property attached by the Pacific Lumber Company was made and executed by it in consideration of a written agreement of Wilcox and Johnston, defendants herein, to indemnify it against loss due to its act in making the bond, brought this action to recover thereon.

Plaintiff appeals from a judgment rendered in favor of defendants based upon a finding that—

"It is not true that said contract of indemnity was the consideration and inducement, or consideration or inducement, upon which and for which, or upon which or for which, the plaintiff executed, signed, and delivered, or executed or signed or delivered, the said bond or undertaking. * * * It is true that said bond or undertaking so issued by the plaintiff in said action was issued upon the plaintiff's own responsibility on application only of Standard Lumber & Wrecking Company, without any reference to, and without relying upon, the contract of indemnity attached to the plaintiff's said complaint, marked 'Exhibit A,' and without any promise or agreement on the part of the defendants, or either of them, to reimburse the plaintiff therefor."

These findings are attacked upon the ground that the evidence is insufficient to support them.

It appears that the Standard Lumber & Wrecking Company had frequent occasion to call upon plaintiff for the execution of bonds for and on its behalf, and for the purpose of protecting plaintiff from liability upon the bonds so issued to said company, defendants Wilcox and Johnston were in the habit of executing instruments in writing, whereby they agreed to indemnify plaintiff for any loss sustained by reason of the making of such bonds for and on behalf of said company. Under these circumstances, a writing in the nature of a blanket agreement of indemnity, and signed by the Standard Lumber & Wrecking Company, and defendants W. W. Wilcox and Dan Johnston, was executed on January 30, 1912, which contained the following recital:

"This agreement witnesseth: That, whereas, Standard Lumber & Wrecking Company, Incorporated, W. W. Wilcox and Dan Johnston (hereinafter called applicant), may from time to time hereafter request the National Surety Company, a corporation under the laws of the state of New York (hereinafter called the company), to make and execute various and sundry bonds and undertakings; and, whereas, the company, by making and executing such bonds and undertakings, may become liable to pay, and may pay, various and sundry sums and amounts of money under such bonds and undertakings: * * * Now, therefore, in consideration of the premises, we, the undersigned, hereby covenant with the company, its successors and assigns, in manner following—that is to say"

—followed by various and sundry provisions and covenants on the part of the signers of the agreement, among which was one to the effect that they would indemnify and hold the company harmless from any demands, liabilities, expenses, and loss of whatsoever kind or nature sustained or incurred by reason of its executing such bonds and undertakings, which agreement appellant claims covered and included the bond so given by

it for the release of the property of the Standard Lumber & Wrecking Company levied upon by writ of attachment issued in the action brought against it by the Pacific Lumber Company.

It is clear, we think, that the agreement sued upon has reference solely and alone to bonds executed by plaintiff at the request of the applicant therefor and named therein; and it is likewise clear that the applicant was the Standard Lumber & Wrecking Company, Incorporated, W. W. Wilcox, and Dan Johnston. The writing given by these parties was in the nature of a blanket agreement to indemnify plaintiff for losses sustained by reason of executing certain specific bonds, viz. those requested, not by the Standard Lumber & Wrecking Company, but by those designated in the agreement as constituting the applicant, the effect of which was that defendants Wilcox and Johnston incurred no liability to plaintiff under said agreement, unless it was made to appear that they joined with the Standard Lumber & Wrecking Company in a request for such bond. It is neither alleged, proved, nor claimed by plaintiff that either of these defendants ever requested it to issue the bond in the suit brought by the Pacific Lumber Company against the Standard Lumber & Wrecking Company, but that it was executed at the request of the latter company alone and without defendants' knowledge. Defendants' covenant was to indemnify plaintiff for loss sustained upon bonds executed upon their request. They did not request the issuance of the bond in question, and knew nothing about it. Hence it is one not covered by the agreement to indemnify plaintiff, and imposes no obligation upon defendants to answer for any loss resulting from its execution.

Our conclusion renders it unnecessary to discuss other alleged errors, since, if we are correct, they could in no event affect the determination of the case.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

DAVIES v. RAMSDELL. (Civ. 2718; S. F. 8530.)

(District Court of Appeal, First District, Division 2, California. March 25, 1919. Opinion of Supreme Court Denying Rehearing May 22, 1919.)

1. INJUNCTION ⇐1 — WITHIN INHERENT POWER OF EQUITY.

Equity has inherent power in aid of its jurisdiction to grant injunctions, and the exercise of the power rests very largely in the discretion of the chancellor.

2. RECEIVERS ⇐8—APPOINTMENT WITHIN INHERENT POWER OF CHANCELLOR.

Equity has inherent power in aid of its jurisdiction to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor.

3. APPEAL AND ERROR ⇐920(5)—ON REVIEW APPOINTMENT OF RECEIVER PRESUMED REGULAR.

On appeal every presumption is in favor of the regularity of an order of a chancellor appointing a receiver.

4. APPEAL AND ERROR ⇐1024(2)—WEIGHT OF AFFIDAVITS ON REVIEW OF ORDER APPOINTING RECEIVER.

On appeal from an order appointing a receiver on plaintiff's application, where there is any conflict in the affidavits, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also facts which may reasonably be inferred or presumed from direct and positive statements.

5. APPEAL AND ERROR ⇐1097(1)—DECISION ON ANOTHER APPEAL BASED ON SAME FACTS LAW OF THE CASE.

On appeal from an order appointing a receiver in an action to remove a cloud on title, a decision on another appeal from the final judgment in the action, so far as it is based on the same facts, furnishes the law of the case.

Opinion of Supreme Court Denying Rehearing.

6. APPEAL AND ERROR ⇐1048(4)—WHEN FINAL JUDGMENT WAS FOR PLAINTIFF APPOINTMENT OF RECEIVER WAS HARMLESS TO DEFENDANT.

Where the final judgment in an action to remove a cloud on title established the right of plaintiff to the possession of the property and to be freed from all claims of the defendant as of the date of the filing of the complaint, defendant, on appeal from an order appointing a receiver, cannot complain that the order was erroneous, because he could not have been injured thereby; the final judgment in the case having been affirmed.

Appeal from Superior Court, Alameda County; William H. Waste.

Action by Glennie Davies against Lucie C. Ramsdell. The District Court of Appeal affirmed an order appointing a receiver, and the Supreme Court denied a rehearing.

See, also, 181 Pac. 94.

C. D. Dethlefsen, of Oakland, and Peck, Bunker & Cole, of San Francisco, for appellant.

Ralph R. Eltse and Elston, Clark & Nichols, all of Berkeley, for respondent.

LANGDON, P. J. [1-4] This is an appeal from an order appointing a receiver pendente lite, in a suit in equity, more resem-

bling the old suit to remove a cloud on title than the Code suit merely to quiet title. The appellant contends the order should not have been made, as such appointments are not usually made in suits to quiet title. In this case there were equitable considerations before the court in addition to those of the ordinary suit to quiet title. Equity has inherent power in aid of its jurisdiction to grant injunctions and to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor. Every presumption is in favor of the regularity of the order. Mere denial of the facts in the plaintiff's verified complaint and affidavits simply presents an issue of fact, which the court below determined adversely to the appellant. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also all facts which may reasonably be inferred or presumed from the direct and positive statements. *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1001.

[5] After the order appointing the receiver was made, judgment was rendered for the plaintiff, from which judgment the defendant below, the appellant here, appealed. The judgment has this day been affirmed. *Davies v. Ramsdell* (No. 2724) 181 Pac. 94. The decision on the appeal from the judgment, so far as it is based upon the same facts as those presented on this appeal, furnishes the law of the case. On the application for the appointment of the receiver both parties relied upon substantially the same facts as those set forth in the pleadings on which judgment was entered. *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382. The judgment established the right of the plaintiff to the possession of the property and to be freed from all claims of the defendant as of the date of the filing of the complaint. At the date of the order appointing the receiver, the defendant had no right to the possession of the property nor to collect its rents. How, then, was she injured by the appointment of a receiver? Even though the appointment was erroneous, in determining this appeal the rule that the appellant must show injury as well as error would require the order to be affirmed for the reason that the reversal would not benefit the appellant. *Horton v. City of Los Angeles*, 119 Cal. 602, 51 Pac. 956; *Foster v. Smith*, 115 Cal. 611, 47 Pac. 591. The order was a remedial process and was followed by judgment in favor of the prevailing party. In such a case the court will not revise the propriety of the order. *Hicks v. Davis*, 4 Cal. 67; *Imperial Land Co. v. Imperial Irr. Dist.*, 173 Cal. 674, 161 Pac. 119; *Adams v. Prather*, 176 Cal. 164, 167 Pac. 867; *Estate of McSwain*, 176 Cal. 238, 168 Pac. 117. The order appealed from is affirmed.

We concur: HAVEN, J.; BRITAIN, J.

Opinion of the Supreme Court Denying Rehearing.

In Bank.

PER CURIAM. [8] The application for a rehearing in this court after decision by the District Court of Appeal of the First Appellate District, Division Two, is denied on the ground last stated in the opinion of the District Court of Appeal, which is substantially that, the judgment in favor of the plaintiff, on whose application the receiver was appointed, having been affirmed, and having become final, it does not appear how the appellant could possibly have been prejudiced by the making of the order. We express no opinion upon the first question discussed in the opinion, viz. the propriety of the appointment of a receiver in such a case as this.

All concur.

LEACH v. KLEIN. (Civ. 2004.)

(District Court of Appeal, Third District, California. July 28, 1919.)

1. APPEAL AND ERROR ⇨ 981-4-ABUSE OF DISCRETION—NEW TRIAL—EXCUSING FAILURE TO PRODUCE WITNESSES.

Discretion of trial court in excusing defendant for not producing witnesses at trial to show that his cattle were not present at such a time that they could have committed the trespass complained of *held* not to be interfered with on appeal.

2. NEW TRIAL ⇨ 104(1) — NEW EVIDENCE — PROBABLE CHANGING OF RESULT.

The test as to whether a new trial shall be granted for proposed new evidence objected to as cumulative is whether it would probably change the result.

3. NEW TRIAL ⇨ 76(2)—EXCESSIVE DAMAGES —DISCRETION OF COURT.

Where plaintiff recovered \$1,250 for damages for trespass by cattle resulting in the destruction of certain fig trees, *held*, that trial court would not abuse its discretion in granting a new trial on ground that the amount of damages awarded was entirely disproportionate to the actual loss.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Edith Leach against O. H. Klein. Verdict for plaintiff, and, from an order granting a new trial, plaintiff appeals. Order affirmed.

J. T. Fuller, of Portersville, for appellant.
D. E. Perkins, of Visalia, for respondent.

BURNETT, J. The action was for damages alleged to have been caused by defendant's cattle to plaintiff's fruit trees and crops, and the jury rendered a verdict in her favor for \$1,250. A motion for a new trial was made by defendant on the grounds of

newly discovered evidence, and that the verdict was excessive, appearing to have been given under the influence of passion or prejudice, and the motion was granted by the trial judge in the following language:

"Said motion having heretofore been argued and submitted for decision, now at this time, the court, having duly considered the law and the evidence and being fully advised of its opinion therein, doth order that said motion for a new trial be and is hereby granted."

The appeal is by the plaintiff from said order.

Plaintiff owned a tract of land of 14.84 acres, 10 of which she claimed was under cultivation. This tract was fenced and was surrounded by a larger tract used as a cattle range, which was rented by defendant. It is claimed by plaintiff that the damage was caused between May 20, 1917, and June 10th of that year. Defendant contends that he took his cattle away from this pasture on May 20, 1917, and that they were not in that vicinity thereafter. No one testified to have seen any cattle on plaintiff's premises, the plaintiff herself being absent from the place at that time. However, there is sufficient evidence to justify the conclusion that the damage was caused as alleged in the complaint. In addition to the defense that his cattle were not in the vicinity at the time and could not, therefore, have caused the damage to plaintiff's property, defendant endeavored to show that the extent of the injury was grossly exaggerated by plaintiff; but there is substantial support in the record for the amount of the verdict.

In support of her theory that defendant was responsible for the damage, plaintiff testified to a conversation with him in which she claims he admitted that it must have been his cattle that trespassed upon her land. As to this point, she relied, in her case in chief, upon that admission. In opposition to this showing defendant gave an entirely different version of the conversation and, furthermore, testified that the cattle were taken away as before indicated. In rebuttal, plaintiff called a witness, L. McClary, who testified that "along the last of May—the last days of May," he saw in said pasture "about 80, close to 100, head of red and white-faced cattle, just as testified by Mr. Klein." It is claimed by respondent:

That after the testimony of McClary, the former had no opportunity "to consult his witnesses as to exact dates," and that "the testimony of McClary was particularly damaging and undoubtedly influenced the jury largely in their verdict. It was totally unexpected because he had been on the stand in plaintiff's main case and had testified that he was at plaintiff's land on July 1st, when he saw cattle on the pasture. If true, his testimony was of vital importance. If successfully contradicted it leaves plaintiff without any evidence whatever that defendant's cattle were in a locality where they could have caused the damages complained of."

In consequence of the foregoing situation, defendant upon his motion for a new trial introduced the affidavits of himself, John W. Hewey, George Guinn, and Henry Bellah. In his own affidavit he avers:

That he was taken by surprise by said testimony of "L. C. St. Claire" (meaning, no doubt, L. C. McClary) "because he had removed his cattle from said field about May 20, 1917, and had not returned them thereto and had no reason to suppose that his testimony to that effect would be controverted; that he files herewith the affidavits of John W. Hewey, George Guinn, and Henry Bellah, each of whom swears that defendant's cattle were not in said pasture adjoining plaintiff's land on or after May 27, 1917; that affiant could not with reasonable diligence have produced this evidence, at said trial because the evidence of said St. Claire (McClary?) was given in rebuttal and at the end of said trial and affiant had no opportunity to talk with any of said witnesses or to learn from them what they knew in regard to said matter; that he had not talked to them previously because he had no reason to believe or did not believe that the evidence of himself and Karl B. Klein that said cattle were removed from said pasture on May 20, 1917, would be controverted or disputed."

It may be added that said affidavits of Hewey, Guinn, and Bellah are in effect as claimed by respondent in the foregoing.

[1] The objection to the consideration of these affidavits made by appellant is that sufficient diligence is not shown therein and that said evidence would be merely cumulative. As to "diligence," it may be said that it is a comparative term and in its determination much is left to the discretion of the trial court. No doubt, many persons, in the situation of respondent would have been more alert to secure all the available evidence to support the defense. It also seems somewhat singular that respondent should not anticipate that his testimony as to the removal of the cattle would be controverted, since it related to a circumstance that was vital to appellant's case. It is generally supposed that a plaintiff expects to offer evidence to sustain the material allegations of his complaint, and every careful lawyer would advise his client to be prepared for that situation. Still, we are not prepared to say that it would be an abuse of discretion under the circumstances for the trial court to hold that respondent was excusable for not producing said witnesses at the trial. The trial judge might be satisfied that the verdict was unjust, and that a different result would follow if said witnesses gave their testimony. In that event, he should be liberal in construing the conduct of the moving party in order that justice might prevail.

[2] Nor is it a sufficient objection that the proposed evidence would be cumulative. As to this, the test is whether it would probably change the result. No one could with certainty say whether it would produce a different verdict from a jury, and it might be diffi-

cult for any one to determine whether it would probably do so; but the trial judge is in a better position than any one else to determine that question, and, assuredly, in a case like this it cannot be said that he abused his discretion if he concluded that the testimony of these three persons would likely turn the scales in favor of respondent.

[3] Again, the trial court may have believed that, while plaintiff was entitled to receive something for the damage suffered by her, the amount awarded by the jury was entirely disproportionate to the actual loss. If so, the plaintiff might have been put to an election to remit a portion of the amount with the alternative of a new trial, or the motion could be granted on the second ground specified. This ground, indeed, does not necessarily imply misconduct on the part of the jury, but it does presuppose that the result has been induced through excited feelings or prejudice of which the jury may not, perhaps, have been aware, but which has, nevertheless, precluded an impartial consideration of the evidence. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 162, 47 Pac. 1019. The essence of the contention is that a fair view of the evidence would not lead an impartial mind to the approval of such a verdict. In effect, it means that the verdict is not fairly supported, and, if the court granted the motion, its action could be interpreted as signifying:

"That the trial court was not satisfied that the finding of the jury as to the extent of the damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case." *Meinberg v. Jordan*, 29 Cal. App. 762, 157 Pac. 1006.

We can readily understand how the lower court might have so regarded the case. While, as before stated, there is support in the record for the verdict, the evidence consists entirely of the opinion of plaintiff and another witness, and the former admitted that her opinion was somewhat arbitrary. We can understand also how the trial judge might have greatly discounted that opinion, and made an allowance for exaggeration, which self-interest is likely to produce. In fact, to one living in another part of the state it seems rather startling that land in Tulare county worth \$125 per acre should be increased to the value of \$400 by the addition of fig trees, 15 months old. It is true that no witness on behalf of defendant expressed an opinion as to how much the value would be depreciated by the destruction of

183 P.—45

the trees, but facts were disclosed from which a reasonable inference would follow that the award was at least twice as great as it should have been. We do not deem it necessary to set out the evidence specifically; but we think it sufficient to say that after a careful reading of the transcript we are satisfied the lower court did not abuse its discretion in granting a new trial, whether upon the first or second ground or both.

Of course, the principle that must govern us in the determination is well settled and hardly needs restatement.

We may, though, in closing, make the following quotations from the decisions of the Supreme Court in *Oberlander v. Fixen & Co.*, 129 Cal. 692, 62 Pac. 254, and *Mercantile Trust Co. v. Sunset, etc., Co.*, 176 Cal. 456, 168 Pac. 1033. In the former it is said:

"Hence, where the motion is denied, the fact that the newly discovered evidence is merely cumulative will in general be a sufficient ground for affirmance; but, where the motion is granted, the contrary will hold. For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on retrial, the order will not be disturbed. * * *

"Whether in this case the evidence could with reasonable diligence have been discovered and produced at the trial was also a question upon which the judgment of the court below must be regarded as conclusive, unless it appear that his discretion has been abused."

In the latter this is found:

"In deciding a motion for a new trial the court below has large discretionary power. Its order denying or granting such motion will not be reversed on appeal unless an abuse of discretion appears. In considering the evidence upon such motion that court has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial, provided they are not unreasonable. The order granting the motion for a new trial was general in its terms. It did not specify the reasons upon which the motion was granted. This court must uphold the order if any ground upon which it might have been granted is supported by the record."

We think within the purview of the foregoing the action of the lower court should not be interfered with, and the order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

**WARREN BROS. CO. v. BOYLE, Auditor of
City and County of San Francisco.**
(Civ. 2870.)

(District Court of Appeal, First District, Division 1, California. July 16, 1919.)

1. MUNICIPAL CORPORATIONS ⇨269(2)—SAN FRANCISCO CAN IMPROVE ACCEPTED STREET BY BOARD OF PUBLIC WORKS.

The city and county of San Francisco, under its Charter, art. 6, c. 1, §§ 3, 9, 22, has authority to improve an accepted street under the direction and control of its board of public works.

2. MUNICIPAL CORPORATIONS ⇨278(1/2) — PROCEDURE IN STREET IMPROVEMENTS PAID BY ASSESSMENTS.

City and County of San Francisco Charter, art. 6, c. 2, describing the proceedings to be followed by board of public works in the making of street improvements, has reference to improvements the expense whereof is to be assessed against property benefited, and not improvements the entire expense of which is to be paid by city and county, in view of article 2, c. 2, § 9.

3. MUNICIPAL CORPORATIONS ⇨278(2)—PROCEEDINGS FOR IMPROVEMENT OF ACCEPTED STREETS.

Under City and County of San Francisco Charter, art. 2, c. 2, §§ 1, subd. 2, and 9, subd. 2, and article 6, c. 2, §§ 1, 2, 8, 9, 23, all that was necessary to legally initiate proceeding for improvement of accepted street at city's expense was that board of public works recommend improvement, and board of supervisors order work done, whereupon board of public works could do work under contract, or by and through its own organization.

4. MUNICIPAL CORPORATIONS ⇨303(1) — WHAT CONSTITUTES "ORDER" FOR STREET IMPROVEMENT.

Board of supervisors of city and county of San Francisco, by fixing and allowing in its budget an item of expenditure for street improvement pursuant to board of public works' recommendation, and appropriating out of budget an amount to be expended for such improvement, did not order the improvement within the Charter, art. 6, c. 2, §§ 1, 2, empowering board of supervisors to "order" improvements.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Order.]

5. MUNICIPAL CORPORATIONS ⇨278(4)—IMPROVEMENTS BY BOARD OF PUBLIC WORKS UNDER CONTROL OF SUPERVISORS.

City and County of San Francisco Charter, art. 2, c. 1, § 9, authorizing board of public works to improve accepted street "under such ordinances as may from time to time be adopted by the supervisors," held to place action of board of public works under the direction and control of board of supervisors.

6. MUNICIPAL CORPORATIONS ⇨339(1) — WHEN CONTRACT FOR PATENTED PAVEMENT COMPLIANCE WITH CHARTER.

City's agreement with paving material concern, furnishing city with patented paving ma-

terial, held a sufficient compliance with City and County of San Francisco Charter, art. 6, c. 2, § 26, providing that, where patented pavement material is ordered, owner of patent shall transfer to city and county right to use patent, with privilege to any person to manufacture and lay the pavement upon the streets under contract with the city and county.

7. MUNICIPAL CORPORATIONS ⇨330(4) — WHEN USE OF PATENTED SURFACE PAVEMENT PERMITTED.

In improving accepted street, city and county of San Francisco, under the charter, may use a patented wearing surface mixture.

8. MUNICIPAL CORPORATIONS ⇨330(1)—PROPOSALS FOR MATERIALS NECESSARY FOR ACCEPTED AND UNACCEPTED STREETS.

City and County of San Francisco Charter, art. 6, c. 2, § 31, requiring board of public works to invite proposals for contract to supply materials for improvement of street, applies to accepted as well as unaccepted streets.

9. MUNICIPAL CORPORATIONS ⇨278(4) — STREET WORK TO BE DONE ON ORDER OF BOARD OF SUPERVISORS.

All street work in the city and county of San Francisco, except possibly urgent repairs, shall be done on the order of the board of supervisors.

10. MUNICIPAL CORPORATIONS ⇨330(4)—ON TRANSFER OF USE OF PATENTED PAVEMENT, OWNER AND OTHERS MAY COMPETE.

Where right to use of patented pavement has been transferred to city and county of San Francisco under Charter, art. 6, c. 2, § 26, board of public works is in a position to call for sealed bids for contract to furnish necessary quantities of the pavement, for which contract owner of patent and others may compete.

11. MUNICIPAL CORPORATIONS ⇨320—ORDINANCE RATIFYING STREET IMPROVEMENT CURES OMISSION OF SUPERVISORS.

Ordinance ratifying, approving, and confirming purchase of paving materials, and conferring authority upon board of public works to do all acts set forth as fully as if authority had been conferred before the doing of the acts, held to cure omission of board of supervisors, in the first instance, to order the street improvement and the purchase of the material.

12. MUNICIPAL CORPORATIONS ⇨365 — CITY ACCEPTING PAVEMENT ESTOPPED TO REFUSE TO PAY FOR SAME.

City and county of San Francisco, having accepted, used, and retained pavement material which the board of supervisors had the general power to authorize board of public works to purchase, could not refuse to pay for it upon ground that certain provisions of the charter or ordinances were not strictly complied with.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Mandamus by Warren Bros. Co. against Thomas F. Boyle, as auditor of the city and county of San Francisco, etc. Petition denied, and petitioner appeals. Reversed.

Frank English, of San Francisco, for appellant.

George Lull, City Atty., M. T. Dooling, Jr., Ed. F. Moran, and J. B. Gartland, all of San Francisco, for respondent.

WASTE, P. J. Plaintiff sought a writ of mandate to compel the defendant to allow certain claims alleged to be due for material furnished the city and county of San Francisco, and used in the improvement of Mission street, a duly accepted public street in said city. The trial court denied the petition, and this appeal, taken upon the judgment roll, is from that judgment. The findings of fact, together with the allegations of the pleadings, not denied, constitute the record for the purposes of this appeal.

The board of public works of the city and county of San Francisco recommended to the board of supervisors the improvement of the roadway of Mission street, easterly from Fourth street, by constructing thereon a certain pavement. The board of supervisors, in acting upon this recommendation, carried an item into its budget for the fiscal year 1917-18, for the amount of \$30,000, for the performance of the work, and thereafter, by proper resolution, specifically set aside and appropriated that amount for the said improvement. The board also thereafter set aside and appropriated to the board of public works the sum of \$23,375 out of the urgent necessity fund for the fiscal year 1917-18, for repairs, reconstruction, and paying of streets.

The board of public works in proper manner transferred, set aside, and applied said amount of money for the reconstruction of Mission street. The board of public works, by and through its own department organization, then proceeded to reconstruct and improve Mission street, easterly from Fourth street, by removing therefrom the existing pavement of basalt blocks, constructing in lieu thereof a concrete pavement with a wearing surface of the material best adapted, in the judgment of the board, to meet the conditions created by the traffic in said street.

For the purpose of providing for this wearing surface, and as a necessary and desirable ingredient for the pavement, the board of public works, on the 20th day of August, 1917, entered into a contract with petitioner to purchase, for and on behalf of the city and county of San Francisco, a quantity of certain material constituting such wearing surface for the pavement, which material, petitioner alleges, was a proprietary and patented article, the patents to which were controlled by it. No proposals calling for competitive bidding for the furnishing of the paving material were invited. The price agreed to be paid for this material was \$7 per ton. Petitioner furnished to the city, and the city used and incorporated in the

reconstruction of the pavement of Mission street, such material to the value of \$7,756. Claims against the city for the amount were presented by the petitioner.

After a previous approval thereof by the board of public works, the board of supervisors approved the demands on the treasury of the city and county for the specified sum, for the quantity of petitioner's paving material delivered and used. Each of these demands was in an amount less than \$500, and all of them were based on the contract price of \$7 per ton for the materials delivered. The auditor refused to audit the claims.

There was subsequently regularly adopted and passed by the board of supervisors an ordinance which ratified and approved and confirmed the action of the board of public works in the reconstruction of the pavement on Mission street, and all the proceedings had and taken by the board of public works in relation thereto. The ordinance specifically appropriated and authorized to be expended out of the funds set aside and appropriated by the board of supervisors for improving Mission street the sum of \$7,756 for payment to the appellant for the materials furnished by it to the city and county.

By stipulation at the trial of the action, the amount of the claims against the city was reduced to \$5,764, being the aggregate amount of 12 different claims approved by the board of public works and the board of supervisors. The occasion for this reduction appears to have been certain claims by way of set-off on the part of the city which were agreed to by appellant.

The lower court reached the conclusion, first, that the city and county was not permitted by its charter to perform the work in question; and that, as the requirements of that instrument relating to award of contracts and purchase of supplies had not been complied with, no legal obligation rested upon the municipality to pay the claim of petitioner. The findings relied upon to support that phase of the court's determination are that the board of supervisors of the city and county of San Francisco did not order, or authorize by ordinance, the board of public works to improve or repair Mission street, except as such authorization might be gathered from its action on the recommendation of the board, in appropriating the money therefor; that the board of supervisors did not authorize the purchase of any materials from the plaintiff, except as such authorization might be found in the same proceedings; that no proposals were invited for competitive bids; and that the board of public works did not at any time pass a resolution determining that the material delivered by petitioner was necessary for street repairs or improvements.

Appellant challenges the correctness of the court's conclusion, and contends that by vir-

tue of section 14, c. 1, art. 6, of the charter of the city and county of San Francisco, the board of public works has the power to, and in the instant case did, improve a duly accepted street, by and through its own departmental organization, freed from the necessity of following the requirements of the charter in the matter of awarding contracts therefor. That section provides as follows:

"All public work authorized by the supervisors to be done under the supervision of the board of public works shall, *unless otherwise determined by the board of public works* (the italics are ours), be done under written contract, except in case of urgent necessity as hereinafter provided; and except as otherwise specifically provided in the charter, the following proceedings shall be taken in all cases of letting contracts by said board. Before the award of any contract for doing any work authorized by this article, the board shall cause notice to be posted conspicuously in its office for not less than five days, and published for the same time, inviting sealed proposals for the work contemplated; except, however, that when any repairs or improvements, not exceeding an estimated cost of five hundred dollars, shall be deemed of urgent necessity by the board, such repairs or improvement may be made by the board under written contract or otherwise, without advertising for sealed proposals."

[1] That the city and county of San Francisco has authority, under its charter, to improve an accepted street, under the direction and control of its board of public works, seems to be settled. Chapter 1, art. 6, provides, in part, as follows:

"Sec. 9. The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors:

"1. Of all public ways, streets, * * * and of all work done upon, over, or under the same;

"Sec. 3. [The board of public works] may employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects and workmen as shall be necessary to a proper discharge of these details.

"Sec. 22. The work in this article provided [improvement of streets, among other things] must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specification of said board."

Construing provisions of the charter of the city of Los Angeles in part identical with, and similar as to the remainder to, the above-quoted section, but relating to "the design, construction, maintenance, and use of all sewers," and "the design, construction, alteration, repair, maintenance, and care of all public works and improvements, and of all public buildings belonging to the city" (charter of the city of Los Angeles, art. 16, § 146, subds. 1, 2, and 4), the Supreme Court of this state, in an opinion by Chief Justice Angellotti, decided that the city of Los Angeles had the power

to construct an outfall sewer, involving an aggregate expenditure of more than \$500, "without letting any contract therefor, in other words, by day's labor, under the authority and control of the city by its board of public works, purchasing such material as it may require therefor." *Perry v. City of Los Angeles*, 157 Cal. 146, 106 Pac. 410.

The duty to keep in repair and improve its duly accepted streets, or portions thereof, is imposed upon the city and county of San Francisco by the charter. Section 23, c. 2, art. 6. By subdivision 2, § 1, c. 2, art. 2, of the charter, the board of supervisors is given general power "to regulate and control, for any and every purpose, the use of the streets * * * and sidewalks of the city and county." By section 1, c. 2, art. 6, the same board is "empowered to fix the width and grade thereof, and to order done therein and thereon any and all street work and street improvement under the proceedings" in that chapter described.

[2] These proceedings, it may be here noted, are the various steps to be followed by the board of public works, and deal entirely with work or improvement the expense whereof is to be assessed according to the nature and character of the work upon the property benefited (subdivision 2, § 9, c. 2, art. 2), and do not, in our judgment, apply to the improvement of, or work upon, accepted streets, the entire expense of which must be paid by the city and county.

Application for the doing of *any* street work, or improvement, however, must, in the first instance, except as otherwise provided in the charter, be made by the proper parties to the board of public works, which may in turn recommend the work to be done. No street work, or improvement of any kind, shall be ordered by the supervisors to be done unless a written recommendation to do the same has been made to them by the board of public works, except that in case an application is made for any work or improvement the expense of which is to be paid by the city and county, and the board of public works shall not approve of the application, and it shall report to the supervisors its reasons for such disapproval, the supervisors may then, after having obtained from the board of public works an estimate of the expense of the work or improvement, by ordinance passed by the affirmative vote of not less than 14 members of the board, order the work done. The board of public works may recommend any improvement the expense of which is to be paid by the city and county, though no application may have been made therefor, and must make, with said recommendation to the supervisors, an estimate of the expense. In such cases the supervisors may order the same done. Section 2, c. 2, art. 6, of the charter.

The expense of all work or improvement

done on streets, crossings, and intersections of streets, that have been accepted by the city and county, after acceptance of the same, and all repairs and improvements deemed of urgent necessity that may be made upon the public streets, shall be borne and paid for out of the general fund of the city and county. Section 8 of the chapter and article last mentioned. The expense of all other street work and improvement, except certain emergency repairs done at the expense of the owner of the property, shall be assessed upon the lots and lands fronting on the street improved, according to the nature and character of the work. Section 9 of the same chapter and article.

[3] It seems reasonable to conclude, therefore, starting with the premise we have reached, that the city and county has power to do the work in question; that all that was necessary in the present instance, to legally initiate the proceeding for doing the work, was for the board of public works to recommend to the board of supervisors, and for that board to order that the work be done; that, so much accomplished, the board of public works, acting for the city and county, was in position to either do the work under contract, or, by and through its own organization, purchasing the materials therefor. *Perry v. City of Los Angeles*, supra.

The first step was duly taken. The board of public works in writing made recommendation to the board of supervisors that the work be done. The record falls, however, to furnish evidence that the second requirement was directly performed. The allegation of the complaint, not denied by the answer, is merely that "the said board of supervisors did act upon said recommendation of the board of public works by fixing and allowing in its budget for the fiscal year 1917-1918 an item of expenditure (No. 66) in the amount of thirty thousand (\$30,000) dollars for the reconstruction of Mission street easterly from Fourth street." This allegation is followed by a recital of the fact that "thereafter, and by resolution No. 14,579, new series, approved July 17, 1917, the said board of supervisors did set aside, appropriate, and authorize to be expended out of said special budget allowance (No. 66) the sum of thirty thousand (\$30,000) dollars," as appears from the copy of the resolution made a part of the complaint, "for the reconstruction of Mission street easterly from Fourth street." The trial court found, as before stated, "that the board of supervisors of the city and county did not, at any time before the delivery by plaintiff of the said paving material, order, or authorize by ordinance, the board of public works to improve or repair Mission street, * * * or the laying of the said pavement, or of the said paving material, or the purchase of any materials from plaintiff, except as such

authorization" might be found in the recommendation made by the board of public works, and the subsequent action of the supervisors in carrying an item into the annual budget for the estimated cost of the work, and its later action in making direct appropriation of the sums of money needed to defray the expense thereof.

[4] Our conclusion is in harmony with the decision of the lower court, to the effect that these proceedings do not present facts sufficient to warrant a finding that the board of supervisors in the present case "ordered" the work of improving Mission street to be done, or the materials necessary therefor to be purchased, at any time prior to the doing of the work or the furnishing of the materials. The so-called ratification ordinance, to which we shall hereinafter refer, in its preamble contains the important admission on the point, when it recites: "Whereas, the board of the public works, in view of a necessity existing for an immediate performance of the said work, and without a formal order of this board in that behalf, did, by and through its departmental organization," do the particular work, describing it.

[5] Under the provision of the charter, hereinbefore quoted, the board of public works is given authority to do work of the nature involved here, "under such ordinances as may from time to time be adopted by the supervisors." The direction and control of the board of supervisors is, by this direct language of the charter, impressed upon whatever action the board of public works may take in pursuance of the authority granted thereby. That fact seems manifest from even a cursory reading of the section itself. The Supreme Court has so held. In construing the very broad powers of the board of public works, as related to public utilities owned and operated by the city and county, and which power is expressly granted by the section of the charter we are now considering, Mr. Justice Wilbur, speaking for the court in *Vale v. Boyle* (Sup.) 175 Pac. 787, said:

"Under the charter provisions concerning public utilities, the city and county of San Francisco, through its board of public works, is acting in a proprietary, and not in a governmental, capacity, and it may well be assumed that, in placing such utilities in charge of one of the boards of the city, it was contemplated that, so far as consistent, such board should have the usual powers incidental to the operation of such public utility, including the power to purchase the necessary supplies and equipment, this power to be exercised under the charter of the city of San Francisco by the board of public works, under such limitations as may from time to time by ordinance be prescribed by the board of supervisors. Section 9, subd. 8, Charter, supra. While it is true that this general consideration alone should not control the express language of section 1, c. 3, art. 2, of the charter, if applicable thereto, it aids us in construing

such general provisions of the charter concerning the purchase of supplies, etc., to consider that they were adopted for the purpose of regulating the conduct of the board of supervisors of San Francisco, acting in their governmental capacity."

The court then held that the charter having given the board of public works "charge, superintendence, and control" of public utilities, in a proprietary capacity, the board was authorized to purchase, in conformity with the ordinance of the board of supervisors, certain automobile busses required, and that the limitations contained in section 1, c. 3, art. 2, of the charter, relating to the manner of purchasing supplies, and awarding of contracts in the ordinary case of governmental affairs, did not apply. *Vale v. Boyle*, supra.

As we understand them, in neither of the foregoing decisions does the Supreme Court go so far as to hold that the charter requirements relating to the purchase of supplies can be dispensed with. In the *Vale Case* Mr. Justice Wilbur lays emphasis upon the fact that, while the authority of the board of public works is derived from the charter, its activities are confined within the scope of such directions by ordinance as the board of supervisors may from time to time adopt, as in that case was actually done. The real point determined in the case of *Perry v. Los Angeles*, supra, as stated by the court in the opinion, was "whether the city may itself do such work without letting any contract therefor, in other words, by day's labor," purchasing such material as it may require. The manner in which the materials for the construction of the outfall sewer were to be purchased was not referred to in the opinion. That question does not appear to have been in issue. The opinion, however, does say, in discussing two sections of the charter of Los Angeles in substance the same as the provisions contained in the organic instrument of San Francisco:

"The charter provisions * * * undoubtedly require that wherever it is proposed to make an agreement for the purchase of certain materials or supplies for a sum exceeding five hundred dollars, or to make an agreement with another by which he is to furnish such labor for a sum of money exceeding five hundred dollars, a written contract must be let and entered into in the manner prescribed." *Perry v. City of Los Angeles*, supra.

By section 31, c. 2, art. 6, of the charter, the board of public works shall "from time to time, after it shall have been directed to do so by the supervisors by ordinance, invite proposals for supplying to the city and county such materials as may be required for the repair of the public streets, or for any improvement thereof, and such proceedings shall be had in awarding contracts therefor as are in this article provided for

awarding other contracts." The proceedings referred to in this section are those set forth in sections 14 to 22, c. 1, art. 6, which, as the lower court found in the present case, were not complied with, in that no sealed proposals calling for competitive bidding, for furnishing the materials, were advertised for or secured.

Another provision of the charter (section 26, c. 2, art. 6), relating to the definition of terms, and the use of patented pavements in street work in the city and county, provides:

"The word 'paved' shall include any pavement of stone, iron, wood, or other material which the supervisors may by ordinance order to be used; but no patented pavement shall be ordered during the existence of the patent therefor, until the owner of such patent shall have transferred to the city and county all right to the use of the same therein, with the privilege to any person to manufacture and lay the same upon the streets under any contract that may be awarded to him with the city and county."

The trial court found that the supervisors did not, at any time, order the laying of a patented paving on Mission street, and that the further provision of the section just quoted, relating to the transfer of the right to use the same, had not been complied with by petitioner in this case, "except as such transfer may be found in the contract entered into by petitioner and the board of public works."

This contract consisted of two parts. As they appear in the findings, the first is a formal agreement between the petitioner and the board of public works, acting for and on behalf of the city and county. It refers to a "License Mixture Agreement" filed by petitioner with the board, which is made a part of the contract, and to a resolution of the board, executing the contract, referring to the license mixture agreement, and approving the specifications therefor. By the agreement petitioner agrees to furnish the city and county the material and the services provided in the license mixture agreement, at the rate of, and the city and county agrees to pay therefor, \$7 per ton of said wearing surface. The license mixture agreement, made a part of the contract, contains these provisions:

"Whereas, it is deemed advisable by the proper authorities of the city and county of San Francisco, state of California, that portions of Mission street, and of such other accepted public streets in said city and county as may be determined by the said authorities, be paved with the bitulithic pavement, under and in accordance with approved specifications, a copy of which is attached to and made a part hereof; and whereas, the said improvement requires the laying of a certain patented bitulithic wearing surface and seal coat; and whereas, the undersigned, Warren Bros. Company, is the owner of all patents and processes covering the said bitulithic pavement—Warren Bros. Company hereby proposes and agrees to furnish to the city and county of

San Francisco, at any time up to and including December 31, 1917, the following materials ready for use, as specified and required under and by said specifications: * * * (3) The right to use any and all patents owned or controlled by Warren Bros. Company which are necessary to be used in the laying of said pavement, and the perpetual right to use and repair or reconstruct the patented pavement so constructed. The right of the city and county to repair or reconstruct such pavement with such patented material or other material is hereby reserved in this proposition to said city and county. (4) * * * This agreement shall inure to the benefit of said city and county of San Francisco, and of any person to whom any contract may be awarded by, or entered into with, said city and county of San Francisco for the performance of said work."

Then follows full details and specifications relating to the "construction of Bitulithic Wearing Surface," which appears to be the proper name for said patented wearing surface.

[6] We are of the opinion that there was a sufficient compliance with the charter provisions relative to the transfer to the city and county of the right to the use of the patented wearing surface. While the language might be more explicit, as to the privilege granted any person to manufacture and lay the same upon the streets under contract awarded to him, or entered into by the city, we think the intention to comply with the requirement of the charter is manifest, and that we are right in so holding.

Much of the argument of counsel in the numerous briefs in this case has been devoted to the question of this use by the city of the patented wearing surface, which was laid on the concrete base, on Mission street, as reconstructed. On oral argument this question was referred to as the principal contention.

[7] That such patented composition, or mixture, may be used, if called for by proper jurisdictional procedure, is settled. *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; *Dunne v. Altschul*, 57 Cal. 474; *Sarver v. Los Angeles*, 156 Cal. 187, 189, 103 Pac. 917. The charter provision we have heretofore quoted provides for such use in the city and county of San Francisco. Appellant contends that the board of public works, although required to let all contracts to the lowest bidder, may, nevertheless, let a valid contract for improving its streets by a patent process and subject to a monopoly. Such is undoubtedly the law relating to the purchase of patented articles generally, such as fire engines, machinery, furnishings for public buildings, and ordinary supplies. But the framers of the San Francisco charter had a well-defined object in view, in the enactment of the section in question, the purpose of which was to secure active competition, regardless of the use of a patented pavement in the improvement of its streets.

[8] We are not prepared to hold with appellant that the provision shall apply only in case of street work on unaccepted streets, in which case the proceedings are in invitum. All street work in the city and county, except, possibly, urgent repairs, shall be done on the order of the board of supervisors.

[9] No patented pavement shall be ordered by the supervisors until the owner shall have made the assignment, required by the section, of the right to use the same, with the privilege to any person to manufacture and lay the same upon the streets under any contract that may be awarded to him or entered into by him with the city and county.

[10] This jurisdictional step taken, the board of public works is in position to follow the provisions of the charter in the matter of securing sealed bids for the furnishing of such quantities of the patented pavement as may be necessary, as in the case of ordinary supplies. *Nicolson Pavement Co. v. Painter*, supra. On such bids being called for the owner of the patents governing the pavement, and all other bidders, are in position to compete for the contract which should be awarded the successful bidder in the manner provided in the contract. To hold otherwise would, in our judgment, be doing violence to the intent and terms of the charter.

Two situations are to be dealt with: First, the board of supervisors did not "order" the reconstruction of Mission street; second, the contract between petitioner and the board of public works was entered into without the formalities required by the charter, although the contract has been fully performed to the satisfaction of the board, and the city and county has received the full benefit thereof. To meet these situations petitioner relies, first, upon the effect of the ordinance of ratification, adopted after the doubt as to the regularity of the proceedings by the board of public works presented itself; and, second, it invokes the doctrine of equitable estoppel.

After reciting the facts relating to the matter, much as they appear here, the said ordinance ratifies, approves, and confirms the purchase of the paving material by the board of public works, confers authority on said board "to do all of the acts hereinbefore set forth as fully as if such authority had been conferred prior to the doing of said acts," and appropriates "the sum of \$7,756 for payment to Warren Bros. Company for the wearing surface material purchased from the said company by said board of public works," etc.

[11] We are of the opinion that this ordinance had the effect, contended for by appellant, to cure the omission of the board of supervisors, in the first instance, to order the work of improving the street, and the laying thereon of the patented wearing surface. *People v. Swift*, 31 Cal. 26, 28. As an

ordinance was necessary in the first instance to inaugurate the work, it was proper that the ratification be in the form required in the original act. When passed, its effect was equivalent to a previous authority. It operated upon the action of the board of public works as though the authority had originally been given. *McCracken v. City of San Francisco*, 16 Cal. 591; *Zottman v. City & County of San Francisco*, 20 Cal. 98, 81 Am. Dec. 96.

The contract between petitioner and the city and county, by and through its board of public works, for furnishing the material used in the improvement of Mission street, did not arise from, or result in, proceedings in invitum, whereby any interests of third parties could be affected. In improving one of its accepted streets the municipality was acting more in a proprietary than in a governmental capacity. It was to all intents and purposes caring for its own property as an individual or private corporation would do.

"When a municipal corporation engages in ordinary business transactions, such as purchasing supplies, it exercises merely the right of a private corporation or a natural person; and when making contracts about such matters it is not to be regarded as exercising political or governmental powers; and, like natural persons, it is subject to the principle that after it has received the benefit of a contract within the scope of its power to make, it is estopped from denying its validity in an action based upon such contract." *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 436, 73 Pac. 189, 191.

"Substantially the authorities indicate no different rule in applying the doctrine of estoppel to the acts of individuals or private corporations than is proper to be applied to the acts of municipal corporations. There is, however, a distinction suggested, and it is this: That where the contract or agreement upon which recovery is sought is one wholly without the scope of the power of the municipality to make—in other words, is *ultra vires*—then there can be no estoppel; but where the authority exists to make the contract, but the proceedings precedent thereto have been informally taken only, then the rule of estoppel may be made to operate against a municipality as completely as it would against an individual under the same circumstances." *McCormick Lumber Co. v. Highland School District*, 26 Cal. App. 641, 147 Pac. 1183.

[12] The board of supervisors clearly had the general power to provide for the purchase, by the board of public works, of the supplies, including the wearing surface, necessary for the improvement of Mission street, whatever the contention may be about the manner in which the contract for such supply ought to be made. Even if it be that certain provisions of the charter, or ordinances, were not strictly complied with, the city, under well-settled legal principles, should not be allowed to accept, use, and retain the ben-

efit of petitioner's property, and then refuse to pay for it upon the plea that in making the contract it has not proceeded in strict conformity with some part of the complicated internal machinery of its complex corporate organization. *Contra Costa Water Co. v. Breed*, supra; *Higgins v. San Diego Water Co.*, 118 Cal. 555, 46 Pac. 824, 50 Pac. 670; *Brown v. Board of Education*, 103 Cal. 534, 37 Pac. 503.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

PEOPLE v. BRAY. (Cr. 663.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919.)

1. CRIMINAL LAW §1023(8)—DENIAL OF MOTION IN ARREST—APPEAL FROM ORDER.

Since no appeal from an order denying defendant's motion in arrest of judgment finds any warrant under the Penal Code, an attempted appeal therefrom must be disregarded, in view of Pen. Code, § 1237.

2. HOMICIDE §268 — CAUSE OF DEATH — QUESTION FOR JURY.

In a prosecution for manslaughter, the weight of the evidence as to the cause of death, whether influenza or an assault by defendant, was for the jury.

3. CRIMINAL LAW §722½ — ARGUMENT — REFERENCE TO DECEDENT'S ADULTEROUS RELATIONS WITH ACCUSED.

In prosecution for manslaughter of the woman with whom defendant was living, she being undivorced from her husband, the district attorney was justified in referring to decedent by her proper married name, and not as defendant's wife.

4. CRIMINAL LAW §727—EVIDENCE TO OVERCOME ARGUMENT OF DISTRICT ATTORNEY.

In prosecution for manslaughter of the woman with whom defendant was living as his wife, she not having been divorced from her husband, certified copy of marriage certificate and license, showing that defendant and decedent had gone through the form of a marriage ceremony, was inadmissible, offered for alleged purpose of overcoming district attorney's repeated and proper reference to decedent as the wife of her real husband.

5. CRIMINAL LAW §367—EVIDENCE—BODILY OR MENTAL FEELINGS—RES GESTÆ.

When the bodily or mental feelings of a person are material issues, the usual expressions of those feelings, involuntary declarations, and exclamations are admissible as tending in some degree to show bodily pain and suffering, or present physical condition, being the mental reflexes of what it might be impossible to show otherwise.

6. CRIMINAL LAW §366(6) — EVIDENCE — CAUSE OF DEATH—DECLARATIONS OF DECEDENT—RES GESTÆ.

In prosecution for homicide, the state claiming that defendant was the cause of the death of decedent, the woman with whom he was living, and defendant claiming that she died from influenza, testimony was inadmissible that decedent told a witness, five days after the time when the state claimed defendant inflicted the deadly blows, that she had been delirious, had had a fever, and had fallen in the bathroom and hurt herself.

7. CRIMINAL LAW §367 — EVIDENCE — RES GESTÆ—STATEMENTS OF PHYSICAL CONDITION.

Testimony of complaints of bodily pain and suffering is admissible on the principle of *res gestæ* only, and statements of a person's present condition or symptoms, or of the preceding cause of a present condition, are not admissible.

8. CRIMINAL LAW §367—RES GESTÆ—NARRATIVE DECLARATIONS AS TO CAUSES OF INJURY.

Declarations or complaints by one in his last illness which are but a narrative of the cause of sickness or injury, or the manner in which, or the time at which, the injury was inflicted, or the nature of past symptoms, or the bodily condition at a prior time, are incompetent and inadmissible.

9. CRIMINAL LAW §367—EVIDENCE—DECLARATIONS OF DECEDENT AS TO CONDITION.

In a prosecution for manslaughter of the woman with whom defendant was living, he claiming that she died of influenza, testimony as to declarations by decedent of present bodily condition, offered to show that decedent disregarded the conditions that would make for health or sickness, etc., *held* inadmissible.

10. CRIMINAL LAW §1114(1)—APPEAL—REFUSAL OF SUBPENA DUCES TECUM—RECORD SHOWING CONTENTS OF PAPER.

In prosecution for manslaughter of woman with whom defendant was living, defendant claiming that she died of influenza, the Appellate Court, despite any statement of counsel to the trial court, cannot reverse conviction for refusal to grant defendant's motion for an order directing issuance of a subpoena duces tecum directed to the city health officer, and requiring production of the certificate of death filed with him, in the absence of showing that such certificate gave influenza as the cause of death.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Edward J. Bray was convicted of manslaughter, and from the judgment and an order denying his motion for new trial he appeals. Judgment and order affirmed.

Charles W. Lyon, Arthur Veitch, and Fredericks & Hanna, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. [1] Defendant was convicted of manslaughter. He appeals from the judgment of conviction and from an order denying his motion for a new trial. He also has given notice of appeal from an order denying his motion in arrest of judgment, but, as no appeal from an order of that character finds any warrant under our Penal Code, the attempted appeal therefrom must be disregarded. Pen. Code, § 1237.

The information charges that on or about October 27, 1918, in the county of Los Angeles, defendant wrongfully, unlawfully, and feloniously, and with malice aforethought, did kill and murder one Bertha May Wiswell.

The following summary of some of the facts will suffice for an understanding of the questions presented: For some time prior to October 19, 1918, defendant and the deceased had been living together in an apartment house on Main street, in the city of Los Angeles. The deceased was a married woman. She had been married to one Kent Wiswell, from whom she had not been divorced, and who was still alive at the time of her death, but from whom she had lived separate and apart for some years prior to the homicide. About 3 o'clock on the morning of October 19th the deceased returned to the apartment where she and defendant were then living. Just prior to her return she had been in the company of a man of the name of Julius Hammer. She died on October 27, 1918. On the evening of October 19th, in front of the apartment house, defendant, in a conversation with a witness for the prosecution, on being asked if he was going to a dance that night, replied that he had "had his dance last night"; that "he and the old lady" had a battle about 3 o'clock in the morning. On the next day defendant told the same witness that "he had been to the drug store to get some medicine for the old lady"; that "he guessed he had hurt her pretty bad"—that "I beat her up pretty bad." To another witness, who lived in the same apartment house, defendant, on October 20th, said: "She [the deceased] is not feeling very well; I knocked hell out of her," or "I beat hell out of her." He said that he did this on the morning of Saturday, the 19th day of October. After his arrest defendant told an officer that, as he was leaving the apartment house about 3 o'clock in the morning of October 19th, he met deceased in the lobby; that he suspected her of being out with Julius Hammer; that they had an argument; that he slapped her and struck her two or three times, and kicked her. The mother of deceased, who saw her on October 25th, testified that at that time deceased, who had been confined to her bed from the time when defendant struck her until her death, had a terrible black eye, and that the whole side of her face was mashed and bruised and in a terrible condition. On November 6th, the body meanwhile having

been exhumed, a post mortem was held. Doctor Wagner, the county autopsy surgeon, who attended the post mortem and testified to many bruises on the body, enumerating and describing about 30 contusions or abrasions, said:

"The contusions on the abdomen were rather extensive. There is interstitial hemorrhage and contusion of the abdomen and other tissues, with similar hemorrhage in the rectus muscles. * * * The fibres were parted. * * * These contusions, taken all together, with the interstitial hemorrhage or hematoma, were, in my opinion, the cause of death."

The mother, in giving her testimony, said that, on the occasion when she saw her daughter on October 25th, she complained all the time of terrible pain across her stomach and bowels.

[2] We have deemed it necessary to state thus in detail some of these gruesome particulars, for the reason that defendant, who did not take the stand, advanced the theory that influenza was the cause of his victim's death, and upon this theory of the cause of death bases two of his claims of error in the rejection of certain proffered evidence. It is needless to say there was evidence for defendant directly contradicting the prosecution's contentions. The weight of that evidence, however, was for the jury.

[3, 4] Defendant offered in evidence a certified copy of a marriage certificate and license, showing that defendant and deceased had gone through the form of a marriage ceremony at Santa Ana, in Orange county, on October 2, 1918, and he now assigns as error the ruling of the court sustaining an objection to this offer. Appellant concedes that ordinarily such evidence would be immaterial, but argues that it was admissible here in order to overcome the effect of the district attorney's repeated references to deceased as Bertha May Wiswell; thus creating in the minds of the jurors, so it is claimed, the idea that defendant was living with deceased in adulterous and illicit cohabitation instead of as her lawful husband. But the district attorney was justified in referring to deceased as Mrs. Wiswell, or as Bertha May Wiswell, and not as Mrs. Bray. Bertha May Wiswell was her true name. She had been married to Kent Wiswell, who was still alive. In fact, he testified at the trial. She had not been divorced from him. The husband himself so testified. Moreover, one of defendant's witnesses, who was present at the marriage ceremony performed in Santa Ana was permitted, without objection, to give oral evidence of that ceremony, testifying that defendant and Mrs. Wiswell were married at Santa Ana by a justice of the peace on October 2, 1918.

[5-8] Appellant complains of the exclusion of his offer to show that on October 24th, or about five days after the time when the prose-

cution claims defendant inflicted the lethal blows, the deceased told a witness over the telephone that she had been delirious and had had fever, and that she had fallen in the bathroom and had hurt herself severely. The offer to show that the deceased told this witness that "she had been delirious and had had fever" was for the purpose of laying a foundation for the testimony of experts that influenza was the real cause of death. Counsel for appellant say that "complaints and declarations of a decedent made during the course of the last illness are competent evidence upon the question of the cause of death." If by this counsel mean that declarations, during the last illness, as to the cause of the fatal injury or disease, are admissible, they state the rule too broadly. The rule is that, when the bodily or mental feelings of a person are material issues in a case, the usual expressions of those feelings, involuntary declarations, and exclamations are admissible as tending in some degree to show present pain or suffering or present physical condition. The expression of physical or mental feeling—pain or sorrow—may take any form, inarticulate, as in groanings, articulate, as in exclamations, or more detailed statements, summarized as "complaints." Such expressions are but the natural reflexes of what it might be impossible to show by other evidence. But though declarations, exclamations, or complaints are admissible as indicative of what the bodily or mental condition of the declarant is at the time of the declaration or complaint, such bodily or mental condition being an issue in the case, they are not admissible when they are but statements of the person's past condition or symptoms, or of the preceding cause of his present condition. Testimony of complaints of present pain and suffering is admissible upon the principle of *res gestæ*. Declarations, to become a part of the *res gestæ*, must accompany the bodily pain or suffering, or the feeling or act which they are supposed to characterize and explain, and must so harmonize as clearly to be one transaction. To be competent as evidence, the declarations must exclude the idea of a narrative of past occurrences. Hence, declarations or complaints by one in his last illness, that are but a narrative of the causes of the sickness or injury, or the manner in which, or the time at which, the injury was inflicted, or the nature of past symptoms, or the bodily condition at a prior time, are incompetent and inadmissible. *Kennedy v. Rochester, etc., R. Co.*, 130 N. Y. 654, 29 N. E. 141; *Gulf, etc., Ry. Co. v. McKinnell (Tex. Civ. App.)* 173 S. W. 937; *Smith v. Chicago, etc., Ry. Co.*, 42 Okl. 577, 142 Pac. 398; *Hamilton, etc., Co. v. Hoskins*, 244 Pa. 1, 90 Atl. 541; *Kelley v. Detroit, etc., R. R. Co.*, 80 Mich. 237, 45 N. W. 90,

20 Am. St. Rep. 514; *Green v. Pacific Lumber Co.*, 130 Cal. 435, 82 Pac. 747; 16 Cyc. p. 1162; 1 R. C. L. p. 493; *Wigmore on Evidence*, § 1722. Tested by these principles, the proffered evidence was inadmissible.

[9] Defendant's counsel asked one or two questions that, possibly, were not objectionable under the rule applicable to declarations of present bodily condition by one who is injured or ill. But just before he asked these questions counsel stated to the court that his purpose was to show, by the declarations of the deceased, that she "disregarded the conditions that would make for health or for sickness," and "gave no thought to what would occur." In view of this preliminary statement as to what counsel expected to prove by decedent's declarations, the court was justified in sustaining the objections. Counsel indicated that it was not his purpose to use the declarations as probative circumstances showing the existence of a particular bodily or mental condition at the very time when the declarations were made.

[10] Finally, complaint is made of the court's refusal to grant defendant's motion for an order directing the issuance of a subpoena duces tecum, directed to the city health officer, and requiring the production of the recorded certificate of death, showing the cause of death as certified to by Dr. Finch, a physician who was called in to examine the decedent shortly prior to her death, and who himself departed this life while the case was on trial. Defendant's counsel told the court that his purpose was to show by the certificate that Dr. Finch had certified that influenza was the cause of death. The application for the order directing the issuance of a subpoena duces tecum was not accompanied by any affidavit. At any rate, the record before us fails to disclose that the motion was accompanied by an affidavit showing any of the contents of the death certificate, or that the court was apprised of its nature otherwise than by the unsupported statement of counsel as to his purpose in asking for the issuance of the subpoena.

The health officer of the city of Los Angeles is the local registrar of vital statistics for that city. Section 4, Vital Statistics Act, Stats. 1915, p. 578. A certificate of death is required to be filed with the local registrar, showing the primary cause of death, and the contributory or secondary cause, if any, with the signature and address of the physician making the medical certificate. Subdivision 17, § 7, Vital Statistics Act, Stats. 1915, p. 579. Every local registrar is required to make a complete and accurate copy of each death certificate, to be preserved permanently in his office as the local record, and to transmit to the state registrar at Sacramento, on the 5th day of

each month, all original certificates registered by him for the preceding month. Section 19, Vital Statistics Act, Stats. 1915, p. 586. A certified copy of the record of any death, certified to by the state or local registrar, must be supplied to any applicant on payment of a fee of 50 cents, and shall be "prima facie evidence in all courts and places of the facts therein stated." Section 21 of Vital Statistics Act, Stats. 1915, p. 586.

Assuming, for the purpose of this decision, that if the death certificate did contain a statement that influenza was the cause of death it would be admissible as prima facie evidence of the facts stated therein, nevertheless there is nothing in the record before us to indicate what the certificate showed the cause of death to be. The colloquy between the court and counsel, when the latter was asking for the issuance of a subpoena duces tecum, justifies the conclusion that counsel, in good faith, believed that the death certificate showed influenza to be the cause of death; and we likewise may justly infer from the remarks of the learned trial judge at that time that, even if the certificate did show influenza to have been the cause of death, he nevertheless would neither have admitted it in evidence nor have issued a subpoena for its production. But even so, we cannot reverse for this assigned error. For non constat but that counsel was mistaken in his supposition that the certificate gave influenza as the cause of death. Though he doubtless in good faith believed that the certificate stated that decedent died of influenza, there is nothing in the record to show that there was any reasonable ground for such belief. A copy of the original certificate was on file in the office of the local registrar at Los Angeles, and, upon the payment of the trifling sum of 50 cents, a certified copy could have been obtained and presented to the court with the application for the subpoena; or counsel himself could have examined the record in the local registrar's office, and, having done so, could have presented with his motion for the subpoena an affidavit setting forth what the certificate showed the cause of death to be. Had he pursued either of these courses, the record here, if it were a full and correct transcript of the proceedings in the court below, would have enabled us to see whether the death certificate showed the cause of death to be other than as contended for by the prosecution. In the absence of something in the record before us disclosing what the death certificate did show as to the cause of death, we cannot say that the court erred in refusing to order the issuance of a subpoena for its production. Error warranting a reversal must affirmatively appear in the record, otherwise this

court cannot determine whether a substantial right of a defendant has been prejudiced by a ruling assigned as error. *People v. Harris*, 169 Cal. 64, 145 Pac. 520. The case falls within the principle of those authorities which hold that where documentary evidence is offered and refused, the contents of the writing, or so much thereof as is necessary to show that error has been committed, should be set forth in the record on appeal, in order that the court may determine whether the rejection of the offered writing was prejudicial to any substantial right of the appellant. *San Francisco, etc., Agency v. Hogan Co.*, 6 Cal. App. 408, 92 Pac. 312; *In re Angle*, 148 Cal. 102, 82 Pac. 668. Nor will the statement of counsel, made to the court at the time of the offer, supply the lack of the document itself, or of so much thereof as may be sufficient to enable the appellate court to determine whether its rejection was prejudicial. *Bensch v. Farnsworth*, 9 Ind. App. 547, 34 N. E. 751, 37 N. E. 284. Though appellant could have procured from the local registrar a certified copy of the record in his office, upon paying the fee of 50 cents, he argues that, "where the issues are as serious as they were in this murder case, the defendant would only be fully equipped against all quibble by the production of the original document before the jury, supplemented by proof of the handwriting of the physician whose name was signed to the document." This argument proceeds upon the false assumption that the original certificate, signed by Dr. Finch, was on file in the office of the local registrar at Los Angeles. The trial did not take place until some months after the homicide; and, presumably, the original, signed by Dr. Finch, was at that time on file in the office of the state registrar at Sacramento, where the local registrar, after making a copy for his office, was required by section 19 of the act to send it.

The judgment and the order denying a new trial are affirmed.

We concur: SLOANE, J.; THOMAS, J.

SCHAAD v. BARCELOUX. (Civ. 1828.)

(District Court of Appeal, Third District, California. July 23, 1919.)

1. APPEAL AND ERROR §918(1)—OVERRULING MOTION TO STRIKE AMENDED COMPLAINT PRESUMED TO BE JUSTIFIED.

Order overruling defendant's motion to strike plaintiff's amended complaint must be presumed to have been justified by the facts, in the absence of anything in the record to the

contrary, and if at the hearing of the motion it appeared that the amended complaint was filed as of course, under Code Civ. Proc. § 472, and not by leave of court, some memorial to such effect should have been incorporated in the bill of exceptions; otherwise regularity of proceedings will be presumed.

2. PLEADING §248(17)—AMENDMENT OF COMPLAINT NOT CHANGING CAUSE OF ACTION BUT REMEDY ALLOWABLE.

Amended complaint alleging plaintiff's ownership of corporate stock, delivery of the certificate to defendant under a pooling agreement, sale of the franchise and property of the company, with extinguishment of the trust and conversion by defendant of plaintiff's shares to his own use, *held* not to have introduced an entirely new and different cause of action, the original complaint having alleged delivery of the stock to defendant as trustee under the pooling agreement, sale of the company's property, and defendant's refusal to account to plaintiff for his proportionate share of the proceeds; the remedy only, not the cause of the action, having been changed by the amendment.

3. APPEAL AND ERROR §757(1)—ON APPEAL BY ALTERNATIVE METHOD PARTIES MUST PRINT NECESSARY PORTIONS OF RECORD IN BRIEFS.

Under Code Civ. Proc. § 953c, in filing briefs on appeal taken under the alternative method, both parties must print such portions of the record as they desire to call to the attention of the court, as in support of a contention that denial of defendant's motion for nonsuit was erroneous.

4. TRIAL §419—ON DENIAL OF NONSUIT FAILURE TO ATTACK VERDICT ADMITS SUFFICIENCY OF EVIDENCE.

Where, though plaintiff did not make out a prima facie case, defendant introduced evidence, oral and documentary, on the merits, which was followed by further evidence introduced by plaintiff, the order denying defendant's motion for nonsuit, at the close of plaintiff's evidence, will not be disturbed, defendant not having attacked general verdict or special findings for plaintiff, thus conceding the evidence had supplied any deficiency existing when motion for nonsuit was made.

5. CORPORATIONS §116—ON CONVERSION OF STOCK BY TRUSTEE LIABLE FOR ITS VALUE.

Where corporate stock was delivered to plaintiff by the promoter of the company in consideration of services, and plaintiff deposited the stock with defendant, as trustee, under a pooling agreement, and defendant, in violation of his trust, by collusion with the promoter surrendered plaintiff's certificate to the promoter, who had it canceled, and a new certificate issued to him, defendant was guilty of a conversion, and liable to plaintiff for the return of his certificate or its value before any dissolution or winding up of the company, which would involve no violation of Civ. Code, § 309.

6. EVIDENCE §121(6)—DECLARATIONS OF THIRD PERSON ADMISSIBLE AS RES GESTÆ.

In an action for the conversion of corporate stock by the trustee under a pooling agreement,

testimony as to declarations made by the promoter of the company to plaintiff, though not in the presence of defendant, tending to dispute defendant's claim of ownership of the stock in the promoter, *held* admissible as part of the *res gestæ*.

7. APPEAL AND ERROR §=1050(1)—ADMISSION OF EVIDENCE AS TO DECLARATIONS HARMLESS WHERE FACT OTHERWISE SHOWN.

In an action for conversion of corporate stock against the trustee under a pooling agreement, admission in evidence for plaintiff of testimony as to declarations made by the promoter of the company to plaintiff as to ownership, though not in the presence of defendant, if erroneous, *held* harmless to defendant.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by C. L. Schaad against H. J. Barceloux. From judgment for plaintiff, defendant appeals. Affirmed.

C. L. Donohoe and W. T. Belleu, both of Willow, for appellant.

Frank Freeman and George R. Freeman, both of Willow, for respondent.

CHIPMAN, P. J. The original complaint in the action had for its object to recover the value of certain 5,000 shares of the capital stock of the Glenn County Telephone Company, evidenced by certificate No. 12, of which plaintiff claimed to be the owner on March 14, 1908. Subsequently to the filing of the original complaint, plaintiff filed an amended complaint alleging that defendant had converted said shares, and praying for the judgment of the court that said shares be returned to plaintiff or that defendant pay the value thereof. Defendant filed a motion to strike out portions of the first amended complaint for the following reasons:

"(1) That no order was had or obtained for the filing of said first amended complaint; or if an order was had or obtained for the filing of said amended complaint, the same was not filed within the time allowed by law or by the court; (2) that said amended complaint changes the original cause of action, from an action in contract to an action in tort, and that said first amended complaint is not germane to the issues as framed by the original pleadings, and introduces a different cause of action."

It was alleged in the original complaint that on March 14, 1908, plaintiff deposited a certain certificate No. 12, with defendant as a trustee under the terms of a certain pooling agreement, a copy of which is attached to the complaint and made a part hereof; that this pooling agreement provided that the stock so deposited with defendant was to be pooled for 10 years from that day for the purposes set forth in said agreement; that said pooling agreement was entered into between plaintiff and defendant and several

other stockholders of said company on March 14, 1908, and, among other things, provided that the signers of said agreement represented 51 per cent. of the capital stock of said company, and they agreed that the stock should be vested in a trustee for their benefit for 10 years after the incorporation of said company, the said shares to be voted in a body for any and all purposes during that period, and that the votes to be cast, whether for directors, or any other purpose, should be cast as a whole, agreeable to the direction or control of a majority of the 51 per cent. of said stock; that each of the signers was the owner of a specified number of shares, of which the agreement showed that plaintiff owned 5,000 shares; that defendant owned 12,000 shares, and that pursuant to, and to attain the purposes mentioned therein, the certificates of stock belonging to the signers should be placed in the physical possession of defendant, to be held by him during that period; that said certificates of stock, representing 51 per cent. which had been, or might be, issued to the signers should bear the indorsement showing that it was subject to said pooling agreement; that during the time covered by the agreement no part of the stock should be sold or transferred except by consent of a majority of the owners, and that defendant accepted such trusteeship and agreed to and did accept physical possession of said certificate subject to the terms of said pooling agreement.

It is further alleged in the complaint that in December, 1915, the franchise and property of said company were sold for \$83,000, the company receiving that amount on account of such sale; that, deducting the indebtedness of the company, there remained the balance of \$51,500, to be divided among the 100,000 shares of stock of said company then outstanding; that defendant received from the corporation all moneys due the plaintiff from said incorporation on account of his said 5,000 shares of stock, amounting to \$3,000, and before the commencement of this action plaintiff demanded the same of defendant, and that defendant refused and still refuses to account to plaintiff therefor, or for any sum of money due him, as owner of the said stock; that defendant has converted the money to his own use; that the owners of said stock received from the said sale \$0.60 per share, as their proportion of the proceeds thereof.

The complaint also sets forth a second cause of action in the form of a common count for money had and received by defendant for and on account of plaintiff, and for the use of plaintiff, in the sum of \$3,000, and it was alleged that defendant became indebted to plaintiff for that sum, and, though often requested to pay the same, had failed at all times to do so.

The original complaint was filed on or about May 8, 1916. Defendant demurred thereto, which being overruled, he filed his answer to the complaint on July 10, 1916. In his answer he denied plaintiff's ownership of said certificate of said shares, evidenced by said certificate No. 12, but admitted that on March 14, 1908, plaintiff deposited said shares with defendant, as trustee, under the terms of said pool agreement, and admitted that ever since he has retained the possession thereof, subject to conditions as later in the answer alleged, and admitted that said indorsement and delivery of said stock to defendant was for the purpose set out in said pool agreement; admitted that during the month of December, 1915, the franchise and property of the said company was sold to the Sacramento Valley Telephone Company, and alleged that the sum of \$40,311.40 and \$10,000 in bonds remained to be divided among the stockholders, after deducting the indebtedness of said company; denied that defendant received from said company any money alleged to be due plaintiff from said company on account of the alleged ownership of said 5,000 shares; and denied that he received any money on behalf of plaintiff on account of or by virtue of the alleged possession of any stock of said company.

Admits that prior to the commencement of said action plaintiff demanded of defendant all moneys received by him on account of the said shares, and admits that defendant refused and now refuses to account to plaintiff for the sum, or any sum of money, on account of said shares, and denies that plaintiff herein has converted said shares, or anything of value, to his own use to the detriment of plaintiff herein; denies that all of the owners of the shares of stock of said company received \$0.60 per share, but alleges that some received that amount, others received \$0.50 per share, and still others received bonds in lieu of their said stock; denied that the value of said alleged 5,000 shares of stock was of the value of \$3,000.

Further answering the said complaint, the defendant denies that he had received for, or on account of, plaintiff the sum of \$3,000, or any other sum; denies that he is indebted to plaintiff in said sum or any sum whatever; admits demand and refusal as alleged in the complaint.

For a further and separate defense, defendant alleges that on or about the month of March, 1908, one A. S. Lindstrom was the owner and in possession of 51,500 shares of the capital stock of said company, and at that time said Lindstrom had a contract with the said Glenn County Telephone Company by which he was obligated to pay certain expenses connected with the organization of the said Glenn County Telephone Company; that on or about the month of March, 1910, said

Lindstrom contracted and agreed to and with the plaintiff herein that if the said plaintiff "would pay and defray one-fifth of said organization and promotion expenses of said Glenn County Telephone Company, a corporation, that he, the said A. S. Lindstrom, would convey to the said plaintiff, C. L. Schaad, and cause to be transferred to him on the books of said corporation, 5,000 shares of the capital stock of said corporation, Glenn County Telephone Company, to be and remain the sole and exclusive property of the said C. L. Schaad, as soon as and when the said C. L. Schaad should pay his one-fifth of the expenses of the organization and promotion of said corporation"; that, plaintiff agreed thereto, and that in consideration of said shares he would pay and defray one-fifth of the said expenses; that thereafter, and in pursuance of said agreement, said Lindstrom did convey to plaintiff and cause to be transferred on the books of said corporation, subject to the conditions above specified, 5,000 shares of the capital stock of said company, and had issued to him certificate No. 12, evidencing said shares.

The answer then alleges the termination of said pooling agreement referred to in the said complaint, by the terms of which the defendant herein was made a trustee of all the parties thereto, and that at said time plaintiff indorsed to defendant and delivered to him, as such trustee and as part of said pooling agreement, said certificate No. 12; that by the terms of said agreement between said Lindstrom and said plaintiff, the title and ownership of said 5,000 shares and said certificate No. 12 was to remain in and be the property of said Lindstrom until the plaintiff had fully paid his part of said expenses; that thereafter there became due and payable on account of the expenses of the organization of said company the sum of \$—— from said Lindstrom, and that thereafter, on or about the —— day of March, 1909, said Lindstrom demanded of plaintiff herein that he pay to said Lindstrom his said one-fifth of said expenses, but plaintiff refused and ever since has refused so to do; that thereafter, in the month of September, 1909, the said Lindstrom notified plaintiff that on account of his failure and refusal to defray his part of said expenses that he, the said Lindstrom, rescinded the said agreement, and demanded a redelivery to him of said certificate No. 12, and that said plaintiff failed and refused so to do, or to authorize the defendant herein to redeliver the said certificate to the said Lindstrom; that in the month of April, 1910, said Lindstrom demanded of said defendant herein the redelivery to him of the said certificate No. 12, held in the name of plaintiff, as aforesaid, on account of the failure of plaintiff to comply with the terms of his agreement, and to withdraw said certificate from said pooling

agreement, and that said certificate be canceled.

That thereafter said certificate of stock was withdrawn from said pooling agreement and redelivered to said Lindstrom, and was canceled on the books of said corporation, and the certificate issued to said Lindstrom in lieu thereof, and the same was thereafter delivered by said Lindstrom to said defendant herein, and again placed in said pooling agreement; that said defendant now holds said certificate as trustee under the terms of said pooling agreement, and ever since the said month of April, 1910, said Lindstrom has been the owner and now is the owner of said certificate, "and ever since the said time, the plaintiff has had no interest in or to said certificate of stock in any manner whatever or at all"; that by reason of the plaintiff's refusal to comply with the terms of his said contract with said Lindstrom in not making the payments connected with the organization expenses of said company, the said plaintiff never became the owner of said stock, or entitled to any of the proceeds arising therefrom.

On September 5, 1916, defendant filed an amended answer, substantially the same as before, but, in addition thereto, pleaded the statute of limitations. On March 26, 1917, plaintiff filed an amended complaint on which the action was tried. It was alleged in the amended complaint that plaintiff is the owner of 5,000 shares of the capital stock of the Glenn County Telephone Company, evidenced by certificate No. 12 of said corporation, and that on that day he deposited the said certificate with defendant as aforesaid, under the terms of a certain pooling agreement, "a copy of which is attached to the original complaint, marked 'Exhibit A', and made a part thereof, and by reference said 'Exhibit A' is hereby made a part of this first amended complaint"; alleges the sale of the property and franchise of said company, in December, 1915, and "that the purposes of said trust ceased and said trust was extinguished, and that defendant converted said 5,000 shares of the capital stock of said corporation to his own use, and at that time claimed and asserted, and now claims and asserts, that plaintiff has no interest or ownership in or to said 5,000 (\$5,000) shares of stock, and then repudiated and now repudiates his trust in connection therewith"; alleges the value of said stock to be the sum of \$3,500, and prays judgment for the return of said shares or the sum of \$3,500, the value thereof, with interest thereon from December 15, 1915.

On April 2, 1917, defendant filed a motion to strike out portions of the amended complaint on the grounds heretofore stated, which motion being denied, the defendant answered plaintiff's amended complaint, in which he denied plaintiff's alleged ownership

of said shares of said corporation, admitted that on the 14th day of March, 1908, he deposited said certificate with defendant, as trustee under the terms of said pooling agreement; admitted that during the month of December, 1915, the franchise and property of said company were sold to the Sacramento Valley Telephone Company, but denied that the purposes of the trust under the said pooling agreement "then or ever ceased or was ever extinguished"; denied that defendant converted said 5,000 shares to his own use or at all; denied that he had ever asserted that plaintiff has no interest or ownership in said shares except as herein and hereinafter set out and described; denied that defendant at any time repudiated or repudiates his trust in connection with said 5,000 shares of stock, and alleges the fact to be that said trust is now in full force and effect; denies that said shares were of the value of \$3,500, or any greater sum than the sum of \$—; alleges that in April, 1910, he delivered said certificate of stock to one A. S. Lindstrom and that ever since said time said defendant has not had in his possession or under his control said certificate No. 12.

For a further defense, defendant set up particularly all the facts stated in his answer to the original complaint and the amendments thereto.

Defendant, also, on September 11, 1917, filed what purports to be an amended answer to plaintiff's amended complaint; the pleadings are verified. The cause was tried by the court with a jury, and a verdict was rendered on September 28, 1917, in which the jury found "in favor of the plaintiff for a return of the certificate of stock, being certificate No. 12 for 5,000 shares of the capital stock of the Glenn County Telephone Company, a corporation, being the same certificate of stock referred to in plaintiff's complaint herein, or for the value thereof in case a return cannot be had, to wit, the sum of \$1,816.60 and interest, from December 1, 1915."

Certain particular questions of fact were submitted to the jury and answered as follows:

"(1) At the time of the delivery of certificate No. 12 for 5,000 shares of the capital stock of the Glenn County Telephone Company to the plaintiff C. L. Schaad, was it understood and agreed between A. S. Lindstrom and the plaintiff that the title to said stock was not to pass to the plaintiff until he paid to Lindstrom one-fifth of the moneys expended by Lindstrom in connection with the promotion and organization of the said telephone company? Answer: No.

"(2) When did the defendant Barceloux deliver said certificate No. 12 to A. S. Lindstrom? Answer: April 6, 1910.

"(3) Did the plaintiff Schaad consent to the delivery of said certificate No. 12 by the defendant Barceloux to said Lindstrom? Answer: No.

"(4) When did plaintiff Schaad first learn that the defendant Barceloux had delivered said

certificate No. 12 to Lindstrom? Answer: Latter part of 1915."

Judgment passed for the plaintiff in accordance with said verdict. Defendant moved for a new trial, and, his motion being denied, appealed from the judgment, and has brought up the record under the alternative plan, pursuant to section 953a, etc., of the Code of Civil Procedure.

[1] 1. As to plaintiff's alleged ground for his motion to strike out the amended complaint: The record shows nothing in relation thereto except the recital in the amended complaint, the motion to strike out, and the order overruling the motion. The amended complaint reads:

"Now comes the plaintiff, and, leave of court having been first had and obtained, files this his amended complaint."

Appellant claims that the amended complaint was filed "as of course" under section 472, Code of Civil Procedure. It does not so purport to be. On the contrary, it purports to have been filed by leave of the court "having been first had and obtained." This recital not only negatives the inference that the pleading was filed "as of course" under leave given by section 472, but shows on its face that it was filed after leave given by the court. The order overruling the motion must be presumed to have been justified by the facts in the absence of anything in the record to the contrary. If at the hearing of the motion it was made to appear, as defendant now claims was the fact, some memorial to that effect should have found its way into the bill of exceptions. Otherwise, the regularity of the proceedings will be presumed.

[2] 2. By plaintiff's amended complaint, was "an entirely new and different cause of action introduced into the case," as claimed by defendant? Substantially the facts constituting the cause of action set forth in the original complaint also constitute the cause of action set forth in the amended complaint. In the original complaint plaintiff alleged ownership of certain shares of the Glenn County Telephone Company, which plaintiff delivered to defendant as trustee under the alleged pooling agreement; that subsequently the company sold all its property and franchise to the Sacramento Valley Telephone Company, thus realizing a certain sum of money of which defendant received a certain portion on account of said shares so held by him as trustee; that defendant demanded the money so received by him, "but that defendant refused and now refuses to account to plaintiff for said sum or any sum received from the sale of said property and due to the plaintiff as the owner of 5,000 shares of said capital stock, and said defendant has converted said sum and all of them to his own use."

In his amended complaint plaintiff alleges

his ownership of these same 5,000 shares in said telephone company, evidenced by certificate No. 12; that plaintiff delivered said certificate to defendant under said pooling agreement made part of both the original and amended complaint; that the franchise and property of said telephone company were sold and the purposes of said trust ceased and said trust was extinguished and "that defendant converted said 5,000 shares to his own use, and claimed and now claims that plaintiff has no interest in said shares, and that defendant 'then repudiated and now repudiates his trust in connection therewith'; alleged the value of said shares, and prayed for judgment for their return or the value thereof."

As to the two pleadings the identity of the facts, constituting the cause of action, is plainly perceivable. In the original complaint plaintiff sought to recover the value of the shares which it was alleged defendant received and converted to his own use. In the amended complaint he sought to recover the shares or their value. Technically the amended complaint might be said to "sound in tort," but in reality the amended complaint sets forth the defendant's obligation, as did the original complaint, and the obligation was the cause of action in both pleadings.

The cause of action was not changed by the amendment, but only the remedy was changed. Mr. Pomeroy points out the difficulty in framing a complaint under reformed pleadings in actions for conversion of chattels, and the like wrongs, that will show on its face that the plaintiff has elected to bring his action either in tort or in contract. "The very facts which are alleged in the action of tort are the facts from which the promise is inferred, and according to the true theory of pleading, these facts must be stated in the action *ex contractu*, without any legal inferences or conclusions. It conclusively follows that, in this general class of liabilities, as the facts which constitute the cause of action are the same in each, the averments of the complaint or petition must be the same in each kind of action, if the essential principles of the reformed system are complied with, so that it is impossible to indicate upon the face of the pleading alone the election which the plaintiff has made." Pomeroy's Code Remedies (4th Ed.) § 464. In whatever class the original complaint may be placed, whether *ex contractu* or *ex delicto*, if, as we think is true, the amended complaint, in its material elements, is the same as the original complaint, no new cause of action is pleaded therein. Not only does this similarity of facts exist, but the same evidence would be admissible in support of both the original and amended complaints. *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53, is an instructive case, as showing that where the cause of action set up in the original and amended complaint was simply the obliga-

tion sought to be enforced, an amendment may be made which merely changes the remedy. As stated in a syllabus, it was there held that—

"All that can be required is that a wholly different cause of action, which is entirely foreign to the original cause of action, cannot be introduced, and that the plaintiff cannot be allowed to strike out the entire substance and prayer of his complaint, and insert a new case by way of amendment."

The Supreme Court, in *Glougie v. Glougie*, 174 Cal. 126, 162 Pac. 118, had the question before it. In considering the original and amended complaint the court said that:

"In both cases the fundamental equitable consideration was the same, namely, was there a breach of trust by virtue of which the defendants were inequitably retaining possession of property rightfully belonging to plaintiff?"

In *Born v. Castle*, 22 Cal. App. 282, 134 Pac. 347, *Frost v. Witter*, supra, is cited, and the rule stated in 1 Ency. Pleading and Practice, 564, is approved:

"As long as the plaintiff adheres to the contract of injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter—another subject of controversy—or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony."

[3] 3. At the close of the evidence submitted by plaintiff a motion for nonsuit was made by defendant and denied by the court. This evidence is found in the first 17 typewritten pages of the reporter's transcript. The grounds of the motion are that the evidence was insufficient to sustain the issues in several particulars pointed out in the motion. The Supreme Court and the several District Courts of Appeal have many times called attention to section 953c of the Code of Civil Procedure, which reads:

"In filing briefs on said appeal [taken under the alternative method] the parties [not one but both] must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

Utter disregard of this provision by attorneys in presenting their briefs has led the appellate courts to warn attorneys that the law must be obeyed if they expect to avoid the consequences that may follow their dereliction. In *Miller v. Oliver*, 174 Cal. 404, 163 Pac. 357, where the appellant, after his attention was called to the matter, failed to print any part of the record in his brief, the court said:

"In the face of this contumacy, the court would be justified in affirming the judgment without further consideration."

In *Barker Bros. v. Joos*, 171 Pac. 1085, no portions of the record were printed in appellant's brief; reference being made to pages of the typewritten transcript only. Said the court:

"It has been repeatedly held that appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether grounds exist for the reversal of the judgment appealed from"—citing twelve different cases, to which others, subsequently decided, may be added.

Attorney for appellant calls attention to certain folios of the transcript as showing the evidence upon which the objection was considered, and refers to certain exhibits to be found at certain folios. Attorneys for respondent do no more.

[4] Inasmuch as plaintiff's prima facie case is made in a few pages, we have read this part of the record, and, while some facts might have been brought out more clearly, we think enough appeared which, with the admissions in the pleadings, justified the court in denying the motion. But if the court erred, the order will not be disturbed in view of the fact that defendant then took up the matter of his defense and introduced evidence oral and documentary upon the merits of the case, which was followed by further evidence of like character introduced by plaintiff, the record comprising nearly 500 typewritten pages. *Van Horn v. Pac. Refining Co.*, 27 Cal. App. 105, 110, 148 Pac. 951, and cases cited.

It was upon this evidence that the jury rendered a general verdict in favor of plaintiff, and also made answer to the special questions submitted to them. Appellant has not attacked the general verdict or special findings of fact. This must be taken as a concession that the evidence supplied any deficiency existing when the motion for nonsuit was made. If the sufficiency of the evidence to sustain the verdict were challenged, we would feel at liberty to affirm the judgment for the failure of the parties in dealing with the evidence to comply with the statute already pointed out.

[5] It was urged in support of the motion for nonsuit that the stock in question was part of the assets of the corporation, and that in seeking to have it returned or its value plaintiff not only sought to have defendant violate the pooling agreement, but also sought to compel him to distribute the assets of the corporation before its dissolution or the winding up of its affairs, contrary to the provisions of section 309 of the Civil Code, citing *Kohl v. Lilienthal*, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, and *Tapscott v. Mexican Colo. etc., Co.*, 153 Cal. 664, 96 Pac. 271. It will be recalled that defendant's special defense was that this stock belonged to Lindstrom, who had agreed to sell

it to plaintiff conditionally, and that, the conditions having been broken, it never became plaintiff's. There was evidence that this defense was unfounded, and that the stock was delivered to plaintiff by Lindstrom (the promoter of the company) in consideration of services rendered and to be rendered by plaintiff in connection with the enterprise; that it was placed in the pool in plaintiff's name, the agreement reciting that it belonged to him, and this agreement was signed by Lindstrom and by defendant, among other stockholders; that without plaintiff's knowledge or consent defendant surrendered the certificate, evidencing these shares to Lindstrom under circumstances tending to show that defendant was acting in collusion with Lindstrom to deprive plaintiff of any benefit arising from his ownership, and that defendant took part in causing the certificate to be canceled and reissued to Lindstrom and placed back in defendant's possession as Lindstrom's; that defendant denied plaintiff's ownership of the stock, or that he had any right to share as such in the proceeds of the sale of the company's property, or otherwise to participate in any benefits as a stockholder. Defendant was guilty of a gross violation of his trust, and by thus surrendering the certificate to Lindstrom for the purpose of having it canceled and reissued to Lindstrom defendant was guilty of conversion, and became answerable to plaintiff for its return or the value thereof. We can see no necessary connection of defendant's liability to plaintiff with the sale of the company's property. If that sale was invalid and the distributees of the proceeds of the sale should be compelled to restore the money to the company's treasury, defendant must look to Lindstrom, in whose name this certificate now stands, for protection. Plaintiff calls attention to section 1825 of the Civil Code, which requires a bailee to give prompt notice to the bailor "of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him," and, also, to the rule that a bailee in an action brought against him by the bailor cannot set up the title of a third person except by the authorization of that person, citing several cases. It is pointed out that defendant surrendered the certificate to Lindstrom, of which fact plaintiff knew nothing until long after defendant had received it back as issued to Lindstrom.

Attention is also called to the fact that in his answer the defense is confined to the statement that no notice was given to plaintiff of the delivery of the certificate to Lindstrom or of Lindstrom's claim to it until after the delivery had been made; and it is

claimed that the answer is wholly inadequate in view of the provisions of the Civil Code, §§ 1822-1826.

[8, 7] 5. There remains but one other point made in defendant's brief, namely, that the court erred in admitting certain testimony. In support of Lindstrom's claim of ownership of the shares in question he testified that the sale to plaintiff was conditional and on the terms stated in his answer. Certain witnesses were called by plaintiff, and over objection were permitted to testify to certain declarations made by Lindstrom to plaintiff not in the presence of defendant, tending to dispute the claim of ownership. These statements were made while the Glenn County Telephone Company was in process of organization, and were admitted for the twofold purpose: First in rebuttal of Lindstrom's testimony; and, second, as corroboration of the fact, directly testified to by plaintiff, that Lindstrom was to and did deliver to plaintiff the shares in question for plaintiff's services in organizing the company and subsequently to be rendered thereto. The character of this testimony may be judged from the following answer of one witness, who was asked to state what had been said to plaintiff by Lindstrom about the stock:

"He told him that they wanted him in the Glenn County Company; that they desired to have him very much; that he was a large stockholder there in the Colusa County Company, and it would assist him a great deal in having him in this company; that they wanted him, and he also told him that he would be in the division of the promotion stock if he came in."

There was testimony that subsequently Lindstrom caused 5,000 shares to be issued to plaintiff in consideration of his influence and services in effectuating the organization of the company. These declarations were made before defendant had anything to do with the shares, and at a time when the acts or declarations of Lindstrom did not concern him. They related wholly to plaintiff and Lindstrom and to the effort the latter was making to induce plaintiff to interest himself in the proposed company. They may properly be classed as part of the *res gestae*. There was direct and positive testimony that the shares were delivered to plaintiff in consideration of his services rendered and to be rendered, and whatever view may be taken of these so-called declarations they were not prejudicial.

Our conclusion is that the judgment should be affirmed; and it is so ordered.

We concur: HART, J.; BURNETT, J.

HALE v. KENNEDY et al. (Civ. 2652.)

(District Court of Appeal, Second District, Division 1, California. July 25, 1919.)

1. QUIETING TITLE \Leftrightarrow 2—ACTION TO QUIET TITLE TO PERSONALTY NOT MAINTAINABLE.

A general demurrer to a complaint seeking a judgment determining that plaintiff was the sole owner of certain promissory notes secured by mortgages, should have been sustained, because an action to quiet title to personal property does not lie.

2. APPEAL AND ERROR \Leftrightarrow 867(3)—ON APPEAL FROM DENIAL OF NEW TRIAL OVERRULING GENERAL DEMURRER NOT REVIEWABLE.

The overruling of a general demurrer to a complaint cannot be considered where the appeal is only from an order denying a motion for new trial, in which the sufficiency of the complaint was not an issue.

3. APPEAL AND ERROR \Leftrightarrow 1011(1)—CONCLUSION OF COURT ON CONFLICTING EVIDENCE NOT REVIEWABLE.

The matter of resolving conflicting evidence is for the trial court, and if any substantial conflict appears, the appellate tribunal has no right to disturb the conclusion of the trial judge.

4. HUSBAND AND WIFE \Leftrightarrow 133(1)—EVIDENCE SUFFICIENT TO SUSTAIN FINDING THAT PERSONALTY BELONGED TO WIFE.

In widow's action to determine that the sole ownership of certain promissory notes secured by mortgages was in plaintiff, *held* that testimony as shown by a statement of the case shows some substantial evidence to sustain the findings of the trial judge for plaintiff.

5. HUSBAND AND WIFE \Leftrightarrow 131(2)—PRESUMPTION THAT CONVEYANCE TO WIFE WAS HER SEPARATE PROPERTY APPLIES TO PERSONALTY.

In an action brought to secure judgment determining certain promissory notes secured by mortgages, to be the sole property of plaintiff, the presumption under Civ. Code, § 164, that where conveyance is made to a married woman title is vested in her as her separate property, *held* to apply to notes and mortgages, the proceeds of certain property sold; the question for the trial judge being whether the presumption had been overcome.

6. HUSBAND AND WIFE \Leftrightarrow 49½(8) — THAT NOTES AND MORTGAGE WERE MADE TO WIFE EVIDENCE OF GIFT TO HER.

In a widow's action to secure a judgment determining that the sole ownership of certain notes secured by mortgages was in her, the fact that the notes were made to the wife, with the incidental mortgages, is some evidence of a gift by her husband.

7. HUSBAND AND WIFE \Leftrightarrow 49½(8)—TERMS AND FORMAL DECLARATIONS UNNECESSARY TO GIFT TO WIFE.

It is not necessary that a husband should in terms and formally declare that he present-

ed his interest in property consisting of notes and mortgages to his wife, but circumstances consisting of conduct, words and admissions may be sufficient to establish the fact of a gift.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Bridget O'Neill against Mary G. Kennedy, administratrix of the estate of Michael O'Neill, deceased, and others. Judgment for plaintiff, and from an order denying defendant administratrix's motion for a new trial, the latter appealed, and pending the appeal, Kate Hale as administratrix of Bridget O'Neill, deceased, was substituted as plaintiff. Order appealed from affirmed.

G. Roy Pendell and Pendell & Gleason, all of Los Angeles, for appellant.

Kemper B. Campbell and A. W. Sorenson, both of Los Angeles, L. B. Hibben, and Frank P. Doherty, of Los Angeles, for respondents.

JAMES, J. Bridget O'Neill and Michael O'Neill, now deceased, were husband and wife. The husband died in January, 1913, leaving surviving him a widow, two sons and two daughters. One of the daughters, Mary G. Kennedy, procured letters of administration to represent the estate of Michael O'Neill. The widow, Bridget O'Neill, held title to some real property, the same standing of record in her name, and she brought first an action against the administratrix of her husband's estate for the purpose of having it determined that such property was her sole and separate estate. She succeeded in that action and obtained judgment. Subsequently she brought this action against Kennedy, administratrix, to secure a like judgment determining that she was the sole owner of six promissory notes secured by mortgages. She was successful in this action, and the administratrix of the husband's estate has taken an appeal from an order denying her motion for a new trial. Pending the hearing on this appeal Bridget O'Neill died, and Kate Hale, another of the daughters, has been substituted plaintiff herein, she having been appointed administratrix of her mother's estate.

[1] The subject of this action, as has already been stated, concerns promissory notes, with the mortgage security which was incidental thereto. The notes and mortgages were all taken in the name of Bridget O'Neill. In passing, we note that there was a demurrer to the complaint made upon the ground that no sufficient cause of action was stated. Evidently the demurrer should have been sustained, because an action to quiet title to personal property does not lie. This has been directly decided in this state. *Fudickar v. East Riverside I. Dist.*, 109 Cal. 29, 38, 41 Pac. 1024; *Lamus v. Engwicht*, 179 Pac. 435.

[2] We are not permitted to consider that matter, however, as the appeal is only from

an order denying a motion for a new trial, under which the sufficiency of the complaint cannot be reviewed. *Wadman v. Burke*, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330.

[3] The question to be reviewed under the appeal from the order denying the motion for a new trial is as to the sufficiency of the evidence to sustain the judgment. At the outset of a consideration of the question we may reiterate the oft-repeated statement of the rule that the matter of resolving conflicting evidence is for the trial court, and that if any substantial conflict appears the appellate tribunal has no right to disturb the conclusion reached by the trial judge.

[4] And our conclusion is, after a careful examination of the testimony as shown in the statement of the case, that there was some substantial evidence to sustain the findings of the trial judge. Enumerating briefly the promissory notes mentioned in the complaint, all of which were secured by mortgages, there were: The note of Hendersons for \$1,110; the note of Wilcoxes for \$1,621.80; the note of Gerwings for \$1,000; the note of Webbs for \$1,500; the note of Rusts for \$2,100, and the note of Fred and Clara O'Neill for \$750. The complaint shows that at the time of the commencement of the action the notes of the Hendersons and Webbs had been paid to Bridget O'Neill, and that she held the proceeds. The O'Neills, husband and wife, came from Ireland to the United States in 1860. At the trial Bridget testified that she had some money when she arrived in America, and that when she married Michael he had nothing; that she worked out and accumulated some money which she converted into paper money called "shinplasters"; that the couple lived in New York for two years and then moved to Iowa, and that at that time she used about \$800, investing in a cow and building a house; that they later moved to Michigan, where she gave her husband some money, with which he purchased four acres of ground. Various purchases of real estate were thereafter made, and considerable profit was realized on the transactions, especially on the real property acquired in California, to which state the family removed a number of years prior to Michael's death. Bridget testified that after making the purchase of land in Michigan with the money which she had saved prior to the marriage, and with money received from crops growing on the land and chickens, pigs, and calves which she sold, she made complete payment on the Michigan property. In that connection she testified as follows: "My husband, Michael O'Neill, told me that I could have, as my separate property, all moneys received from the sale of potatoes, chickens, pigs, calves, butter, eggs," etc. While in Michigan she received \$250 from an estate of her aunt. She loaned this \$250 to her husband, taking his promissory note for it,

which she testified had not been paid. The Michigan farm was sold for \$2,000 and 40 acres of land, \$1,000 of the money being used to repay a loan, and the 40 acres received were mortgaged for the sum of \$1,000. Some property was purchased in Pomona, Cal., consisting of several parcels. Some property was purchased in South Pasadena, this state.

[5] During the residence of the family in California \$1,000 was received by Bridget as beneficiary under a life insurance policy after the death of her son. This \$1,000 was used to pay a portion of the purchase price of the Pomona property. Between the years 1863 and 1880 nine children were born to the O'Neills. Bridget O'Neill testified that her husband's health was not good, and that he was not able to work a great deal; that this was particularly true as to the latter years of their residence in California. It appears that the husband was suffering from cancer of the face, which was of some years' standing. The notes mentioned in the complaint were all received to represent a portion of the proceeds upon the sales of various parcels of real property owned by the O'Neills. The deeds to what we will call the Webb property and the Fred and Clara O'Neill property, as originally made, were directly to Bridget O'Neill. The deeds to the other property were made in the name of Michael O'Neill. It is the contention of appellant that section 164 of the Civil Code, which provides that in case a conveyance is made to a married woman the presumption is that the title is vested in her as her separate property, does not apply to notes and mortgages taken in the name of the wife. It is very evident that this presumption does apply to the proceeds of the property sold to the Webbs and to Fred and Clara O'Neill, and that the question for the trial judge in the case of those notes was to determine whether the presumption had been overcome.

[6] Conceding that the presumption did not apply to the other notes, the question was as to whether there was sufficient evidence to indicate that the other property had always been the separate property of Bridget O'Neill, or whether a gift of it had been made to her by the husband. The fact that these notes were made to the wife, with the incidental mortgages, is certainly to be taken as some evidence tending to show a gift by the husband. We cannot, as counsel seem to suggest we should, assume that these mortgages may have been taken without the knowledge of the husband, for it was necessary for the husband to make a deed of the property to the grantees, and the court would be altogether justified in inferring that he knew of the mortgages being made in the name of the other spouse, even though there was no evidence indicating such knowledge. But there was evidence to indicate that the husband intended that the wife should have this property as her separate estate. A neighbor of

the O'Neills living at Pomona, testified that in conversation with the husband the latter referred to some real estate at San Bernardino which Mrs. O'Neill was about to purchase, and that O'Neill "just told me that mother had bought a piece of ten acres down there." This witness further testified that he sold feed for a cow and horse to the O'Neills, and that Mrs. O'Neill always paid him; that at one time he owed O'Neill money, and, there being money owing for feed, he thought to equalize accounts, but O'Neill said: "No; you pay me, and mother will pay for the feed." Fred O'Neill, a son, testified that prior to his father's death he visited him at Pomona, at a time when the last piece of property which had theretofore stood in the name of the father had been sold, and talked with the father; that the father said to him: "It is all right now. The property has all been disposed of, and mother owns it all." Katherine Hale, a daughter, testified that on one occasion she remembered her mother bringing home a mortgage (it being the Rust mortgage), and that her father examined it, and, after he had read it, said: "Everything is all right now."

[7] There was other testimony of a similar character to that narrated, but we think that enough has been stated to illustrate the fact that the court was not without warrant in concluding that the promissory notes and mortgages were the separate property of Bridget O'Neill. The circumstances would justify such a conclusion. Assuming that the husband's earnings as a part of the community estate made up a portion of the purchase price of the real property, it was most natural that in the latter years of his life, being afflicted with an incurable disease which was progressing toward a fatal termination, he should desire that the wife should have the results of the hard-earned capital which they had produced by their joint efforts. We do not think it necessary that he should in terms and formally declare that he presented his interest in the property to the wife. Circumstances, consisting of conduct, words, and such admissions as were testified to, would be sufficient to establish the fact of a gift. We are leaving out of account, of course, testimony introduced on behalf of defendants in contradiction of that produced for the plaintiff, because it is wholly immaterial in view of the restrictions upon this court's duty in examining the appeal. It seems unnecessary, in view of the fact that the only question under consideration relates to the sufficiency of the evidence, to review any of the authorities cited. As to the real property, deeds to which were originally taken in the name of Bridget O'Neill, the presumption under the section cited that the spouse taking it took it as her separate estate applied unless overcome by testimony for the defendant. Concerning the other notes and mortgages, as we

have before stated, the fact that they were taken in the name of the wife (even though the presumption allowed by the section did not apply) afforded some evidence, not sufficient perhaps by itself, tending to show that the wife had acquired the same as her own. Aided by the other facts and circumstances shown in evidence, a sufficient case can easily be made out.

For the reasons given, the order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

HOME BUILDERS' LUMBER CO. v.
WHITE, County Treasurer.
(No. 9779.)

(Supreme Court of Oklahoma. Sept. 9, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 781(6)—SETTLEMENT
PENDING APPEAL—DISMISSAL.

Where plaintiff in error, after filing an appeal from judgment of the trial court, enters into a written agreement of settlement of such judgment, and such agreement is brought to the attention of this court by proper motion, the appeal will be dismissed.

2. APPEAL AND ERROR \S 154(1)—RECOGNITION OF VALIDITY OF JUDGMENT WAIVER OF RIGHT OF APPEAL.

An act on the part of the defendant, whereby he recognizes the validity of a judgment against him, operates as a waiver of his right to prosecute an appeal therefrom, or to bring error to reverse it.

Error from District Court, McCurtain County; C. E. Dudley, Judge.

Action by Leon A. White, County Treasurer of McCurtain County, against the Home Builders' Lumber Company. Judgment for plaintiff, and defendant brings error. Appeal dismissed.

Head & Barrett, of Idabel, Ramsey, DeMueles, Rosser, Martin & King, of Tulsa, and McPherren & Cochran, of Durant, for plaintiff in error.

N. W. Gore, Co. Atty., of Idabel, S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for defendant in error.

PITCHFORD, J. This proceeding in error is brought to reverse a judgment rendered in the district court of McCurtain county against the appellant for the sum of \$33,386.86, as taxes due the state of Oklahoma and McCurtain county for the years 1915 and 1916, and declaring a lien on certain standing timber owned by the appellant. The defendant in error has filed a motion to dis-

miss the appeal, and shows that on March 4, 1918, the parties hereto entered into a written agreement or compromise of the judgment, from which this appeal is pending, in which the plaintiff in error agreed to pay and defendant in error agreed to accept, in full settlement of the judgment, the sum of \$21,300, to be paid in installments of \$5,000 cash and \$5,000 each 30 days thereafter, and, in the event of a default in the payments, the sums therein paid should be credited on the judgment, and process might be issued to enforce the collection of the judgment as if the agreement had not been entered into between the parties.

The appellant, responding to this motion, admits that it compromised the judgment and entered into the agreement as set out in appellee's motion to dismiss this appeal, but contends that the agreement of settlement has been repudiated by the defendant in error, in that the judgment has been assigned and execution issued thereon, and that by reason of such acts the appellee is therefore estopped to urge the settlement as a ground for dismissal of this appeal.

The stipulation of settlement was entered into on March 2, 1918, being filed in the records of the trial court in this cause on September 10, 1918. On August 29, 1918, the defendant in error, through the board of county commissioners of McCurtain county, assigned the judgment in question here to one J. M. Craig, and execution was thereafter issued on October 29, 1918, and the property of the plaintiff in error was levied on and sold under said execution on December 16, 1918. The record presented on this motion shows that the judgment was not assigned, nor execution issued, until long after the plaintiff in error had made default in the payments provided for in the agreement of settlement.

[1, 2] We are of the opinion that the agreement entered into between the parties hereto was the recognition of the validity of the judgment, and, in fact, was a settlement or compromise of such judgment, and where the same has been brought to the attention of this court by proper motion and affidavit, the appeal from such judgment pending in this court will be dismissed. The question as to whether the agreement of settlement or compromise has been repudiated or violated by one of the parties, or as to the validity or invalidity of the proceedings, will not be determined here on this appeal. This court in the case of *Haskell v. Ross*, 175 Pac. 204 (not yet officially reported), held:

"Any act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver to appeal therefrom, or to bring error to reverse it"—citing 2 Cyc. 656; *City of Lawton v. Ayres*, 40 Okl. 524, 139 Pac. 963; *Barnes v.*

Lynch, 9 Okl. 11, 59 Pac. 995; *Elliott v. Orton*, 171 Pac. 1110, L. R. A. 1918E, 103.

The appeal should therefore be dismissed; and it is so ordered.

OWEN, C. J., and RAINEY, SHARP, HARRISON, JOHNSON, and HIGGINS, JJ., concur.

KANE and McNEILL, JJ., absent and not participating.

WALLINGFORD et al. v. ALCORN.
(No. 6539.)

(Supreme Court of Oklahoma. Sept. 9, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1010(1)—ON SUFFICIENT EVIDENCE AND CORRECT INSTRUCTIONS, JUDGMENT SUSTAINED.

Where there is competent evidence reasonably tending to support the verdict of the jury, and the instructions of the court to the jury fairly state the law arising upon the issue raised by the pleadings and the evidence, the judgment rendered upon the verdict will not be disturbed by this court.

2. PAYMENT §63(1)—ON PLEA OF PAYMENT, EVIDENCE OF EQUITABLE RECOUPMENT INADMISSIBLE.

Evidence offered by defendants and excluded by the court examined, and held inadmissible under the pleadings.

3. TRIAL §340(5)—WHEN COURT CAN COMPUTE AND ADD INTEREST TO VERDICT.

In a case tried by a jury, where it is clearly apparent that the prevailing party is entitled to interest upon the amount found in the verdict, and it is unquestionably clear that the jury allowed no interest, and it is clearly ascertainable from the verdict or uncontroverted facts the date from which to which interest should be allowed, and the rate is fixed in the note, it is the duty of the court to make the computation and to add the interest so found to the sum found in the verdict, and to render judgment for the aggregate amount and costs.

4. COSTS §60 — IN ACTION FOR MONEY PLAINTIFF, PREVAILING, IS ENTITLED TO COSTS.

In actions for the recovery of money only, the plaintiff is entitled, upon a judgment in his favor, to the allowance of costs, and a jury is not authorized to divide the costs between the plaintiff and the defendants.

(Additional Syllabus by Editorial Staff.)

5. PAYMENT §4—BY WHOM PAYMENT MAY BE MADE.

It is not essential that payment should be made by the debtor himself; and, though it is made by one who is not a party to a contract and not in privity with the debtor, yet

if accepted in satisfaction of the contract it will discharge the obligation.

6. PAYMENT — 30 — AGREEMENT TO ACCEPT PROPERTY.

Notwithstanding Rev. Laws 1910, § 4234, providing that a negotiable note is payable in money only and without any condition not certain of fulfillment, the parties may by agreement fix a price at which property delivered by the debtor to the creditor shall be valued, and, when so received, it is a payment, and equivalent to a payment of so much money.

Error from District Court, Noble County; W. W. Bowles, Judge.

Action by S. T. Alcorn against C. W. Wallingford and another. Verdict and judgment for plaintiff, and defendants bring error, and plaintiff filed a cross-error. Modified and affirmed.

P. W. Cress and Henry S. Johnston, both of Perry, for plaintiffs in error.

Glenn Alcorn, of Muskogee, and H. E. St. Clair, of Perry, for defendant in error.

RAINEY, J. This is an action on a promissory note instituted by S. T. Alcorn, as plaintiff, against C. W. Wallingford and William D. Upson, as defendants. Trial was had to a jury, resulting in a verdict in favor of the plaintiff for the principal of the note in the sum of \$333.35. Following the amount awarded the verdict contained this language: "Without interest, and costs equally divided between plaintiff and defendants." From the judgment rendered pursuant to the verdict the defendants have appealed to this court, assigning several alleged errors, which will be hereinafter considered. The plaintiff has also filed a cross-appeal, assigning as error the refusal of the court to allow the plaintiff the interest provided in the note, and the refusal of the court to tax all the costs of the proceeding against the defendants.

Plaintiff and defendants were officers and the principal stockholders of the Sumner Cotton & Grain Company. The defendant Wallingford, who was treasurer of said company, was also an officer of the Morrison State Bank. At the time of the execution of the note the Sumner Cotton & Grain Company was indebted in the sum of about \$1,500 to said bank, and upon direction of the state banking department the bank requested the grain company to reduce its indebtedness. The company being without funds, it was proposed that plaintiff and defendants, the three principal stockholders, personally advance \$500 for this purpose. The plaintiff advanced his proportionate part of the \$500, and, at the request of the defendants, who were without ready means, advanced their part of the money and took their joint note for \$333.35. The note was signed, "C. W. Wallingford, Mgr., William D. Upson, Pres."

The defense pleaded to the action was: First, that said note was the obligation of the Sumner Cotton & Grain Company; and, second, that it had been paid.

[1] It was the plaintiff's contention that the note was the individual obligation of the defendants. There is nothing in the note disclosing that the Sumner Cotton & Grain Company is the principal, and the abbreviations, "Mgr." and "Pres." (for manager and president), added to the signatures of the defendants, are merely descriptive of the persons, and do not show that the company authorized the execution of the note, or that it was, in fact, its obligation. However, evidence was introduced by the defendants supporting their contention that it was the company's obligation, and evidence was introduced by the plaintiff tending to prove that the note was the defendants' personal obligation. In fact, this was the principal issue in the case. The court, in its instructions, fairly presented this issue to the jury, and under such instructions the jury's verdict was for the plaintiff. There being evidence in the record reasonably tending to support plaintiff's theory of the case, the jury's finding in this respect will not be disturbed.

[2, 3, 4] Defendants insist that the trial court committed error in refusing to permit their counsel, in his opening statement to the jury, to state facts which it is asserted constituted payment by the grain company, and also say that the court erred in rejecting testimony offered by the defendants proving payment. An examination of the record discloses that the evidence rejected was in effect that subsequent to the execution of the note, and while the plaintiff, Alcorn, was manager of the grain company, he sold some cotton and a cultivator which was the property of the company, and converted the proceeds to his individual use. The law undoubtedly is that it is not essential that payment should be made by the debtor himself; and, even though it is made by one who is not a party to a contract, and not even in privity with the debtor, if accepted in satisfaction of the obligation of the contract, it will operate as a discharge of such obligation. 3 Elliott on Contracts, p. 84, § 1928.

It is not contended, however, by the defendants that plaintiff took said money or property at an agreed valuation as payment of the indebtedness represented by the note, but their contention is, as we understand it, that the conversion of said property, as a matter of law, constituted payment. Our statutes and decisions are against this view. In the case of First National Bank of Tishomingo v. Latham, 37 Okl. 286, 132 Pac. 891, we said:

"Section 4627, Comp. Laws 1909, provided that a negotiable instrument should be payable in money only, and without any condition not certain of fulfillment. But, not

withstanding the statute, the parties may by agreement between themselves fix a price at which the property delivered by the debtor to the creditor shall be valued, and when so received it constitutes a payment, and is in law equivalent to a payment of so much money. *Morrill v. Baggott*, 157 Ill. 240, 41 N. E. 639; *Griffith v. Creighton*, Adm'r, 61 Mo. App. 1; *Howard et al. v. Norton*, 65 Barb. (N. Y.) 161; 1 Cyc. 336; 1 A. & E. Enc. Law, 418. Under such circumstances, the delivery of the property constitutes not alone a satisfaction or settlement of the debt, but a payment thereof, as distinguished from an accord and satisfaction. It is not the result reached, namely, the extinguishment of the debt, but the means of its discharge, that we are considering. Both payment and accord and satisfaction may extinguish the debt, but by different processes. In the reported cases that we have examined, where the delivery of property pursuant to an agreement was held a sufficient payment, as such, of the indebtedness, we find that in all instances an agreed and fixed valuation was put on the property by the parties."

Numerous cases are cited in support of this principle.

There are other means of discharging a debt than by payment; such as, accord and satisfaction, set-off, counterclaim, and equitable recoupment. These defenses, however, must be specifically pleaded. *Continental Gin Co. v. Arnold*, 52 Okl. 569, 153 Pac. 160. The facts pleaded and the evidence offered by the defendants lack some of the essential elements of each of these defenses. The defense pleaded is denominated "payment," but the evidence offered is more in the nature of equitable recoupment, though insufficient to establish this defense. There was no offer to show how much the corporation was indebted and to whom, or what part, if any, of the proceeds of the alleged converted property the defendants would be entitled to upon payment of the note. The record shows that there was other money advanced for the benefit of the corporation by Alcorn, and at the time the receiver was appointed there were still other debts owing by the corporation. Neither of these other creditors of the corporation, nor the corporation itself, or its receiver, is a party to the action. We have been unable to find any authority holding that the conversion of the property or money of a corporation by the payee of a note executed by other stockholders in the corporation on which they are individually liable constitutes payment or discharge of the note.

We do not wish to intimate that the plaintiff converted any property of the corporation, for, as before stated, the proffered evidence was excluded, but, if true, as alleged, it would not constitute a defense to this action.

[3, 4] The jury was without authority to refuse to allow the plaintiff interest on the

note. There is nothing in the record showing that any interest had been paid, nor did the defendants so contend. It is clear from the verdict that the jury did not allow any interest, and it is also clearly ascertainable from the uncontroverted facts the date from which interest should be allowed. Since the rate of interest is fixed in the note, the court should have made the computation and added the interest to the sum found in the verdict and the judgment should have been for the aggregate amount. *The St. Louis, El Reno & Western Ry. Co. v. Oliver et al.*, 17 Okl. 589, 87 Pac. 423, 10 Ann. Cas. 748. The jury was likewise without authority to divide the costs between the plaintiff and the defendants. Section 5229, Rev. Laws of 1910, governs, and is as follows:

"Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific, real or personal property."

The case is therefore remanded, with directions to the trial court to amend the judgment by adding to the amount found due by the jury interest on the note from its date and taxing all the costs against the defendants. As modified, the judgment is affirmed.

OWEN, C. J., and SHARP, HARRISON, PITCHFORD, JOHNSON, and HIGGINS, JJ., concur.

In re REILY. (No. 9222.)

(Supreme Court of Oklahoma. July 29, 1919.
Rehearing Denied Sept. 23, 1919.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT \S 54—COURT CAN SET ASIDE REPORT OF REFEREE IN DISBARMENT PROCEEDING.

A referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require.

2. ATTORNEY AND CLIENT \S 54—REPORT OF REFEREE IN DISBARMENT PROCEEDING NOT CONCLUSIVE ON LAW OR FACT.

The report of a referee appointed to take evidence and report his findings of fact and conclusions of law in a disbarment proceeding is not conclusive as to either the findings of fact or the conclusions of law, but is accorded every reasonable presumption of being correct. The burden is on the party attacking it, but it is to be freely set aside by the court if found to be incorrect.

3. ATTORNEY AND CLIENT §53(1)—IN DISBARMENT PROCEEDING PRESUMPTION OF INNOCENCE PREVAILS.

In a proceeding to disbar an attorney at law, such attorney is presumed to be innocent of the charges preferred and to have performed his duty as an officer of the court in accordance with his oath, and the evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true and warrant a judgment of disbarment.

4. ATTORNEY AND CLIENT §38—EVERY INFRACTION OF LAW DOES NOT JUSTIFY DISBARMENT.

The law does not demand that every technical infraction of the law by an attorney shall require his disbarment, although an attorney should endeavor to observe literally the law, but it is those infractions of duty that involve moral turpitude and evince a depraved character that render such attorney untrustworthy and a reflection upon the bar and the court, as an officer thereof, that demand his disbarment.

5. ATTORNEY AND CLIENT §53(2)—EVIDENCE NOT SUFFICIENT TO JUSTIFY DISBARMENT.

Evidence examined, and held not sufficient to warrant disbarment of respondent.

Pitchford, J., dissenting.

Original action on motion of the Bar Commission on relation of W. S. Pendleton for disbarment of F. H. Rely, an attorney. Findings and conclusions of referee recommending disbarment set aside, and proceeding dismissed.

W. S. Pendleton, of Shawnee, relator.

Frank Dale, of Guthrie, prosecutor.

S. W. Hayes and E. R. Hastings, both of Oklahoma City, for respondent.

OWEN, C. J. This is an original action brought on motion of the bar commission based on charges filed by W. S. Pendleton, hereinafter referred to as relator, for disbarment of F. H. Rely, a member of the bar of Pottawatomie county. Hon. James R. Tolbert of Hobart was appointed referee to take testimony and report his findings of fact and conclusions of law. He reported specific findings as to three counts of the charges, together with his conclusions, recommending disbarment of respondent. To this report exceptions were filed.

[5] Respondent was attorney for one Harriet Nichols Cook, of New Jersey, claimed to be sole heir at law of Enos Nichols, deceased, who died in Pottawatomie county in December, 1911. He was employed as associate counsel under the direction of J. Warren Davis of New Jersey. Harriet Nichols Cook died, and J. Warren Davis was appointed executor of her estate, respondent continuing under his direction to represent the estate as a beneficiary of the

Enos Nichols estate. Prior to her death respondent secured a loan of \$5,000 for her, guaranteeing payment himself by separate instrument. Lydick and Eggerman, attorneys of Shawnee, held an assignment from Harriet Nichols Cook of \$30,000 of her interest in the Enos Nichols estate, claiming that amount as attorney's fees. Respondent brought suit to cancel this assignment. A compromise was effected by the terms of which Lydick and Eggerman were to receive \$15,000. But by agreement judgment was entered in their favor for \$20,000, and \$5,000 of this amount was paid to respondent, for which he gave receipt in the name of Harriet Nichols Cook estate by himself as attorney. This transaction was at the time unknown to the executor, but when explained to him a few days later was entirely satisfactory and ratified. Respondent deposited this \$5,000 to his own account, and retained same with the consent of his client until September, 1917, when he returned the money to the executor. In explanation of this transaction respondent shows the money was secured to protect him on his guaranty of the \$5,000 loan of Harriet Nichols Cook, and his client agreed he might keep the money until he had been relieved of this personal obligation. The uncontradicted evidence shows he returned the money when the first demand was made. The referee found that respondent wrongfully converted the \$5,000 to his own use with the attempt to deprive the estate of same, and was therefore guilty of the crime of embezzlement. We do not approve the method used by respondent in obtaining this money, and we are not unmindful that irregularities of this character sometimes lead to grave consequences. Yet we do not find that the transaction, as explained by respondent, shows any intent on his part to defraud, or that the estate was to any extent defrauded.

The second count alleges fraud and irregularities in the collection of an expense account of \$1,835, from the administrator of the Enos Nichols estate, and made a charge against the estate of Harriet Nichols Cook. This account was for money advanced by respondent for court costs and expense of taking depositions in various parts of the United States, representing the Harriet Nichols Cook estate. The account was submitted to James Mercer Davis, attorney for J. Warren Davis, who approved the same, and his action was later ratified by J. Warren Davis as executor. It does not appear the account was either itemized or sworn to, but the amount was recognized as correct, and was paid as a proper claim against the estate of Harriet Nichols Cook as an advancement out of the Enos Nichols estate. Respondent later prepared the report for the

executor, which was filed with the county court of Pottawatomie county, showing the expenditures of this \$1,835 item.

The referee found that respondent acted arbitrarily, and had been grossly negligent and guilty of conduct unbecoming a lawyer in this transaction, although not prompted by a bad or criminal motive. There was no question as to the correctness of the account, and while good business methods and that degree of care due the handling of accounts by lawyers for their clients would require the account be itemized and verified, the evidence is not sufficient to warrant disbarment.

The third count alleges, in substance, that respondent entered into a conspiracy with E. E. Hood, an attorney of Shawnee, to employ a number of attorneys of that county, and by paying them a retaining fee disqualify them in an election of special judge to preside in the hearing of the probate of the will of Enos Nichols, and thereby thwarting the administration of justice. The referee found that respondent, acting with his associate counsel, had the administrator pay out the sum of \$390 to eight different lawyers, with the express purpose and intent to disqualify them in participating in the election of the special judge, and that he was thereby guilty of an attempt to pollute the administration of the law. It appears Hood represented some of the same interests represented by respondent, but was not employed as an associate counsel with respondent. His employment was by J. Warren Davis, and he reported directly to him and to one Farrington, who represented some of the heirs of Harriet Nichols Cook residing at Springfield, Mo. Hood suggested to respondent the necessity of retaining additional attorneys to assist in such matters as might arise in connection with the Harriet Nichols Cook estate. The probate of the proffered will was being bitterly contested. A large number of lawyers had been employed by the interests adverse to those of the Harriet Nichols Cook estate. Depositions were being taken in various parts of the United States, necessitating the absence of respondent from Shawnee much of the time. Lawyers were retained and paid by Hood, totaling \$390, and this amount was allowed by the administrator on the advice of respondent. But the attorneys retained were not shown to have been unfriendly to respondent, or to the interests he represented, and there is no evidence indicating they would have voted adverse to his interests. A special judge suggested by opposing litigants, was elected, and rendered a judgment adverse to respondent and his clients.

The remaining count, including a charge that respondent had prevented relator from obtaining an attorney's fee in a case in

which it was alleged he was co-counsel with relator, was found by the referee not to be supported by sufficient evidence to justify a recommendation for disbarment.

We have read the report of the referee and transcript of the testimony with care; and, while we give due regard to his findings and conclusions, both because of his office and his very high standing and recognized ability as a lawyer, we are unable to agree with his findings or approve his conclusions.

[1, 2] The referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require. 23 R. C. L. 800; *Krapp v. Aderholt*, 42 Kan. 247, 21 Pac. 1063. The rule to be applied in considering the report was stated in *Town of Grove v. Haskell*, 31 Okl. 77-79, 116 Pac. 805, 806, as follows:

"The report of the referee appointed to take the evidence and report the same to this court with his findings of fact and conclusions of law would not be conclusive on either. It should and would be accorded every reasonable presumption of being correct, with the burden on the party attacking it, but to be freely set aside by the court if found to be incorrect."

[3] The serious consequences of disbarment should follow only where there is a clear preponderance of evidence against the respondent. In such proceeding the attorney sought to be disbarred is presumed to be innocent of the charges preferred, and to have performed his duty as an officer of the court in accordance with his oath, and the evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true and warrant a judgment of disbarment. In *re Sitton*, 177 Pac. 555; In *re Parsons*, 35 Mont. 478, 90 Pac. 163; *People ex rel. v. Thornton*, 228 Ill. 42, 81 N. E. 793; In *re Newby*, 82 Neb. 235, 117 N. W. 691. In the case of *Shufeldt v. Barker*, 56 Ill. 299, it was said:

"A charge so grave in its character, and so fatal in its consequences, ought certainly to be proved by what the law denominates a clear preponderance of the evidence."

This language was quoted with approval in the case of *State ex rel. Williams v. Sullivan*, 35 Okl. 745, 131 Pac. 703, L. R. A. 1915D, 1218.

[4] The law does not demand that every technical infraction of the law by an attorney shall require his disbarment, although an attorney should endeavor to observe literally the law; but it is those infractions of duty by an attorney that involve moral turpitude and evince a depraved character, rendering such attorney untrustworthy and a reflection upon the bar and the court, as an officer thereof, that de-

mand his disbarment. The evidence in this case, as we view it, fails to prove by sufficient preponderance that respondent has been guilty of such conduct. Therefore the findings and conclusions of the referee will be set aside and the proceeding dismissed.

KANE, SHARP, HARRISON, JOHNSON, and McNEILL, JJ., concur.

PITCHFORD, J., dissents.

RAINEY and HIGGINS, JJ., not participating.

MIDLAND SAVINGS & LOAN CO. v. NICOLL et al. (No. 5319.)

(Supreme Court of Oklahoma. April 24, 1919.
Rehearing Denied Sept. 23, 1919.)

(Syllabus by the Court.)

1. BUILDING AND LOAN ASSOCIATIONS —
46(1)—ORGANIZATION OF FOREIGN ASSOCIATION DOING BUSINESS IN STATE MUST ACCORD WITH STATE LAWS.

In order for a foreign corporation to be entitled to exercise the rights, powers, and privileges accorded to building and loan associations by article 19, c. 18, Wilson's Rev. & Ann. St. 1903, and to enforce contracts entered into by it with citizens of such territory in the courts of this state, it must appear that the statute under which such foreign corporation was organized is identical or in all material respects similar to the statutes authorizing the formation of building and loan associations in that territory, and that the character of business conducted by it was substantially like that conducted by such associations in Oklahoma Territory.

2. STATUTES OF OKLAHOMA TERRITORY — BUILDING AND LOAN ASSOCIATIONS.

Section 1217, Wilson's Rev. & Ann. St. 1903, declares building and loan associations to be aggregations of laborers, mechanics, workmen, workingwomen, and tradesmen, who start without any paid-up capital, and only pay in on their stock small weekly or monthly assessments, which are immediately loaned to one of the members of the association for the purpose of furnishing a home.

3. BUILDING AND LOAN ASSOCIATIONS —
46(1, 10)—FOREIGN ASSOCIATION NOT ENTITLED TO DO BUSINESS IN THE STATE.

Evidence examined, and held, upon the facts stated in the opinion, that plaintiff in error was not a building and loan association, entitled to exercise the rights, powers, and privileges of building and loan associations under the laws of Oklahoma Territory, and that the contracts sued upon were usurious.

4. USURY — 98 — ON USURIOUS CONTRACT NO INTEREST COLLECTIBLE.

Under section 849, Wilson's Rev. & Ann. St. 1903, interest could not be collected upon a contract entered into in Oklahoma Territory which was tainted with usury.

Error from District Court, Noble County; Wm. Bowles, Judge.

Separate actions by the Midland Savings & Loan Company against C. K. Nicoll and others, and against Kate P. Nicholson and others, and by D. R. Swaney against the Midland Savings & Loan Company. Actions consolidated by agreement, and from the judgment the company brings error. Affirmed.

H. E. St. Clair, of Perry, and A. J. Bryant, of Denver, Colo., and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error.

P. W. Cress, of Perry, for defendants in error.

HARDY, C. J. The Midland Savings & Loan Company commenced two separate actions in the district court of Noble county, one against C. K. and Hattie Nicoll and H. A. McCandless, and one against Kate P. and H. C. Nicholson and J. L. Boyes, to foreclose certain mortgages, and another action was commenced in said court against Midland Savings & Loan Company by D. R. Swaney, to cancel a mortgage therefore given by him to said Midland Savings & Loan Company on the alleged ground that same had been fully paid off and discharged. All three of the actions involved the construction of certain contracts entered into between Midland Savings & Loan Company and the other parties, and because of the similarity of the questions of law and fact involved in the several cases, by agreement of the parties, the actions were consolidated and tried together. Judgment was rendered in all of the cases against Midland Savings & Loan Company, and the consolidated case was brought to this court for review.

After proceedings in error had been filed in this court, plaintiff in error dismissed as to defendant in error Swaney. One of the grounds of defense urged by the remaining defendants was that each transaction between Midland Savings & Loan Company and said defendants was a mere loan of money and constituted the parties lender and borrower, and that the character of business transacted by Midland Savings & Loan Company, under the form of contract entered into, was a device and a scheme to evade the usury laws of the territory of Oklahoma, and to exact illegal and usurious rates of interest for the loan of money. The evidence shows that plaintiff is a corporation, organized and doing business under and by virtue of the laws of the state of Colorado, with its principal office and place of business at the city of Denver, in said state; that at the time of the transaction involved, to wit, during the year 1899, it had designated an agent

within this territory upon whom service of summons might be had, and had filed in the office of the secretary of the territory a duly authenticated copy of its charter or articles of incorporation. At that time it also had within said territory two or three local agents to solicit and receive applications for stock and loans of its money, which were submitted to the home office for approval. At the time of the trial, the number of such agents employed by plaintiff was 25. When applications for loans were accepted, drafts therefor, payable jointly to its local agent and the borrower, were mailed to the local agent for delivery to the borrower.

The by-laws provide for the issuance of various kinds of stock, viz. monthly installment, prepaid, full-paid, deposit, and permanent shares. Holders of monthly payment stock were required to make stipulated payments thereon at periodical times and had certain privileges upon the withdrawal or maturity of shares. Prepaid stock was issued on a single advanced payment, which was deemed sufficient, with the earnings thereon, to mature the stock at a given period. This class of stock might be withdrawn after a certain time, with 7 per cent. monthly compounded interest, less 2 per cent of par value, for which transferable life membership certificates were given. Full-paid stock was issued on the single advanced payment of \$100 per share, which bore interest at 8 per cent. per annum from date, payable semiannually. Deposit stock was issued for one or more shares upon the deposit of any sum at the time most convenient to the holder of such stock. If the sum deposited was left with the company more than six months, the holder was entitled to draw 6 per cent. annual interest, and if left over one year 8 per cent. interest. Upon the maturity of any certificate of stock the holder was entitled (a) to take its full value in cash, or (b) to exchange same for a paid-up certificate of equal face value, with guaranteed annual interest thereon at 8 per cent., payable semiannually, or (c) to convert the par value of the certificate and its subsequent net earnings into an annuity, payable in installments of \$10 per share per year, the annuity to continue until the principal and its net earnings were exhausted, which time was guaranteed to be not less than 21 years.

In addition to the classes of stock enumerated, the board of directors were authorized to provide by resolution for the issuance of such other series and further classes of stock as they might find from time to time necessary and expedient to meet the requirements of the business and advance the interests of the company. The by-laws authorized the loan of its funds upon improved real estate first mortgage loans, and also authorized the loan of its funds for the purpose of improv-

ing real estate; but in this latter class of loans it was provided that no money should be paid out until the buildings were under roof and insurance policy thereon furnished the company.

The authorized capital at the time of trial was \$7,000,000; it had loaned in Oklahoma approximately \$1,500,000, and was loaning in the territory \$25,000 per month. It had a salary and office expense account of \$25,000 to \$30,000 per annum, and paid out for agent expenses, salaries, and commissions \$10,000 to \$15,000 per annum. The president received a monthly salary of \$700, and the secretary a monthly salary of \$600. The company had a reserve fund of approximately \$50,000, and in addition at the time of trial held undivided profits amounting to more than \$63,000; for the year 1909 it paid a dividend to its stockholders of 12 per cent., and had paid an average dividend during the life of the corporation of 11 per cent. The contracts in question provided for interest upon the amount borrowed at the rate of 7½ per cent. per annum, and for an arbitrary premium of 6¼ cents for each \$100 borrowed, making 15 per cent. for the use of the money loaned, and further provided for a fine of 2 per cent. per month upon all delinquent payments, while they remained delinquent.

[1-3] By its general findings in favor of defendants, the court in effect found that the contracts sued upon and plaintiff's method of doing business constituted a device to evade the usury laws of Oklahoma Territory, and to collect illegal and usurious rates of interest for the loan of its money. This was a question of fact (*Union Savings Association v. Cummings*, 185 Pac. —), and there was sufficient evidence reasonably tending to support the finding. The legal rate of interest in Oklahoma Territory at that time was 12 per cent. Section 847, *Wilson's Revised & Annotated Stat.*

We think it is apparent the business conducted by plaintiff was not in keeping with the aim and purpose of building and loan associations, which originally were formed for the purpose of enabling the members thereof to provide a fund by means of small periodical payments which could be loaned to members upon advantageous terms for the purpose of enabling them to become home owners, and thus encourage thrift and economy, and thereby promote good citizenship. The members were usually people of limited means, who were unable to borrow money by the usual and ordinary methods, and the underlying idea was to accommodate the poorer and less fortunate members of society, by permitting them to make payment of small sums out of their current wages, and thus obtain the means of owning modest homes. Such associations were usually local in their operations, and were supposed to be prudently and economically managed, and when so organ-

ized and managed were productive of industry and frugality upon the part of the members, and were entitled to the confidence of the classes of persons for whose benefit they were organized. 9 C. J. 920, 921; Endlich on Building & Loan Associations, 6. By section 1217, Wilson's Rev. & Ann. Stat., it was declared that building and loan associations in Oklahoma Territory were aggregations of laborers, mechanics, workingmen, workingwomen, and tradesmen, who start without any paid-up capital, and only pay in on their stock small weekly or monthly assessments, which are immediately loaned to one of the members of the association for the purpose of furnishing him a home, and because of such character these associations were granted certain privileges enumerated in article 19, chapter 18, Wilson's Rev. & Ann. Statutes.

But building and loan associations have not always preserved this character, nor always conducted the class of business for which they were originally organized. They have in later years, in many instances, lost their local character, and, instead of conducting a business for the primary purpose of enabling their shareholders to become home owners, have degenerated into associations whose principal business is the loaning of money to borrowing members at excessive and illegal rates of interest, in order to pay large profits to nonborrowing members. The ingenuity of man has been taxed to its utmost in the invention of every conceivable scheme and device which will enable such associations to evade the usury laws of the various states, and obtain usurious rates of interest for the loaning of its moneys, and the courts should tear off the mask and look to the true nature of the transaction. *Andrews v. Poe*, 30 Md. 485. The plan of business of plaintiff company shows that various classes of stock bear a guaranteed rate of interest amounting to 8 per cent., and that the stock of all shareholders may be converted into an annuity, and that loans may be obtained, irrespective of the intention to use the money in the building of a home or the improvement of real estate.

There is no limit to the amount of stock which an individual may acquire, nor is there any limit to the amount of money which he may deposit in exchange for prepaid stock and receive stipulated interest thereon. The amount of salaries to be paid to its officers and the amount of compensation to be paid to its soliciting agents rests solely within the discretion of the board of directors, and the powers possessed and exercised by it under its general plan of business are far in excess of and widely different from that conferred upon building and loan associations by the laws of Oklahoma Territory. Its working capital, instead of being accumulated from monthly subscriptions out of the savings of its members, may, under its plan of business be

furnished by capitalists investing their surplus funds in interest-bearing stock. The benefits accruing to and the obligations of the various classes of stockholders are not strictly equal or mutual, and we conclude that plaintiff is not a building and loan association, except in name, but that it is a corporation created for the purpose of lending money and earning dividends, to which, for the purpose of evading the usury laws of the several states, some of the features of a building and loan association have been attached; and because of its dissimilarity to the general plan of building and loan associations, as originally formed and as contemplated by the territorial statutes, it is not entitled to be considered as such, nor to claim any of the benefits which the statutes intended to confer upon corporations of that class.

The excessive rates of interest charged convince us that the association was not intended to encourage co-operation among the poor, and enable persons of small means to acquire homes, but was intended as a medium for the loaning of money at an illegal rate of interest. It is true that this court has held that contracts entered into by this plaintiff, prior to statehood, with residents of Indian Territory, are to be construed by the laws of Colorado, and were enforceable in the courts of this state (*Midland Savings & Loan Co. v. Henderson*, 47 Okl. 693, 150 Pac. 868, L. R. A. 1916D, 745; *Midland Savings & Loan Co. v. Drake et al.*, 161 Pac. 787), and has also held that similar contracts entered into with residents of Oklahoma Territory were governed by the same rule (*Legg v. Midland Savings & Loan Co.*, 55 Okl. 137, 154 Pac. 682; *Midland Savings & Loan Co. v. Kuntz et al.*, 58 Okl. 156, 158 Pac. 604), and has also held that when contracts were entered into with citizens of this state, since the Constitution was adopted, plaintiff and like corporations could exercise no greater or different rights, powers, or privileges than were accorded to domestic corporations of like character (*Midland Savings & Loan Co. v. Deaton*, 57 Okl. 622, 157 Pac. 285; *Midland Savings & Loan Co. v. Summers*, 58 Okl. 641, 160 Pac. 488). In none of these cases, however, was the question presented or determined as to whether plaintiff was a building and loan association within the meaning of the territorial statutes, or whether its method of doing business was a device to evade the usury laws.

In order for plaintiff to claim immunity from the statutes against usury as a building and loan association, it must appear that the statutes under which plaintiff was incorporated were identical or in all material respects similar to the statutes authorizing the incorporation of building and loan associations in the territory, and that the character of business conducted by it was substantially like the business of domestic build-

ing and loan associations; and, where this is not made to appear, the courts of this state will not recognize its claim to special privileges, greater than those granted to such corporations under contracts entered into under the guise of a building and loan association for the purpose of evading the law prohibiting the charging of usury. *Jarrett v. Cope*, 68 Pa. 67; *Kupfert v. Guttenberg, etc.*, Ass'n, 30 Pa. 465; *Rhoads v. Hoernerstown, etc.*, Ass'n, 82 Pa. 180; *Endlich, Building & Loan Ass'n* (2d Ed.) § 274; *5 Thompson, Corp.* § 6628; *Meroney v. Atlanta Building & Loan Ass'n*, 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; *Cobe v. Airey et al.*, 125 Ill. App. 43, 56; *Rhodes et al. v. Mo. Savings & Loan Co.*, 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93; *Williar v. Baltimore Bldg. & Loan Ass'n*, 45 Md. 546.

In the *Nicoll* case defendants subscribed for 30 shares of stock and applied for a loan of \$500, and received, in fact, \$451.40, upon which they made 38 payments, of approximately \$14.95 each. The total of such payments amounting to \$564.30. About October, 1902, these defendants offered to repay the amount borrowed, with 12 per cent. interest thereon from date of the loan to the time of payment, if given credit for the withdrawal value of their stock, which proposition was rejected by the association. Suit was not brought until August 3, 1907. In its petition plaintiff's claim was itemized as follows: Principal of the loan, \$500; interest and premiums from October, 1902, to August, 1907, \$368.75; fines for delinquencies, \$198.86; insurance premium paid, \$9; interest on advances, \$2.86; tax sale certificate, purchased to protect property for 1905, \$28.55; interest on taxes, \$3.86; attorney's fees, \$50—making a total due on all accounts, \$1,161.88. Defendants were credited with withdrawal value of stock \$249.30; also with taxes paid after suit was commenced, \$32.41—leaving a final balance of \$880.17. This summary of the claim of plaintiff in the *Nicoll* case is a fair example of the situation in the *Nicholson* case.

[4] Having reached the conclusion that plaintiff was not entitled to the benefits of the statutes regulating building and loan associations, and that by reason thereof the contracts sued upon were usurious, plaintiff was not entitled to demand or collect any interest thereon. Section 849, *Wilson's Rev. & Ann. Stat.*; *Ætna Bldg. & Loan Ass'n v. Harris*, 170 Pac. 700. This being true, and defendants having more than paid the amount loaned, judgment was properly rendered for defendants. This view of the case renders unnecessary a consideration of the other questions urged.

The judgment is affirmed.

RAINEY, HARRISON, PITCHFORD, and JOHNSON, JJ., concur.

COLE v. STATE. (No. A-3099.)

(Criminal Court of Appeals of Oklahoma. Sept. 29, 1919.)

(Syllabus by the Court.)

1. LARCENY ⇨27—PERSON INNOCENTLY AIDING IN DRIVING STOLEN CATTLE NOT AN "ACCOMPLICE."

A person who aids another, at his request, to gather up and drive cattle which are stolen, in the absence of evidence that such person so acted with guilty knowledge of the larceny, is not an accomplice in the larceny of such cattle.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. CRIMINAL LAW ⇨1159(4) — CREDIBILITY OF WITNESSES ON CONFLICTING EVIDENCE, FOR THE JURY.

Notwithstanding a witness is shown to have been previously convicted of the larceny of live stock and served a sentence therefor, and that his general reputation for truth and veracity is bad, the jury may believe his testimony, and if his testimony be sufficient to legally convict the accused of the offense charged, this court will not set aside such conviction, though the evidence be in direct conflict with the evidence for the accused; the credibility of the witnesses being the exclusive province of the jury to determine.

3. CRIMINAL LAW ⇨814(3) — INSTRUCTION NOT APPLICABLE TO EVIDENCE PROPERLY REFUSED

It is not reversible error to refuse a requested instruction not applicable to the evidence, notwithstanding such refused instruction states a correct rule of law.

4. CRIMINAL LAW ⇨1186(4) — CONVICTION NOT SET ASIDE FOR IMMATERIAL MISDIRECTION OF JURY.

After a misdirection of the jury by the court, where an examination of the entire record discloses that such misdirection has not resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right, this court is powerless to set aside a conviction on account of such misdirection of the jury.

Appeal from District Court, Caddo County: Will Linn, Judge.

Wesley W. Cole was convicted of stealing domestic animals, and he appeals. Affirmed.

Bristow & McFadyen, of Anadarko, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG J. The plaintiff in error, Wesley W. Cole, hereinafter styled defendant, was, together with John Weems and A. J. Blankinship, jointly informed against for the larceny of domestic animals, tried separately, convicted and sentenced to imprisonment in the penitentiary at McAlester, for a

term of 2½ years. To reverse the judgment rendered, he prosecutes this appeal.

We have carefully read the entire evidence in this case, and, believing that no good would thereby be accomplished, we will not set out the voluminous evidence in detail. The evidence conclusively shows that John Weems, who was jointly informed against in this case with the defendant and his partner Blankinship, and whose conviction on his separate trial was recently affirmed by this court for the larceny of the live stock described in the information in this case, committed larceny of the live stock as alleged in the information in this case. The evidence as to whether or not the defendant advised, aided, or abetted the said John Weems was in direct conflict. Milt Boydston, a witness for the state, substantially testified that he knew John Weems, Wesley Cole, and A. J. Blankinship; that he knew Blankinship when he was sheriff, and had known him for about 5 years; that he had known John Weems about 9 years, and Wesley Cole, the defendant, about 4 years; that a year prior to the trial he saw Cole and Blankinship quite often; that he knew where the slaughter pen of the said Cole and Blankinship was; that it was situated about a mile west of Anadarko; that he was out there quite often; that he knew about the taking on February 26, 1916, of the cattle described in the information in this case on February 25th, that on the 25th he saw him down close to the tracks, and had a conversation with him, in which the said Weems stated that he had some stuff east and north of Gracemont which he wanted to bring down for Cole and Blankinship for butchering, and that he wanted witness to help him bring them down and hold them at witness' father-in-law's and help Cole butcher them out; that on the 26th day of February, 1916, Weems came out to the witness' father-in-law's, where the witness was then living, and said he wanted witness to go up and help him get these cattle; that he went with him, stopped at Gracemont for dinner and to feed their horses, for which witness paid; that said payment for dinner was made by a check on the First National Bank for \$2 (which check was identified and put in evidence), he receiving back \$1.30, out of which he paid the livery barn 50 cents; that he and Weems went on to the pasture, where a large number of cattle were, and took out eight head which were branded with a circle over the left hip bone; that they took said cattle west about four miles, where they were overtaken by a man on horseback, who held conversation with them; and shortly thereafter Weems and the said person turned off on another road, and before doing so Weems directed witness to take the said eight cattle to witness' father-in-law's, stating that the defendant would meet him there; that witness took the said cattle to the place directed, and put them in a

stalkfield near the home of his father-in-law; that the defendant came to said home about sundown on the following day after said cattle had been taken, and witness and defendant went together out to the stalkfield in which the said stolen cattle were, cut three of them out, and took them through the government pasture to the slaughter pen of the defendant and his partner, and that he held a lantern while the defendant butchered said three cattle, cut the brands from their hides, and put the said brands in his pocket; that subsequently, by request, witness took at separate times two other of said cattle to said slaughter pen, and that a few days thereafter witness and Weems took the three remaining cattle of the eight stolen cattle to the said slaughter pen, and defendant and Weems slaughtered them, and the defendant cut the brands out of their hides and carried them off; that when he carried said fifth animal to the slaughter pen, Blankinship paid him \$35 or \$40 for his services.

The evidence of the defendant most positively denied all of the material evidence of Milt Boydston so far as it related to his connection with the offense charged, and offered evidence by his family and his connections and his partner Blankinship in support of an alibi pleaded. There was also uncontradicted evidence that the witness Boydston had previously been convicted of larceny of cattle, and served a term in the penitentiary of this state, and that his reputation for truth and veracity was bad, and that at the time said larceny was committed that Cole, the defendant, and Blankinship were engaged in the wholesale butcher business, and the defendant testified that on Sunday night succeeding the Saturday on which the said cattle were stolen that he (defendant Blankinship) slaughtered two cattle of the heifer kind at said slaughter pen, and one and maybe more than one hog, and in this the defendant was corroborated by the evidence of his brother-in-law, except the brother-in-law testified that three hogs were slaughtered at said time.

The defendant saved exceptions separately to an instruction given, and to instructions requested and refused, which instructions we deem unnecessary to set out in *hæc verba*.

The defendant made a timely motion for a new trial, which was overruled and exceptions saved.

The errors assigned and argued in defendant's brief—all errors in petition in error not assigned and argued in brief being regarded as abandoned—are:

"That the evidence is contrary to the verdict rendered; the giving and the refusal to give certain instructions; and the overruling the motion for a new trial."

[1] It is earnestly contended by the defendant that the evidence is insufficient to

support the conviction had in this case, and especially so because the evidence of the only material witness for the prosecution was that of an accomplice, and whose evidence was not corroborated, and with this contention we cannot agree. After a most careful examination of the evidence, we think there is no evidence showing that the witness Boydston was an accomplice of the theft charged; that it shows that said witness simply aided the codefendant of the defendant in gathering up and driving said stolen cattle, at the request of said codefendant, and does not show that said witness "had guilty knowledge of the larceny charged." *Harless v. United States*, 1 Ind. T. 447, 45 S. W. 133.

"An accomplice" is "one culpably implicated in the commission of the crime of which the defendant is accused; in other words, an associate, one who knowingly and voluntarily co-operates or aids or assists in the commission of the crime." *Hendrix v. State*, 8 Okl. Cr. 530, 129 Pac. 78, 43 L. R. A. (N. S.) 546.

Applying in the instant case the definition given in *Hendrix v. State*, supra, to the acts of the witness Boydston as shown by the evidence, we do not think that his said acts bring him within said definition of an accomplice; and hence it was not necessary that his evidence be corroborated to sustain a conviction.

[2] It is true that the undisputed evidence shows that said witness Boydston had been previously, on a plea of guilty, convicted of the larceny of domestic animals, and that his general reputation for truth and veracity was bad, but this evidence did not require the jury to reject his testimony in the instant case. It was the peculiar province of the jury, notwithstanding said bad character of the witness, to determine whether or not in the instant case he told the truth, and that they believed that he did is conclusively shown by the verdict rendered, and doubtless, in weighing the conflicting evidence of the defendant and said witness, as was proper they should do, considered the paramount interest of the defendant in the outcome of the trial.

"The impeachment of a witness does not require that his testimony shall be disregarded, but goes merely to his credibility, which still remains a question for the jury, who should give his testimony such weight as it is entitled to, and may, if they see fit, believe him." 40 Cyc. 2652-2.

"Where a defendant in a criminal case testifies in his own behalf, his interest in the result is a proper matter to be considered as bearing upon his credibility and it has been considered that his position of itself renders his testimony less creditable than a disinterested witness." 40 Cyc. 2652-2, and the many authorities there cited in support of said text.

"(a) Under the law in Oklahoma controverted questions of fact, involving the guilt or inno-

cence of a person on trial in a court of competent jurisdiction, before a jury, are to be settled exclusively by such jury.

"(b) When an accused is on trial and there is a direct conflict in the testimony between witnesses for the state and witnesses for the accused, * * * this court, in the absence of error of law, will not on appeal reverse a conviction." *Calvert v. State*, 10 Okl. Cr. 185, 135 Pac. 737.

"Where there is any legal evidence to reasonably support the verdict rendered, this court will not disturb such verdict, notwithstanding the evidence is in conflict." *Arnold v. State*, 178 Pac. 897, not yet officially reported.

It is a pertinent question: Why was Weems, who was accessible to defendant, and who, having been convicted as a codefendant of the defendant, could have no interest or reason to testify other than truthfully, not called by the defendant as a witness? Is it not a legitimate inference that if examined Weems would have testified to facts tending to show that the defendant advised and abetted the commission of said larceny, and hence was not called.

In *Graves v. United States*, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021, it is said:

"The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable"—citing *Starkie on Evidence*, 54; *People v. Hovey*, 92 N. Y. 554; *Mercer v. State*, 17 Tex. App. 452; *Gordon v. People*, 33 N. Y. 501.

See, also, *Crumes v. State*, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; *Jackson v. State*, 31 Tex. Cr. R. 342, 29 S. W. 921; *State v. Weddington*, 103 N. C. 364, 9 S. E. 577; *People v. McGrath*, 5 Utah, 525, 17 Pac. 116; *State v. Toombs*, 79 Iowa, 741, 45 N. W. 300; *Commonwealth v. Clark*, 14 Gray (Mass.) 372; *People v. Hovey*, 92 N. Y. 559; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Sutton v. Commonwealth*, 85 Va. 128, 7 S. E. 323; *People v. Mills*, 94 Mich. 630, 54 N. W. 488; *State v. Ward*, 61 Vt. 191, 17 Atl. 483; *State v. Mathews*, 98 Mo. 125, 10 S. W. 30, 11 S. W. 1136.

We are of the opinion that the verdict of the jury is sufficiently supported by legal evidence.

[3] The defendant further insists that the court committed reversible error in refusing to instruct the jury "that, in order to convict on the evidence of an accomplice, the evidence must be corroborated." While as an abstract proposition the refused instruction requested correctly states the law, we think the court did not commit prejudicial error in refusing to give said instruction, for the reason that said requested instruction is not applicable to the evidence in the instant case.

"An instruction should never be given upon any question of law which is not applicable to the evidence." *Inklebarger v. State*, 8 Okl. Cr. 321, 127 Pac. 710.

The defendant also urges that the court committed reversible error in instructing the jury that:

"If you find and believe any witness has testified falsely as to any material fact, you may disregard such witness' testimony, yet you are not bound to do so. It may be considered as the evidence of any other witness when the same is corroborated by other evidence."

Said instruction given is not technically correct, because said instruction "leaves out of consideration the question whether such false testimony was willfully and knowingly given." *Hendrix v. State*, 4 Okl. Cr. 611, 113 Pac. 244.

[4] But we, after an examination of the entire record, think that it appears that the giving of said instruction has not resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. Hence we are prohibited by law from setting aside the judgment rendered by the trial court in this case, on account of the giving of said instruction. Section 6005, Revised Laws.

It follows that the court did not err in overruling the motion for a new trial.

The judgment of the trial court is affirmed, and mandate ordered to issue instant.

DOYLE, P. J., and MATSON, J., concur.

UNITED VERDE COPPER CO. v. WILEY. (No. 1651.)

(Supreme Court of Arizona. Sept. 22, 1919.)

1. CONSTITUTIONAL LAW §245, 301—MASTER AND SERVANT §11—EMPLOYERS' LIABILITY LAW DOES NOT DENY EQUAL PROTECTION OR DUE PROCESS OF LAW.

Employers' Liability Law is not in violation of Const. U. S. Amend. 14; relating to equal protection and due process.

2. DAMAGES §187—LOSS OF SERVANT'S EYE REDUCED EARNING CAPACITY.

In a servant's action for personal injuries, evidence held to show that the loss of plaintiff's eye had reduced his earning capacity.

3. DAMAGES §143—MEASURE FOR LOSS OF SERVANT'S EYE STATED.

The measure of damages for a servant's personal injury is not the difference between his earning power before and after his injury, but under general allegations of a complaint for injury resulting in the loss of an eye the servant was entitled to damages for mental and physical suffering caused by the injury and extraction of his eye.

4. DAMAGES §128—NOT EXCESSIVE UNLESS BEYOND ALL MEASURE.

Damages will not be considered excessive, unless they are so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as to manifestly show passion, partiality, prejudice, or corruption.

5. NEW TRIAL §108(5)—NOT AUTHORIZED FOR NEWLY DISCOVERED EVIDENCE NOT LIKELY TO CHANGE RESULT.

In a servant's action for loss of an eye, where defendant master secured a continuance to obtain evidence that plaintiff had lost the sight of such eye previously, and later, after announcing ready for trial, introduced evidence thereon, held, that defendant was not entitled to a new trial for newly discovered evidence, where the full contents of the letter of new witness to former injury were not in the record, and the court is not satisfied that a different verdict would have resulted, had such witness testified.

Appeal from Superior Court, Yavapai County; John A. Ellis, Judge.

Action by Albert Wiley against the United Verde Copper Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Anderson, Coleman & Nilsson, of Prescott, for appellant.

Cox, Moore & Cox, of Phoenix, and R. B. Westervelt, of Prescott, for appellee.

ROSS, J. The appellee, while in the employment of appellant as a miner in the hazardous occupation of mining in one of its shafts, "was injured [as he alleges in his complaint] by an accident arising out of and in the course of said labor, service, and employment, and due to a condition or conditions of such occupation or employment, and without any fault or negligence on his part in the following manner: * * * That, as a result of the aforementioned accident, plaintiff's right eye has been totally destroyed, and plaintiff has been compelled to have same removed, and an artificial eye put in its place. That he has had his eyesight injured permanently, and his ability to labor permanently diminished—all to the great damage of the plaintiff in the sum of \$15,000." He also alleges the expenditure of \$250 for surgical and medical aid, care, nursing, and attention.

The plaintiff bases his action upon the Employers' Liability Law, Revised Statutes of Arizona 1913, title 14, chapter 6. Demurrers to the complaint, special and general, were overruled, and the trial was had upon the issues made by the general denial in the answer and the allegation that the appellee was blind in his right eye at the time he entered the service of the appellant and on the date of the alleged injury, to wit,

June 18, 1917. A verdict and judgment was had for \$7,500.

[1] The first contention made by appellant mining company is that the Employers' Liability Law, under which the action was brought, is unconstitutional, as being in violation of the "equal protection" and "due process" clauses of the Fourteenth Amendment to the federal Constitution. While this contention had been raised in this court and several times overruled (*Inspiration Cons. Copper Co. v. Mendez*, 19 Ariz. 151, 106 Pac. 281, 1183; *Superior & Pittsburg Copper Co. v. Tomich*, 19 Ariz. 182, 165 Pac. 1101, 1185; *Ariz. Copper Co. v. Burciaga*, 20 Ariz. —, 177 Pac. 29), it was not finally and definitely laid to rest until June 9, 1919, when the Supreme Court of the United States, in the *Mendez, Tomich*, and three other cases, appealed to it from the federal District Court, held the Employers' Liability Law was not unconstitutional because it burdened, in certain hazardous occupations, the employer without fault, in the first instance, with the duty of compensating an injured employé, or in case of his death, his dependents, when the injury or death was not caused by the negligence of the employé. *Ariz. Copper Co. v. Hammer*, 250 U. S. 400, 39 Sup. Ct. 553, 64 L. Ed. —. The overruling of the demurrer that raised the unconstitutionality of the law was proper, and the assignments based thereon are without merit.

[2] It is next contended that there is no evidence to sustain the verdict, because it is not shown that appellee's earning power has been lessened by the loss of one of his eyes, and that therefore no damage was proved. Under this assignment it is insisted that the measure of damages to which appellee was entitled was the difference between his earning capacity before and after his injury, and that, if he could earn as much after as before the eye was lost, he could recover nothing. This contention is certainly a novel one, and we think without merit either in fact or law.

At the time appellee was injured, June 18, 1917, he was being paid \$5.90 per day. Six months thereafter, at the trial, his earning capacity was \$50 per month. His life expectancy at the time he was injured was 28.18 years. If the disparity in earning capacity continue, the loss from his injury may well equal or exceed the judgment of \$7,500.

There was testimony on behalf of the appellant that it and other mines employed one-eyed miners, but one of the appellant's foremen admitted that, as between two applicants, in all other respects equal, he would employ the one with two eyes, and stated that he considered that the loss of an eye impaired a man's earning capacity. The undisputed expert testimony was to the effect that the loss of an eye diminished the power to accurately estimate and gauge distances

from 60 to 75 per cent. A mere statement of the injury—the loss of an eye and its replacement with a glass substitute—indicates its permanency.

[3] It is not true as a question of law that the measure of damages is the difference between appellee's earning power before and after his injury. Under the general allegation of his complaint, that he was injured and as a result thereof lost an eye, he was entitled to damages for mental and physical pain and suffering caused by the injury and extraction of his eye. The rule is stated in 17 C. J. 1011, as follows:

"No allegation as of special damage is necessary to recover for mental suffering, where this is allowed as an element of damages, since such suffering is inseparably connected with and attends personal injuries. Pain and suffering need not be specially pleaded, where inseparable from, and a natural consequence of, the physical injury."

The learned trial judge, perhaps laboring under the impression that in this kind of action no recovery could be had for pain and suffering, so advised the jury. In so doing he committed error, but it was error in favor of appellant. The rule of damages, as announced by this court in *Arizona Copper Co. v. Burciaga*, 20 Ariz. —, 177 Pac. 29, and affirmed in *Arizona Copper Co. v. Hammer*, supra, is that it includes—

"all loss to the employé caused by the accident, not merely in the way of earning capacity, but of disfigurement and bodily or mental pain."

[4] There is no claim that the verdict was rendered through prejudice or passion, and there is nothing in the record to indicate that such was the case. That being so, we think the rule laid down by Chancellor Kent in *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253, is controlling. He said:

"The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess."

After quoting Chancellor Kent as above, in *Chicago, R. I. & P. Ry. Co. v. De Vore*, 43 Okl. 534, 143 Pac. 864, L. R. A. 1915F, 21, the court made the following comment, in which we fully concur:

"We think this rule is sound, for the reason the jury and the trial judge have a much better opportunity than do the appellate judges to measure the actual damages suffered by the plaintiff and the amount which would compensate him for the injury. They have an opportunity of seeing the plaintiff and to discern his manner of testifying, his intelligence and capacity, to note his physical condition, and many

other living evidences bearing upon the issue, including all the attending circumstances, of the larger part of which the appellate court is deprived. The jury, thus being in possession of all the facts and circumstances, is required to pass upon this issue as an issue of fact, under an appropriate charge of the court as to the law. Their solemn finding, returned into court and approved by the trial court, should not be disturbed by this court, unless it comes within the rule hereinbefore laid down. The trial judge has not only the opportunity afforded the jurors to gain knowledge of the conditions of the plaintiff's injury, and the amount which will compensate him, together with all the facts and circumstances surrounding his injury, but he also has the opportunity of observing the jurors in considering said cause, and of any outward feeling evidencing passion or prejudice that may be exhibited during the proceedings before him; and if it is made reasonably to appear that the verdict of the jury is excessive, by reason of any influence of passion or prejudice, it becomes his sworn and solemn duty, as a trial court, to set aside the verdict or require a remittitur to be filed. After he has considered this point on a motion for new trial, and approved the verdict by overruling the motion, the appellate court should never disturb the finding and judgment of the trial court, except for the gravest reasons, wherein it clearly appears that the trial court has abused its discretion, or that the verdict is excessive within the rule herein stated. Quotations from many courts show this rule to be sound and in harmony with the weight of authority and based upon reason and justice."

We conclude, from the facts in the case, the trial court having refused a new trial on account of the size of the verdict, we ought not to disturb it.

[5] It is also contended the court erred in refusing to grant appellant a new trial on newly discovered evidence. The appellant's defense, as set forth in its answer, to the merits of the case, was that in 1907, while working in a mine in Nevada, appellee was blasted, and his right eye injured and "permanently disabled, and that by reason of said injury plaintiff has been ever since * * * wholly unable to see out of the same," and "that plaintiff, at the time he entered the employment of defendant, was so injured and deprived of said sight." The amended answer setting up this defense was filed December 7, 1917; but prior thereto, on September 17, 1917, appellant, in a motion for a continuance supported by affidavit, recited the same facts and asked time in which to procure witnesses or evidence to establish this defense. The motion for continuance was granted, and the order setting the case for trial on September 29th was vacated. December 11th the setting was again vacated on application of appellant, and upon its motion the date of trial fixed as December 21, 1917, and on this date the minute record shows that "the respective parties answered ready for trial." At the trial appellant had five witnesses who had worked with

appellee in its mines prior to June 18th, the date of the alleged injury. One of them testified:

"The eye was dead; it was running all the time; it looked dead. * * * I asked him what was the matter with his eye, and he told me that he had lost the sight of his eye in Nevada from the effects of a blast. It was the right one."

The other four witnesses testified in effect to the same thing. Appellee testified that the sight of his right eye was good, and denied ever admitting to appellant's witnesses that he had lost the sight thereof. Two other witnesses, well acquainted with appellee before June 18th corroborated his statement as to the soundness of his right eye. This sharp conflict in testimony was resolved by the jury against the appellant.

The showing on appellant's motion for a new trial is that on January 16, 1918, one C. K. Norris, of Garden City, Cal., a fellow workman with appellee when he was injured in a Nevada mine, was located by accident; that said Norris knew appellee and the extent of his injuries; "that said injuries consisted of one broken arm, the sight of one eye destroyed," etc., and that upon a new trial he would testify to the same either in person or by deposition; that said Norris had written appellant's agent a letter "giving the foregoing facts and information." This letter was not exhibited.

We think the record shows appellant was diligent in searching for testimony to support or prove its defense that appellee's right eye was blind at the time he began working for it; but it also appears that appellant was satisfied, when it announced ready for trial on December 21st, to risk the issue upon the evidence it had at hand. It might have asked for another continuance, urging as a reason therefor inadequacy of time to locate witnesses of a fact that had happened 10 years before in a foreign jurisdiction. It chose not to do so, and to proceed with the trial. We think, in the circumstances, the application for a new trial ought not to be regarded with special favor. Besides, we are not satisfied a new trial would result in a different verdict, even if Norris should testify as represented. The letter he wrote appellant's agent is not in the record, nor does the record purport to contain its full contents. So far as may be known, it may have contained other statements that would completely nullify "the foregoing facts and information." In *Superior & Pittsburg Copper Co. v. Davidovitch*, 19 Ariz. 402, 171 Pac. 127, the showing for a continuance was very similar to the present showing. We there held the refusal of the application was not error.

The judgment is affirmed.

CUNNINGHAM, C. J., and BAKER, J., concur.

SWANSEA LEASE, Inc., v. MOLLOY.
(No. 1678.)

(Supreme Court of Arizona. Sept. 22, 1919.)

1. CONSTITUTIONAL LAW §245, 301—MASTER AND SERVANT §11—EMPLOYERS' LIABILITY LAW DOES NOT VIOLATE PROTECTION OF LAW CLAUSE.

The Employers' Liability Law is not violative of Const. U. S. Amend. 14.

2. MASTER AND SERVANT §265(1)—PLAINTIFF MUST SHOW THAT HE WAS SERVANT WHEN INJURED.

In action under Employers' Liability Law, defendant cannot be held liable unless the injured person was an employé, and the burden rests upon the plaintiff to prove that relationship.

3. MASTER AND SERVANT §88(3)—INJURED PARTY NOT A SERVANT, BUT INDEPENDENT CONTRACTOR.

A contract by which plaintiff's intestate and others agreed to sink a shaft for defendant according to specifications and at a price per foot, they to have full control over the manner and method of doing the work, reserving to defendant a right to inspect and direct changes of work not done according to agreement, nor in workmanlike manner, requiring continued maintenance of three shifts and providing against employment of persons objectionable to defendant, held to make intestate an "independent contractor," and not a servant, within Employers' Liability Law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

4. APPEAL AND ERROR §837(11)—EVIDENCE ADMITTED WITHOUT OBJECTION CONSIDERED.

In a personal injury action, where there was an agreement establishing the relation of independent contractor, and parol testimony was admitted practically without objection for the purpose of showing what was done under the contract, and that the real contract was one of employment, such evidence must be considered in determining the appeal, regardless of its competency.

5. MASTER AND SERVANT §88(3)—INJURED PARTY INDEPENDENT CONTRACTOR, NOT SERVANT.

Plaintiff's intestate, who with others contracted to sink a shaft for defendant at a price per foot, held to be an independent contractor, and not a servant, within Employers' Liability Law, notwithstanding defendant's deduction of hospital fees and the violent act of its superintendent in running away two of intestate's employés, not done under lawful power to discharge, its insuring against injuring intestate, it having agreed to do the hoisting, and its payment for the work at time of paying employés and ordering waste dumped in another place, but not directing manner of work in extending a trestle, in doing which intestate was killed.

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by Anna C. Molloy, administratrix of the estate of James Chapman, deceased, against the Swansea Lease, Incorporated. From an order refusing a new trial, and from the judgment for plaintiff, defendant appeals. Reversed.

Action to recover the damages given by the Employers' Liability Law (Civ. Code 1913, pars. 3153-3162) for personal injuries suffered by James Chapman, which resulted in his death. The plaintiff alleges that the said deceased was in the employ of the defendant, and that he was injured by accident arising out of and in the course of his said employment, which resulted in his death. The defendant denied that deceased, when injured, was in defendant's service, but alleges that deceased was engaged with two other persons in the performance of a contract which deceased, with two other persons, had entered into with defendant, and while so occupied as independent contractor the deceased was injured and died therefrom. The plaintiff replies to such defense and alleges as follows:

" * * * That said Chapman, with two other miners, was hired and employed by the defendant to sink a certain shaft in and upon the mining properties of the defendant, at Swansea, Ariz., at the agreed price of \$34 per foot, which said hiring and employment was evidenced by a certain instrument in writing, a copy of which, marked Exhibit A, is annexed hereto and made a part of this reply, which said instrument in writing was executed on the day of its date, by said Chapman and said other two miners, on their own behalf, and by one Ernest Lane, the superintendent and manager of the defendant corporation, thereunto duly authorized by the defendant, on behalf of the said defendant; but that said contract and instrument in writing was, and is, a device and means contrived and put into effect by the defendant for the purpose and with the intent of enabling the defendant to exempt itself from the liability created by chapter 6, title 14, Revised Statutes Ariz. 1913, and said contract is, and was at all times, void to that extent."

The reply further sets forth that in its dealings with Chapman under said contract it treated him as its employé, by compelling him to pay hospital fees and ground rent as its other employés were required to pay; that it insured the said Chapman against accident, and upon his death it reported such death to the indemnity insurance company, and presented a claim against such company for the death of said Chapman as an employé of said defendant; that it paid to said Chapman wages. Consequently:

"The defendant is, and by right ought to be, estopped to assert that said Chapman was

not an employé of the defendant, and is estopped to assert that said Chapman was an independent contractor at the time of the fatal accident which resulted in the death of said Chapman."

The contract is dated June 13, 1917, and is an agreement between defendant and F. V. Johnson, James Chapman, and M. D. Burris, by which the said second parties agree to sink a mining shaft a depth of 500 feet, for which they were promised a compensation of \$34 per foot of depth. The contract specifies the duties and obligations of the parties in detail. Clauses added to the contract provide for the time of commencement of the work and its continuous prosecution until completed; also for the deposit of 15 per cent. of the contract price, to be held as a guaranty for the faithful performance of the agreement by the parties of the second part, and in case of their failure—

"to faithfully perform and comply with all of the terms and conditions of this agreement, the amount so deposited shall be forfeited to the party of the first part as liquidated damages. It is understood and agreed, however, that if the failure to perform and comply with the terms and conditions of this agreement by the parties of the second part is due to any fault of the party of the first part, the said parties of the second part are thereby unable to complete said shaft, the said moneys so deposited shall be paid over to the parties of the second part."

The evidence is without conflict that the contract was fully completed by and in behalf of the parties of the second part, and that the defendant company paid to this plaintiff, as administratrix of the estate of James Chapman, deceased, his proportion of the 15 per cent. of the contract price, which was retained and deposited in the bank to be paid on the satisfactory completion of the contract work; that said amount so held and so paid out to said three parties was \$1,695.75, and plaintiff was paid and she received of said amount the sum of \$509.15 as a final settlement of James Chapman's portion of the contract price for the completion of the mining shaft. The contract has been full-performed by both parties thereto, and no dispute of that fact appears in the record.

The jury returned a verdict for the plaintiff, and the defendant appeals from the order refusing a new trial and from the judgment.

George J. Stoneman, of Phoenix, and C. O. Whittemore, of Los Angeles, Cal., for appellant.

Thomas D. Molloy, of Yuma, for appellee.

CUNNINGHAM, C. J. (after stating the facts as above). [1] The action is founded upon the Employers' Liability Law, and the defendant has demurred to the complaint because and for the alleged reason that said

law violates the Fourteenth Amendment of the Constitution of the United States. The demurrer was overruled by the lower court, and the ruling is assigned as error. This court has repeatedly held adversely to appellant's contention, and adheres to the said ruling on the authority of *Inspiration Consolidated Copper Co. v. Mendez*, 19 Ariz. 151, 166 Pac. 278, 1183, *Superior & Pittsburg Copper Co. v. Tomich*, 19 Ariz. 182, 165 Pac. 1101, 1185, *Superior & Pittsburg Copper Co. v. Davidovitch*, 19 Ariz. 402, 171 Pac. 127, and *Arizona Copper Co. v. Burclaga*, 20 Ariz. —, 177 Pac. 29, decided December 21, 1918.

The vital question presented by this record is whether there is any evidence to sustain the plaintiff's allegations that James Chapman, deceased, was, at the time of the accident which caused his death, engaged in the performance of his duties as an employé of the defendant company, in the meaning of that relation understood in the Employers' Liability Law. The question is raised in a number of assignments of error and requires a decision. All parties must concede, if the contract of June 13, 1917, was binding on James Chapman as written at the time of the accident resulting in his death, that his relation to the company defendant, as established by the said contract, was that of independent contractor, and not that of an employé, as understood in the Employers' Liability Law.

The assignments of error deny the existence of any evidence tending to abolish the said contract. The plaintiff sets out the contract, but alleges that the contract was a "device and means contrived and put into effect by the defendant for the purpose and with the intent of enabling the defendant to exempt himself from the liability created" by the Employers' Liability Law. As evidence that such contract was a "device and means contrived and put into effect by the defendant" for such purpose, the plaintiff sets forth in her reply that the defendant—

"caused and compelled said Chapman to pay hospital fees and ground rent, and paid liability insurance to a certain indemnity company [insuring Chapman] as an employé of the defendant company, * * * and immediately upon the death of said Chapman did report said death to such indemnity company, and presented to the said company a claim for the death of said Chapman as an employé of said defendant, and did pay wages to said Chapman at the time and in the manner that the other employes of the defendant were paid wages."

Are such circumstances evidence tending to establish as a fact that the contract of June 13, 1917, was a "device and means" used by defendant to avoid the burdens of an employer? They are offered for the purpose of establishing, as a fact, that a written contract, which, on its face, creates a relation between the defendant and James Chapman,

is in law one other than that of employer and employé, was not a binding contract, and was void for the reason that such paper was a mere device and means contrived to escape liability imposed by statute. In other words, such circumstances are offered by the plaintiff as sufficient evidence of a fraud practiced by the defendant company to escape a duty imposed by statute, owing to an employé.

Chapman was not misled to his injury by the conduct of the defendant, and no party to the contract makes claim that the contract was abandoned. The plaintiff concedes—at least, does not dispute—that the written contract was fully performed by all parties thereto, and that plaintiff, as administratrix of the estate of James Chapman, deceased, received from the defendant company, for and in behalf of such estate, final payment of its share of the contract price earned in the performance of the contract in sinking the shaft.

The facts in evidence are convincing to the effect that all parties to the said contract regarded the contract binding, and so conducted themselves, until after full performance of its terms. Consequently, the plaintiff has wholly failed to sustain by any competent evidence the allegation that said written contract was void, because it was entered into as a device and means contrived by the defendant to escape liability to an employé for an accident occurring in its mines, by which such employé was injured. The evidence relied upon by the plaintiff was not sufficient to establish such allegation of fraud and thereby abrogate said written contract. The trial court erred in refusing to instruct the jury to return a verdict for the defendant, because of such failure of the evidence in such particular.

The judgment is reversed, and the cause remanded, with instructions to take such further proceedings in the cause as justice may require, not inconsistent with law.

BAKER, J. (concurring). I have reached the same conclusion in this case as the Chief Justice, differing from him only in the line of reasoning by which the result is attained. The case is of some importance, and it being one of first impression in this court, as to who is an independent contractor, I propose to state the reasons why I think the judgment of the lower court should be reversed.

The plaintiff's intestate, James Chapman, entered into a written contract with the Swansea Lease, Incorporated, the defendant, to sink a shaft of certain specific dimensions on mining property occupied by the defendant, to the depth of 500 feet, at the agreed price of \$34 per foot. The work on the shaft was to commence between July 1 and 10, 1917, and was to be prosecuted diligently

until the shaft was completed; Chapman and his associates stipulating that they would work three shifts continuously, unless otherwise agreed with the defendant company. Chapman and his associates were to furnish all necessary labor and tools, also all necessary fuses and caps and candles, for the completion of the shaft, but if they desired to purchase these articles from the company they might do so at cost price. All the work was to be done in a good and workmanlike manner, to be in line and square, and done to the satisfaction of the company, and the company was to have the right to inspect the work at any and all times, and direct any and all changes of work that had not been done, or was not being done, in accordance with the agreement. The company was to do all hoisting, and furnish a pumpman and necessary pump to keep the water down, and also was to furnish the necessary timbers framed and delivered at the collar of the shaft, and all hand and drill steel, all air drills, compressed air, and all air pipe. The company was to measure up the work completed by Chapman and his associates on the 1st and 15th of each month, and pay them 85 per cent. of the money due for all work completed up to the measurement date, as follows: On the 7th of the month to pay 85 per cent. of the work measured up to the last of the month, and on the 23d of the month to pay 85 per cent. of the work measured up to the fifteenth of the month; the balance of 15 per cent. was to be deposited on pay days in the Citizens' National Bank of Los Angeles, to be paid by said bank to Chapman and his associates, upon the completion of said work and when the same was accepted by the company. The contract contained a further clause, worded as follows:

" * * * The parties of the second part further agree not to hire any person objectionable to the party of the first part. * * * "

Within the time provided by the contract, Chapman and his associates commenced work on the shaft, and, as is usual and customary in the sinking of a shaft, constructed a trestle for the purpose of dumping the rock and waste material removed from the shaft. On October 20, 1917, while Chapman was upon the rails or runway of the trestle, and while he was in a stooping attitude, endeavoring to ascertain if the rails or runway of the trestle was level, in order to admit of the passage of the ore car used in the dumping, one of the rails turned or slipped while he was standing upon it, and he fell to the ground and was killed.

[2] The vital question for determination in the case is whether the deceased, Chapman, was an employé of the Swansea Lease, Incorporated, within the meaning of the Employers' Liability Law of the state, at the time of the happening of the unfortunate accident

by which he lost his life, or whether he was an independent contractor. It must be conceded that if the deceased was not an employé of the company at the time, the judgment in behalf of his widow and child cannot be sustained under the Employers' Liability Law. That law imposes no obligation upon the defendant company, unless Chapman was an employé of the company, and the burden rested upon the plaintiff to prove that relationship. Employers' Liability Law, Civil Code, 1913, pp. 1051-1054; *Harris v. McNamara*, 97 Ala. 181, 12 South. 103.

[3] The defendant insists that, under the proofs, said deceased was not an employé of the company, but an independent contractor. An "independent contractor" is defined as one who exercises an independent employment, and contracts to do a piece of work according to his own method, and without being subject to the control of his employer, save as to the result of the work. *Alexander v. R. A. Sherman's Sons Co.*, 86 Conn. 292, 85 Atl. 514; *Lurton, J.*, in *Powell v. Virginia Const. Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work, and have the right to control the mode and manner of doing it. *Shearman & Redfield on Negligence*, volume 1 (6th Ed.) par. 164; *Hexamer v. Webb*, 101 N. Y. 377, 385, 4 N. E. 755, 54 Am. Rep. 703.

An independent contractor is not in any legal sense a servant of his employer, but is one exercising an independent employment under a contract to do certain work by his own method, without the suggestion or the control of his employer, except as to the product or result of the work. *Parrott v. Chicago Great Western Ry.*, 127 Iowa, 419, 103 N. W. 352; *Williams v. National Cash Register Co.*, 157 Ky. 836, 164 S. W. 112; *Mountain v. Fargo*, 38 N. D. 432, 166 N. W. 416, L. R. A. 1918C, 600, Ann. Cas. 1918D, 826; *Wood on Master and Servant*, par. 424; *Thompson on Negligence*, par. 622. In *Labatt's Master and Servant*, volume 1 (2d Ed.) par. 64, the author says that:

"The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed. This attribute of the relation supplies the single and universally applicable test upon which serv-

ants are distinguished from independent contractors."

Looking solely to the contract, I am unable to perceive in its terms any reservation of power or right on the part of the defendant company to control or direct the manner or method in which the contractors should accomplish the work of sinking the shaft which they contracted to do. They had full, unrestricted, and unqualified control over the manner or method in which the work was to be done. The defendant company had no authority to say or direct how the work should be performed, or the mode of doing it. The contractors were free to work where, when, and how they chose, except that they were required to maintain three shifts continuously. The defendant company had no control over the employés of the contractors, nor could the company authoritatively interfere in the matter of determining who should be employed by the contractors, or how many men the contractors might employ, or what wages should be paid to the men so employed. No power to discharge the men employed by the contractors is reserved to the company in the contract. The clause in the contract to the effect that no person or persons objectionable to the company should be employed by the contractors in no manner affected the status of Chapman and his associates as independent contractors in respect to the sinking of the shaft. In case the contractors employed any one that was objectionable to the company, all that the company could do was to protest or object to the employment; it had no power or right to discharge such employé. The contractors, if they chose, might employ any one they elected, provided they cared to run the chance of an abrogation of the contract for a breach of its terms. *Callahan v. Salt Lake City*, 41 Utah, 300, 125 Pac. 863. Besides, the relationship between the defendant company and the contractors is to be determined from the contract as a whole—by its spirit and essence—and not by the wording or phraseology of a single sentence or paragraph. 13 C. J. 525; *Foster v. City of Chicago*, 197 Ill. 268, 64 N. E. 322.

The clause in the contract reserving to the company the right to inspect the work at any and all times and direct all changes of work that had not been done or was not being done in accordance with the agreement and in a mining and workmanlike manner, does not change the character of the contract. In *Shearman & Redfield on Negligence*, volume 1 (6th Ed.) par. 165, it is said that:

"Even reservation of the right of inspection at all times, and the requirement that the work must be done subject to the approval of the employer, does not make a servant of one who is doing the work, where there is no reserved right to dictate the details of the method being used, or any right to interfere with the servants of the party doing the work."

See, also, 16 Am. & Eng. Encyc. of Law (2d Ed.) p. 188; *Casement v. Brown*, 148 U. S. 622, 13 Sup. Ct. 672, 37 L. Ed. 582.

[4] So much for the contract. Standing alone and by itself, the contract indisputably creates the relation of employer and independent contractor. The trial court, however, admitted a mass of parol testimony as to what the parties did under the contract. This evidence was admitted, apparently, for the sole purpose of showing what the true or real relationship was between the contractors and the company, as shown by the acts of the parties, notwithstanding the contract. We are not now concerned with the admissibility of this parol testimony on the score that the contract was plain and unambiguous, since it was received practically without objections, and no assignment of error has been made in that regard in this court, and it is therefore unnecessary to pass upon the question as to whether the trial court erred in admitting that evidence; it is a part of the record here, and must be considered in determining the appeal.

[5] It appears from a portion of this testimony that the defendant company procured liability insurance based on all pay rolls of the company, including the pay roll kept by the company for the payment of the contractors and their employes. It is to be borne in mind that the company was to do the hoisting. Under this stipulation, the company assumed the duty, not only to furnish proper and safe appliances with which to do the hoisting, but also the duty to see that the hoist was not negligently operated by its engineer. In the event of the negligent performance of either one of these duties, whereby the contractors or their employes were injured, the law imposed a liability on the company. Under the circumstances, the company was certainly fully within its rights, and justified, as a matter of protection, in insuring itself against such liability, and the procuring of the liability insurance, although based upon all the pay rolls, cannot be considered as having the effect to change the character of the contract.

It is in evidence that the superintendent at one time ran away two men who had been employed by the contractors. The circumstances surrounding this action are not clearly stated in the record, but we have concluded that it was an act of violence or threatened violence on the part of the superintendent. Clearly it was not the exercise of the lawful power to discharge the men, and therefore it could have no effect upon the dependency or independency of the contract.

The wages of the employes of Chapman and his associates were paid by the company out of the money due the contractors, based upon measurement of the work, at \$34 per foot according to the contract. The contract itself provided that 85 per cent. of the moneys due the contractors for sinking the shaft

should be paid to them bimonthly. The statute law of the state requires that every corporation or company shall pay its employes their wages bimonthly, and the fact that the payment of the contractor's employes took place at the same time the company paid its own employes cannot be considered as affecting the character of the contract. The payment of workmen by the owner does not necessarily transform an independent contractor into a servant or agent. *Thompson on Negligence* (2d Ed.) par. 629; *Scales v. First National Bank*, 88 Or. 490, 172 Pac. 499.

The deduction of the hospital fees from the pay of the contractors and their employes was not an act necessarily inconsistent with the independency of the contract. *Good v. Johnson*, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896.

The contract does not in express terms provide where or how the waste rock and material taken out of the shaft should be dumped. The evidence shows that the contractors proceeded to dump the waste rock and material in a circular form around the collar of the shaft. After they had been engaged for some time in dumping, the superintendent of the company instructed them to change the dumping, so as to dump the waste material from shaft No. 7 (the contractors were sinking shaft No. 7) straight across to shaft No. 5, and in building an extension of the trestle for this work Chapman was killed. This action by the superintendent is the nearest approach to the exercise of control over the work found in the entire record. In weighing the control exercised, we must carefully distinguish between authoritative control and mere suggestions or directions as to details. *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

"The mere fact of direction as to things to be done, without control over the method or means of doing them, does not make a contractor a servant." *Shearman & Redfield on Negligence*, vol. 1, par. 164.

I am of the opinion that the case upon this point comes within the class of cases of which *See v. Leidecker*, 152 Ky. 724, 154 S. W. 10 is one. In that case it appears that *See* was a farmer and owned an ox team, with which he did heavy hauling. *Leidecker* employed *See* to haul a heavy boiler from the railroad station to a point several miles distant, where *Leidecker* was preparing to bore a well for oil. *See* with his team and hands loaded the boiler onto a wagon and hauled it to the place of delivery, and left the wagon standing with the boiler on it until the following morning. *See* and his men went to the place for the purpose of unloading. *Leidecker* wished the boiler unloaded at a particular place, and set in a particular way, and he gave directions to *See* accordingly. For the purpose of holding the boiler, or as a means

of pulling it off the wagon, Leidecker directed See to put a chain around the boiler, and for the purpose of connecting it told See to pass the chain under the boiler and hand it up on the other side. In doing this, See went under the boiler and put his head between it and the coupling hole, whereupon the boiler toppled over toward the opposite side, striking him upon the head and badly mashed it. The court held that the relation of master and servant did not exist between See and Leidecker. See, also, *Pace v. Appanoose County (Iowa)* 168 N. W. 916, 17 N. C. C. A. 682; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191-197, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; *Ash v. Century Lumber Co.*, 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973.

In this case the superintendent did no more than to direct where the dumping should take place. He assumed no control over the method or means of doing the work; that was left entirely to the contractors, and the fact that the superintendent directed the particular place at which the debris should be dumped was in no way inconsistent with Chapman's relation being that of an independent contractor.

The doctrine contended for by the plaintiff, that a person employed to do certain work may be an independent contractor as to certain parts of the work, and merely a servant or agent of the party employing him as to the residue of the work (*Shearman & Redfield on Negligence*, vol. 1, par. 165; *Powley v. Vivian Co.*, 169 App. Div. 170, 154 N. Y. Supp. 426; *Swart v. Justh*, 24 App. D. C. 596), has no application to the facts of the case. The dumping of the debris was but the smaller part of the larger work of sinking the shaft. It is necessarily implied in the contract. That the contractors regarded the dumping at the place indicated by the superintendent as a part of their work or duty under the contract is manifest from the undisputed testimony that they made no claim or demand for extra compensation and received none.

Upon the whole case, I am satisfied that the provisions of the agreement, and the acts of the parties under it, as disclosed by the parol testimony, are consistent only with the relation of Chapman being that of a person exercising an independent calling. He was in no sense an employé. This is particularly apparent from the undisputed testimony that Chapman worked from 16 to 18 hours a day, while the employés of the company were required to work only 8 hours a day (underground), in compliance with the state law, and that the scale of wages of the employés of the company was \$5.15 a day, while the employés of Chapman and his associates received \$7 a day.

For the foregoing reasons, the judgment appealed from should be reversed.

ROSS, J. I concur in the opinion stated by Judge BAKER.

JONES v. STATE. (No. 935.)

(Supreme Court of Wyoming. Sept. 29, 1919.)

1. CRIMINAL LAW §1159(4)—LARCENY §55 — EVIDENCE INSUFFICIENT TO SUSTAIN CONVICTION.

In a larceny prosecution where the only evidence upon which the jury could rightfully find the defendant guilty was testimony of a witness who had himself pleaded guilty to the larceny of a horse, considering witness' character, the improbability of his story, and his being directly contradicted by several witnesses on material matters, following the rule that judgment will not be reversed if supported by substantial credible evidence, held that evidence was neither substantial nor credible, was insufficient to sustain a conviction, and warranted reversal.

2. CRIMINAL LAW §839(1)—NEW TRIAL DENIED FOR NEWLY DISCOVERED EVIDENCE, WHERE NO DILIGENCE IS SHOWN.

In a prosecution for larceny, testimony of one who had purchased the stolen horse that he bought it not of defendant, but from the prosecuting witness, was material, but as newly discovered evidence was not sufficient to require a new trial, where defendant was not diligent in procuring it, inasmuch as defendant knew that such witness had the stolen mare at such purchaser's place a day or two after the theft.

Error to District Court, Laramie County; William C. Mentzer, Judge.

William L. Jones was convicted of larceny, and he brings error. Reversed.

H. Dongelmann, of Cheyenne, for plaintiff in error.

W. L. Walls, Atty. Gen., and T. Paul Wilcox, Deputy Atty. Gen. (L. C. Sampson, former Deputy Atty. Gen., and Sam M. Thompson, County and Prosecuting Atty., of Cheyenne, on the brief), for the State.

BEARD, C. J. The plaintiff in error, William L. Jones, was convicted of the crime of larceny, and sentenced to a term in the penitentiary. From that judgment he brings the case to this court by proceedings in error.

The errors assigned are: (1) Insufficiency of the evidence to support the verdict and judgment; (2) newly discovered evidence.

[1] The property alleged to have been stolen was a certain gray mare, the property of Wesley Kelly. The evidence discloses that the mare was put in the barn of Kelly, situ-

ated a little more than a mile from the town of Pine Bluffs, where Kelly resided, about 5:30 or 6 o'clock on the evening of November 21, 1916, and disappeared therefrom some time between that hour and the next morning. The only evidence in the record tending to connect Jones with the larceny is the testimony of one Bush, a witness for the prosecution, a young man about 21 years of age at the time of the trial, who had theretofore been convicted of the larceny of a horse upon a plea of guilty, and was at the time of the trial under sentence therefor in the Industrial Institute in this state, and who admitted that he had stolen other horses. His testimony was to the effect and substantially as follows: That he went to the ranch of Jones, which is about 22 miles from Pine Bluffs, on the evening of November 20, 1916, for the purpose of going to work for Jones. On the next day he accompanied Jones to Pine Bluffs with a load of wheat, where they arrived in the evening about 5 o'clock, unloaded the wheat at the elevator, put up the team in Anderson's livery barn, and went together to supper about 7 o'clock. After supper went to Robinson's store, remained there about an hour, saw Mr. Hastings, Mr. Jones, and Mr. Bloom there. Went from there to Johnston's store, where Jones and Hastings came in; was there probably 20 minutes, and went out with Hastings and Jones. Went with them to MacSheedys, was there 15 or 20 minutes. Went from there with Hastings and Jones to Simon & Sellers saloon, was there a short while, went from there to the drug store, then back to the saloon. Saw Jones and Hastings there. Stayed there a few minutes. Went to Anderson's livery barn. Jones and Bloom were there. Was there a few minutes, and went back to saloon where Jones came in later. "Jones motioned to me to follow him outside. Hastings went out at same time. Hastings, Jones, and I went to Anderson's livery barn. Jones said he wanted to give Hastings the slip. Jones and I went to Bloom's barn. Found Bloom there. On the way down Mr. Jones had told me he had a horse down at Frank Bloom's barn he wanted me to ride out to his place. I told him all right, so we went into Frank Bloom's barn, and he pointed the horse out. The horse was already saddled and bridled, and he said: 'There is the horse.' They told me to be careful of this horse; that he hadn't been ridden much. Jones told me that, and also gave me instructions not to tie my reins together, so if she got away and throwed me or anything I could catch her again, and Bloom spoke up and told Jones to tell me to go out the state line road, and I didn't do it. It must have been about 11 o'clock. (On cross-examination he said 10:30.)" That he led the horse out in the street, got on it, and rode out to Jones' place, arriving about 4 o'clock in the morning, put the horse in the barn, fed it,

talked with Mrs. Jones, who was in bed. Jones came home about 5 o'clock in the evening. "He told me Wesley Kelly was looking for this mare, that he had been down past Frank Bloom's place with a car, and that he had to get her out of there that night; that Kelly might be out there the next morning. After he put his team away and got supper, he saddled his horse and gave me instructions to saddle my horse. He said it would be best for me to go along, as they might come looking for me. He told me it was Kelly's mare. Jones led the Kelly mare and rode one of his, and I came along behind on a horse of mine, and we went north and east about 40 miles across country until about 2 o'clock the following morning. Jones left me in the pasture there, said he would ride down to the house and see if this fellow was there, where he was going, came back, and said it was all right. We took the mare down and put her in the barn. A fellow by the name of Nelson came out, and Jones introduced me to Nelson. We went in the house, and Nelson got Jones and I a bite to eat and some coffee. We sat there and talked quite a while. I went to bed, and Jones and Nelson sat up and talked. Jones came in while I was asleep, and we slept together. We got up the next morning about the same time, about 8 or 9 o'clock. Jones planned to go home in the afternoon, and instructed me to stay until the following morning and drive a cow home, which he had bought down there, which I did, arriving at Jones' ranch about 5 o'clock in the evening."

The foregoing is the substance of all of the testimony of the witness Bush tending to connect Jones with the larceny. Jones testified, in substance, that Bush accompanied him to Pine Bluffs with the load of wheat; that they arrived there in the evening, had supper together; that he was at several places in the town with him during the evening up to about 9:30 o'clock, at which time he went to the hotel kept by Beaver, and went to bed there about 10 o'clock that evening. In that statement he was corroborated by Beaver, who testified that Jones went to bed about 10, or between 10 and 11 o'clock. Jones denied being with Bush after about 9:30 o'clock, denied being with him or Bloom at Bloom's barn, or that any such conversation as related by Bush as taking place at the barn was had. Denied being at Bloom's barn that evening. Stated that he went to Anderson's livery barn to attend to his team before going to the hotel, and that Bush did not go with him. Denied being at the saloon. Hastings testified that Jones and Bush were at the saloon, and that the three went to Anderson's barn about 11 o'clock, and that he did not see them later. Bloom testified that he was not at his barn that evening with either Bush or Jones; that he left Jones on the street about 9:30 o'clock, and went home and was not out again that night; that nei-

ther Bush nor Jones were at his barn that evening to his knowledge; that Bush told him he was going to Cheyenne on the train, No. 17, that night. (It appears from other testimony that No. 17 was due in Pine Bluffs at 10:10 p. m.) Mrs. Bloom testified that her husband came in about 9:30, or a few minutes thereafter, and went to bed about 10 o'clock. Jones further testified that Bush told him on the way to town that he was going out in the country that evening to a party, and later that he was going to Cheyenne; that he went home the next day, arriving there in the evening, and that Bush was not there; that he started to Nelson's alone the next morning for a cow which he had bought at a sale; that he overtook Bush about a mile or mile and a half from Nelson's, riding a gray mare, and asked him where he was going, and he replied, "To Nelsons"; that he had never seen this gray mare before that time, and did not know to whom she belonged; that he was going right back home, and Bush said, "If you want to go back, I will drive the cow back for you to-morrow," which he did; that Nelson's place is about 25 miles from his place. Mrs. Jones testified that Bush was not at the Jones' place after he left to go to Pine Bluffs on November 21st, until he returned with the cow on the 24th, that Jones started for the cow in the morning about 7 or 7:30 o'clock, and that one Verne Sequine was there at that time. Segune testified that he was at the Jones' place on the morning Jones started for the cow, that there was no one with Jones, and that he did not see Bush there at that time. W. A. Sherrill, who resided at Crawford, Neb., testified that he bought the mare from Nelson at Crawford, and that she was claimed and taken from him by Kelly.

We have set out at considerable length the material testimony in the case, as this court has always followed the rule that it will not reverse a judgment on the ground of the insufficiency of the evidence to support the verdict of a jury, or the findings of the trial court, if there is in the record substantial credible evidence to support it. But in the present case the only evidence upon which the jury could rightfully find the defendant guilty was the testimony of the witness Bush. Considering the character of that witness, the improbability of his story, and the fact that he was directly contradicted by so many witnesses on material matters forces one to the conclusion that his evidence is neither substantial nor credible. The animal was stolen from a barn a mile or more away from the town of Pine Bluffs, where the owner lived and was engaged in business, some time during the night of November 21, 1916, and according to Bush's testimony it must have been before 10:30 on that evening. It is highly improbable that a thief at that time of night would take the stolen animal to

a small town where the owner lived, and while business places were open and people were on the streets. There is no evidence that Jones was at Kelly's barn that night, or was out of Pine Bluffs.

[2] The material evidence, claimed to be newly discovered, consists of the evidence of the man Nelson mentioned by the witnesses. In his affidavit attached to the motion for a new trial, he states, in substance, that on the afternoon or evening of November 23, 1916, John Bush came to his home and had with him two horses, one a gray mare; that Bush remained there that night, and the next morning Bush wanted to trade the mare to him, but no trade was made; that Bush then wanted to sell the mare to him, and that he then bought the mare from Bush for \$50; that he never purchased any horse or mare from William L. Jones, the defendant; that this was the same gray mare he took to Crawford, Neb., and sold there. That evidence was material; but, according to Jones' own testimony, he knew Bush was at Nelson's with this mare on November 23d; and there is no sufficient showing in the record of reasonable diligence to procure it and present it at the trial.

Reluctant as appellate courts are to set aside the verdict of a jury, a careful consideration of all of the evidence in this case satisfies us that it is one of the few cases which comes within the exception to the general rule, and that there is not in this record sufficient substantial credible evidence to support the verdict and judgment. For that reason the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

Reversed.

POTTER, J., and BURGESS, District Judge, concur.

BLYDENBURGH, J., being unable to sit, Hon. James H. BURGESS, Judge of the Fourth Judicial District, was called in and sat in his stead.

BURLEY-WINTER POTTERY CO. v. ONKEN BROS. & WEST CO. (No. 924.)

(Supreme Court of Wyoming. Sept. 22, 1919.)

1. FRAUDS, STATUTE OF §158(2)—INSUFFICIENT MEMORANDUM OF SALE INADMISSIBLE.

In seller's action for breach of sales contract, a memorandum of the contract, which does not satisfy the statute of frauds, is inadmissible in evidence.

2. FRAUDS, STATUTE OF §106(1), 118(2)—MEMORANDUM UNCERTAIN AS TO TERMS OF SALE INSUFFICIENT.

Memorandum of sales contract, in order to satisfy statute of frauds, must contain the substantial terms of the contract, expressed with such certainty that they may be understood.

from the contract itself, or some other writing to which it refers, without resorting to parol evidence; and when reference is made to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another.

3. FRAUDS, STATUTE OF §109—WHEN DESCRIPTION OF SUBJECT-MATTER OF SALE INSUFFICIENT.

Order for goods, describing them as "stone-ware as per orders shown for same," held insufficient memorandum of sales contract under statute of frauds; description of subject-matter being too indefinite.

Appeal from District Court, Sheridan County; James H. Burgess, Judge.

Action by the Burley-Winter Pottery Company against the Onken Brothers & West Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

Metz & Sackett, of Sheridan, for appellant.

Lonabaugh & Wenzell, of Sheridan, for respondent.

BEARD, O. J. In this case the appellant was plaintiff, and the respondent was defendant, in the district court, and will be referred to as plaintiff and defendant. The plaintiff in its amended petition, for a first cause of action, after alleging the corporate capacity of each of the parties, alleged in substance and effect:

That it was engaged in the manufacture and sale of crockery, pottery, glassware, and other articles of like character, in the city of Crooksville, state of Ohio. That on or about April 7, 1914, it sold and delivered to the defendant, at defendant's request, certain articles of merchandise and other property, at the agreed price of \$278.50. In the petition was set out an itemized account of goods, amounting to \$284.25, followed as follows:

"Less ¼¢ per gallon on 4,987 gallons..	\$12.47	
Less 10% on \$32.83 specialties.....	3.28	15 75
		\$268 50
Two stop-off charges prepaid.....		10 00
		\$278 50"

That defendant promised and agreed to pay for said merchandise within a reasonable time after delivery thereof. That said reasonable time had long since expired and said defendant had not paid the same or any part thereof.

For a second cause of action it alleged that defendant purchased and plaintiff delivered the merchandise set forth in the first cause of action, at which time the plaintiff, at defendant's request, shipped said goods to defendant, by freight, from Crooksville, Ohio, to the towns of Riverton and Lander, Wyo.; that defendant agreed to pay plaintiff the freight charges upon said goods, in

the sum of \$589.58, within a reasonable time after said shipment as made; that plaintiff, at defendant's request, prepaid said freight in said sum; that defendant had refused and neglected to pay the same. Plaintiff prayed judgment for \$868.08, with interest from May 1, 1918, at 8 per cent. per annum.

For answer defendant denied each and every allegation contained in said petition, except that defendant was a corporation. For a second defense, defendant pleaded certain new matter, which was denied by the reply; but, as the defendant introduced no evidence, that issue is not in the case here.

It is conceded that the first cause of action comes within the statute of frauds, which reads as follows:

"Any contract for the sale of goods, chattels or things in action for the price of fifty dollars or more, shall be void, unless:

"First—A note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby; or

"Second—Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or

"Third—Unless the buyer shall at the time pay some part of the purchase money."

The plaintiff offered in evidence a written order in words and figures as follows:

"Onken Bros. & West Co., Inc.,

"Wholesale Grocers,

"Sheridan and Casper, Wyoming.

"Burley & Winter Pottery Co., Crooksville, Ohio:

"Please enter our order as follows:

"Ship to Sheehan & Fisher at Lander, Wyo. via C. & N. W. R. R., f. o. b. Crooksville, Ohio.

"On all shipments forward original invoice and bill of lading to Sheridan and duplicate to Casper.

Amount.	Size.	Article.	Price Quoted.
1	Car	Stoneware as per orders shown for same at ¼¢. per gal. less than prices sold at.	

"Onken Bros. & West Co.,
"Successors to J. E. West Co., Inc.,
"Per E. W. Elder."

Defendant objected to the introduction of the order for the reasons:

"(1) That it is not shown that the person signing the same had any authority to give the order.

"(2) That the alleged order is void for uncertainty, and is incompetent, irrelevant, and immaterial.

"(3) That the alleged order wholly fails to disclose the price at which the goods pretended to be described therein are to be sold.

"(4) The said order wholly fails to describe the subject-matter thereof in that there is no sufficient description of the goods sold.

"(5) The order is void under the statute of frauds for the reason that the value of the goods exceeds \$50."

The court reserved its ruling on the objections until the close of plaintiff's evidence, whereupon the defendant moved the court to dismiss the action on numerous grounds, the substance of which were that no valid contract of sale was proven, that there was no evidence of a delivery of the goods, and that the order offered in evidence was void for insufficiency of description of the goods—no price stated; that the evidence disclosed that the order did not contain all of the contract and that the contract in question was for the sale of goods of the value of more than \$50. The court sustained the objection to the introduction of the order offered in evidence, and sustained the motion to dismiss the action and rendered judgment against plaintiff for costs. Plaintiff appeals.

[1, 2] If the order which plaintiff offered in evidence was not such a memorandum of the contract as required by the statute of frauds, its exclusion by the court was correct, and the judgment should be affirmed. The correct rule for the construction of such memorandum, as we understand it to be, is well stated in *Waul v. Kirkman*, 27 Miss. 823, where it is stated:

"The rule upon this point is well settled to be that the memorandum, in order to satisfy the statute, must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. * * * And when reference is made in the memorandum to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another."

See, also, *Willis v. Ellis*, 98 Miss. 197, 53 South. 498, Ann. Cas. 1913A, Ann. Cas. 1039; *Wineburg v. Gay*, 27 Cal. App. 603, 150 Pac. 1003, and cases cited in the opinion; *Cushing et al. v. Monarch Timber Co.*, 76 Wash. 678, 135 Pac. 660, Ann. Cas. 1914C, 1239; *Campbell et al. v. Weston Basket & Barrel Co.*, 87 Wash. 73, 151 Pac. 103; *Salomon v. McRae*, 9 Colo. App. 23, 47 Pac. 409.

In 20 Cyc. 258, the rule is stated:

"In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by reference contained in it to some other writing, without recourse to parol proof to support them."

[3] A long list of authorities will be found in the notes to that statement of the rule. In the case at bar the description of the subject-matter of the contract is too indefinite to fulfill the requirements of the statute. "1 Car Stoneware," may mean any kind or several kinds of stoneware, and the property could not be identified without other evidence. Nor does the additional statement,

"as per orders shown for same," render the description of the property any more definite. The names of the parties giving the orders are not stated; but, if that had been done, the orders referred to were not offered in evidence. The order offered in evidence not being such a memorandum as is required by the statute, it was properly excluded. In addition to the insufficiency of the memorandum, there was no competent evidence of a delivery. The only evidence of a delivery was the testimony of the salesman who took the order that to the best of his knowledge the goods, the carload, was shipped according to the orders he had taken. But he admitted he had no personal knowledge of the shipment, was not present, and in fact knew nothing about the shipment.

As to the second cause of action, there was no competent evidence of the payment of any freight by the plaintiff; the evidence offered on that branch of the case being the same as on the question of delivery. The plaintiff having failed to prove its case by competent evidence, the judgment is affirmed.

Affirmed.

POTTER and BLYDENBURGH, JJ., concur.

ROGERS v. HERBST et al. (No. 2247.)

(Supreme Court of New Mexico. July 25, 1919.
Rehearing Denied Sept. 27, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐465(1)—SUPERSEDEAS BOND WHERE JUDGMENT IS FOR FIXED SUM DOUBLE SUCH AMOUNT.

A supersedeas bond, where the amount of the judgment is for a fixed sum under the provisions of the statute, must be in double the amount of such judgment, and a bond for a less sum does not have the effect of superseding the judgment.

2. APPEAL AND ERROR ⇐461 — DEFECTIVE SUPERSEDEAS BOND SUFFICIENT AS UNDERTAKING FOR COSTS.

A bond conditioned as a supersedeas bond may be sufficient as a cost bond, where, by the terms of such bond, there is an undertaking to pay all costs that may be adjudged against the appellant in the Supreme Court.

3. APPEAL AND ERROR ⇐468—WHERE DEFENDANT FILES SUPERSEDEAS BOND, OTHER DEFENDANTS CANNOT JOIN AFTER STATUTORY TIME.

Where an appeal is taken by all the parties against whom a joint and several judgment is rendered, and but one of the appellants files a cost or supersedeas bond, the remaining appellants will not be permitted to join in such cost or supersedeas bond, or file a new bond after the time limited by statute for the giving of such bonds, and the appeal as to the defaulting appellant will, on motion, be dismissed.

Appeal from District Court, Chaves County; McClure, Judge.

Action by W. E. Rogers against James B. Herbst, Robert Kellahin, and J. C. Reese. Judgment for plaintiff, and defendants appeal. Motion to dismiss the appeal as to Herbst denied, and motion to dismiss as to Kellahin and Reese granted.

Reid, Hervey & Iden, of Albuquerque, for appellants.

R. D. Bowers, of Roswell, for appellee.

ROBERTS, J. Appellee recovered a judgment in the district court of Chaves county for damages upon an injunction bond against James B. Herbst, as principal and Robert Kellahin and J. C. Reese, as sureties. A jury having been waived, the cause was submitted to the court, and upon the evidence a judgment was rendered in favor of appellee, Rogers, against the parties named jointly and severally, in the sum of \$300. From this judgment, an appeal was prayed by the three parties named, and the trial court was asked to fix the amount of the supersedeas bond. The appeal was allowed, and the amount of the bond fixed at \$500. As the judgment was for a fixed amount, the amount of the supersedeas bond to be given is fixed by statute (section 17, chapter 43, Laws 1917) in double the amount of the judgment. A purported supersedeas bond was given by Herbst only, and it was so conditioned that the sureties undertook and agreed to pay only such judgment and costs as might be rendered against him.

[1, 2] A transcript has been filed in this court, and appellee has filed two motions—one to dismiss the appeal as to all the appellants because of the failure to give a supersedeas bond, as required by said section 17, or a cost bond, as required by section 15, chapter 43, Laws 1917; and a second motion asking for the dismissal of the appeal as to Kellahin and Reese because of their failure to give either a supersedeas or cost bond. Appellants have filed a motion to be allowed to file an amended supersedeas bond as to all three of the appellants. The first motion referred to, asking the dismissal of the appeal as to all three of the appellants, is upon the theory that the purported supersedeas bond given by Herbst is not sufficient either as a supersedeas or cost bond. The bond is not sufficient as a supersedeas

bond. A supersedeas bond, where the amount of the judgment is for a fixed sum, must be in double the amount of such judgment, and a bond for a less sum does not have the effect of superseding the judgment. A bond conditioned as a supersedeas bond may be sufficient as a cost bond, however, where, by the terms of such bond, there is an undertaking to pay all costs that may be adjudged against the appellant in the Supreme Court. The bond in the present case so undertakes, and, while not in the exact words of the statute, it clearly is an undertaking on the part of the makers of the bond to pay the costs adjudged against the appellant on appeal.

For this reason, the motion to dismiss the appeal as to all three of the appellants will be denied. The motion to dismiss the appeal as to Kellahin and Reese must, however, be granted. They have complied with neither section of the statute, and it has been uniformly held by this court that, where neither a cost nor supersedeas bond is given, the appeal will be dismissed.

[3] Appellants will not be permitted to file an amended bond. In the case of Milliken v. Martinez, 22 N. M. 61, 159 Pac. 952, an appeal had been taken by defendants and an intervenor in the court below. The intervenor filed a supersedeas bond, but the defendants filed neither a supersedeas nor cost bond, and did not join with the intervenor in the supersedeas bond given by him. A motion was there made, as here, to dismiss the appeal as to the two defendants. They applied, together with the intervenor, to this court for permission to file an amended supersedeas bond in which all should join. The motion was denied, and the appeal was dismissed; no written opinion being filed in the case. To permit the defaulting appellants, at this time, to give a new bond, or an amended supersedeas bond to be filed, would be to set aside the provisions of the statute which limit the time within which a supersedeas bond must be filed.

For the reasons stated, the motion to dismiss the appeal as to Herbst will be denied; the motion to dismiss the appeal as to Kellahin and Reese will be granted; and it is so ordered.

PARKER, C. J., concurs.

RAYNOLDS, J., being absent, did not participate in this opinion.

MAYS v. ROBERT MAYS ESTATE CO.

(Supreme Court of Oregon. Sept. 16, 1919.)

1. MORTGAGES \Leftrightarrow 36 — PRESUMPTION THAT DEED IS ABSOLUTE MAY BE OVERCOME IN EQUITY.

The presumption is that a deed absolute upon its face, is what it purports to be, and is intended as an absolute conveyance; but this presumption may be overcome in a proper case in a court of equity by evidence that the transaction was really a loan and that the deed was intended as a mortgage only.

2. MORTGAGES \Leftrightarrow 38(1)—WHEN EVIDENCE INSUFFICIENT TO SHOW ABSOLUTE DEED A MORTGAGE.

Evidence held insufficient to sustain claim that an absolute deed was intended as a mortgage to secure loan from grantee to his brother, and that grantee agreed to convey property to brother on brother's repayment of loan.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Action by Joel D. Mays against the Robert Mays Estate Company. Judgment for defendant, and plaintiff appeals. Affirmed. See, also, 174 Pac. 716.

This is a suit brought by the plaintiff against the defendant, Robert Mays Estate Company, a corporation, to compel the defendant to deed over to the plaintiff a certain 80-acre tract of land situated in Lane county, Or. It seems that plaintiff was a younger brother of Robert Mays, deceased. In 1891 the plaintiff had contracted with one R. P. Allison for the purchase of the 80 acres of land in question, agreeing to pay therefor the sum of \$800. He went into possession of the land, and paid the interest up to 1898, but seems to have been unable to make any payments on the principal. About that time Allison demanded the payment of the principal sum, and plaintiff, being unable to pay it, appealed to his brother Robert, who then lived in Wasco county, Or. Here there is a controversy between plaintiff and defendant; plaintiff contending that Mays agreed to loan him \$700, with which to complete the purchase of the land, and take the deed from Allison in Robert Mays's name to secure the payment of the money, which plaintiff claims he was to have without interest, and that he was to have a deed for the land from Robert Mays whenever he paid said sum of \$700.

On the contrary, the defendant claims that Robert Mays refused to make a loan to the plaintiff, but that he agreed to buy the land if it could be bought for \$700, and let plaintiff have the use of it for a home. At any rate, it is conceded that Robert Mays paid or advanced the \$700, and that the deed from

Allison, with the consent of plaintiff, was made out to Robert Mays in absolute form, and that the deed was duly recorded in the deed records of Lane county. In 1902, about four years after the deed was executed, Robert Mays died, leaving a widow and heirs. Some years after his death the heirs formed a corporation, which is the defendant herein, and the land in question was conveyed by the heirs to said corporation, which has ever since been the holder of the legal title. After the purchase of the land in 1898 the plaintiff remained in possession of the property, using it as a home, until the death of Robert Mays, and thereafter continued to make it his home, with the consent of the heirs of Robert Mays, up to the year 1909, when plaintiff moved away from the land, and never lived upon it again; however, he continued to retain possession of the premises and rented the property to different parties, and finally, about 1913, leased it to one Hunnicutt for a period of eight years. The defendant refused to recognize the validity of these leases, and about 1917 commenced a proceeding against Hunnicutt to recover possession of the property.

During the time plaintiff was in possession of the property, he made some moderate improvements on the place, and paid the taxes up to the year 1913, and he had the use of the premises free of charge while he made it his home, and collected the rents and profits from the place after he moved away. The plaintiff brings this proceeding to have the deed made to Robert Mays declared a mortgage, and to compel the transfer of the land from the defendant to him.

H. B. Slattery, of Eugene, for appellant.
C. A. Hardy, of Eugene, for respondent.

BENNETT, J. (after stating the facts as above). The only question in this case is purely one of fact, as to whether the transaction by which Robert Mays obtained an absolute deed to the land was an actual purchase by him, or whether it was in the nature of a loan, and the deed in the nature of a mortgage or security for the same. It is very plain that Robert Mays purchased the land with the primary purpose of providing a home for his brother; but Robert Mays is dead, and as there were no other witnesses to the transaction between Joel D. Mays and Robert Mays, and as the written communications between the two, at the time of the transaction, have been lost or destroyed in the intervening years, a conclusion must be reached almost wholly from the circumstances of the transaction, the presumption from the deed itself, the testimony of the plaintiff, and his statements and admissions at different times.

[1] The natural presumption, in the first

instance, is that a deed absolute upon its face is what it purports to be, and is intended as an absolute conveyance; but this presumption may be overcome, in a proper case in a court of equity, by evidence that the transaction was really a loan and that the deed was intended as a mortgage only. While the testimony of plaintiff in this case was that the transaction was a mortgage, we think his repeated admissions are inconsistent with that view, and destroy the effect of his testimony in that regard.

The defendant has introduced a series of letters from the plaintiff, written at different times, from which it appears he always recognized that the title in Robert Mays was an absolute title, and that the land belonged to him and his heirs, and he seems to have made no claim otherwise until shortly before the commencement of this suit. The plaintiff acknowledges the writing and sending of the letters referred to. As early as 1892 he wrote to F. P. Mays, who seems to have been managing the Robert Mays estate, as follows:

"I want to know whether he ever had any understanding with any of you boys as to what disposition he wanted made of this place that he bought. I should have spoke to him and made some kind of a deal for the place when he was down, if he had not started back so unexpectedly. Now, Pierce, I want you to let me know just what I can have the place for."

Again on May 11, 1909, he writes:

"I believe I have asked you twice by letter how much you would take for the place, so I will ask you again to put a figure on the place, just what you will take right down."

On April 23, 1915, he writes:

"I never expected him to give us the place, but I did believe he would do just what he had told your Aunt Miley Hail and your Uncle Oliver Mays and Robertson Allison, the man he bought the place of, and they all told me that your father, in talking with them, said he had made such provisions regarding the land that my family could have a home as long as we lived."

And again:

"Now Pierce, if you want to sell the place, and want to do the right thing by us, as I requested you to do years ago, put a reasonable price on the place, and give us the first dig at it."

Again in August of the same year (1915):

"So far as giving you possession, I will turn it over, and you can place it on the market, with the understanding that Hunnicutt has the use of the place until the expiration of the fourth year, as he states in his letter."

On the 3d of October following, after the matter of the validity of the lease to Hunni-

cutt had come up and was discussed, he writes:

"I told him (Hunnicutt) I only claimed a life lease on the place. * * * As to buying the place, I am not able. As to the reasonable cash value or cash sale, I will say \$40 per acre. I believe I can sell it for that. I am satisfied I could in a short time by putting an adv. in our county paper. I will try it, if you say so, for just what I get over \$40 per acre, when you get ready to sell."

Finally, on October 28, 1915, he writes:

"I aimed to tell you in my last correspondence that the taxes on your eighty in Lane county has not been paid this year, and I can't for my life raise the money to pay them. If they ain't paid at once, the place will be advertised and sold. I will send you the statement I received from the sheriff not long ago, so you can send the amount necessary to settle them and get your receipt."

[2] These statements and admissions are absolutely and fatally inconsistent with the present claim of the plaintiff, that he owns the property and that the transaction was only a loan and mortgage. In view of these statements and admissions, and of the absolute character of the deed upon its face, it seems plain that the plaintiff has not sustained the allegations of his complaint.

The court below evidently came to this conclusion, after hearing the plaintiff's testimony and all the oral testimony in the cause. We find nothing in the record upon which this finding and conclusion can be disturbed.

Affirmed.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

McPHERSON et al. v. BARBOUR et al.

(Supreme Court of Oregon. Sept. 16, 1919.)

ESCROWS — 1—VENDORS' DEPOSIT OF DEED IN BANK—COMPLIANCE WITH CONTRACT.

Deposit, by the vendors of a tract, in a specified bank, of deeds conveying lots to buyers of such lots from the vendees of the tract, held a full compliance by the vendors with their agreement to place such deeds in escrow in the bank, an "escrow" being an instrument importing obligation deposited with a stranger or third party, to be held until the performance of a condition, and then delivered, though the time given to some of the lot purchasers to pay extended the time beyond the contractual four-year period of payment for the whole tract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escrow.]

Department 2.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Suit by Seth M. McPherson and Walter McPherson, administrators of the estate of P. M. McPherson, deceased, substituted as plaintiffs for P. M. McPherson, and Mary Ann McPherson, against A. C. Barbour, T. Rosalynd Barbour, M. M. Peery, E. E. Kepner, and others. From a decree for plaintiffs, the named defendants appeal. Affirmed.

This is a suit in equity, brought by P. M. McPherson and Mary Ann McPherson to foreclose a land sale contract, entered into May 1, 1913, between them and A. C. Barbour, T. Rosalynd Barbour, M. M. Peery, and E. E. Kepner. Upon the death of P. M. McPherson, Seth M. McPherson and Walter McPherson, administrators of his estate, were substituted as plaintiffs instead of P. M. McPherson. Reference will be made hereafter to plaintiffs without noting such substitution. A decree was rendered in favor of plaintiffs, and against the above-named contractees, and the latter appeal.

The complaint is in the usual form in such suits, setting out the contract and alleging that the vendees had made default in the matter of payments called for by the contract. The agreement entered into between the parties was in effect that the plaintiffs agreed to convey to the appellants certain real property described in the contract. The purchase price of the property is mentioned as \$30,698, \$10,198 of which was paid at the time of the execution of the contract, and the balance, \$20,500, was to be paid on or before four years after date of the contract, with interest at 6 per cent. per annum, payable January 1, 1914; and annually thereafter; \$500 or more could be paid on the principal at any time, and the same was to be applied when full payment was made on the purchase price of the tract. Certain reservations were made in regard to the growing crops on the land, the details of which are not material here. The contract contained the following stipulation:

"It is further agreed that second parties may have said lands, or any part thereof, surveyed and platted into blocks and lots as they shall elect, and first parties hereby agree and contract to execute, acknowledge, and deliver without charge, but at the expense for platting, surveying, notaries' fees, and filing of second parties, any and all deeds of dedication thereof required or requested by second parties.

"It is further agreed that second parties may sell any part of said premises and lots or blocks therein, subject to the above reservations, at a price of not less than 150 per cent. pro rata of the above-mentioned purchase price, and upon payment to first parties of 90 per cent. of such sale price, in addition to the payments herein acknowledged, first parties shall, at the expense of second parties, make and execute deeds for such lots or tracts so sold; also that for lots or tracts sold by second parties upon time, first parties shall at the request of second parties make and execute good and sufficient deeds

therefor, which deeds shall be placed in escrow in the First National Bank of Springfield, Or., to be delivered to the purchaser upon full payment therefor. Ninety per cent. of the purchase price for lots or tracts sold, including those sold for cash and those sold wholly or partially on time, shall be paid into said First National Bank, and by it held in a separate account to the sum of five hundred dollars, and whenever such proceeds shall amount to the sum of five hundred dollars or more, the same shall be, by said bank, paid over to said first parties, and credit shall be given on this contract therefor."

The purchasers agreed to pay the taxes assessed against the premises on the 1913 and all subsequent tax rolls. The vendors, in case all of said payments, with interest and taxes, should be fully paid as specified in the contract, agreed to execute and deliver to the vendees, their heirs or assigns, a good and sufficient deed in fee simple of the premises, or such portion thereof as shall not have been theretofore deeded. The contract further provided as follows:

"And it is agreed that, if the said parties of the second part shall fail to make any of said payments at the time and in the manner above specified, or within sixty days after any payment of principal or interest shall become due, or shall fail to pay any tax or assessment before the same shall become delinquent, this agreement shall be henceforth void, all payments thereon forfeited, and possession of said premises shall be at once surrendered to the first parties, or said first parties may elect to declare the whole of said purchase price due and proceed at once, by foreclosure or otherwise, to gain possession of said premises."

The contract of sale was executed in triplicate; one of which was retained by the plaintiffs, one by the appellants, and one was left with the officers of the First National Bank of Springfield. After making the contract the purchasers proceeded to plat and subdivide said tract into lots and blocks, making a total of 365 lots, and duly recorded the plat; the McPhersons assisting therein, making the necessary dedication of the streets and alleys provided for in the plat.

The appellants, by their answer, after admitting the making of the contract, alleged that the vendors breached the contract by refusing to comply with the terms and conditions of the same, and—

"absolutely refused to enter into any escrow agreements with purchasers procured by these defendants, or to make, execute, acknowledge, and deliver in escrow in the First National Bank of Springfield, or elsewhere, deeds of conveyance from them to the said purchasers, as provided in said contract, or otherwise, and absolutely refused and neglected to part with dominion and control over such deeds and deposit the same in the First National Bank of Springfield, Or., in escrow, as provided in said contract, or in any other manner so as to protect the purchaser, so that such purchaser could procure deeds by payment of the purchase price

in installments and on time, as the plaintiffs had agreed and covenanted to do under the terms of their contract."

By reason thereof it was impossible for the vendees to sell lots or tracts of land to prospective purchasers.

O. H. Foster and Chas. A. Hardy, both of Eugene, for appellants.

L. Bilyeu and A. C. Woodcock, both of Eugene (Frank Depue, of Enterprise, on the brief), for respondents.

BEAN, J. (after stating the facts as above). It appears from the record that, after the land was platted, the original vendees negotiated sales of some of the lots to different parties. In regard to the lots that were sold on the installment plan, or on time, the appellants usually collected 10 per cent. of the amount of the purchase price for such lots, and would prepare a deed for the same from P. M. McPherson and wife, or the purchaser of the respective lot, stating the consideration to be paid, and left the same at the First National Bank of Springfield, Or., for plaintiff and wife to execute; that upon notice thereof, either by one of the appellants or an officer of the bank, McPherson and wife duly executed and acknowledged such deed, and deposited the same in the First National Bank of Springfield as a fulfillment of the contract. The officer of the bank noted on the back of the original contract left with it as follows:

"No payments in amount less than \$500 to be indorsed hereon. Place credits in smaller amounts in McPherson escrow acct."

The bank proceeded to keep an account of the payments made for lots sold by the appellants and deposited in the bank until such time as the same should amount to \$500. After the sale of a few lots had been made by appellants, they prepared and had printed blanks for a so-called escrow agreement, to the effect that the deed to the particular lot sold shall be held in escrow at the First National Bank of Springfield until the price of the lot, with interest, has been paid, and directing the bank to deliver the deed to the grantee when such payment is made, and upon failure to make payment the deed to be recalled and the amounts paid forfeited. After that, when they sold a lot, they obtained the signature of the purchaser of the same to the escrow agreement, properly filled out and inserted the name of P. M. McPherson therein, and left the same at the bank, and requested Mr. McPherson to sign the agreement. This he failed to do, as he states that he had already signed a contract for the sale of the land and the same was unnecessary; that it would complicate the matter. It is not contended by the appellants that the McPhersons failed to execute the deeds as requested, but that they failed to execute the escrow agreement which the

vendees desired. This they contend was a breach of the contract. It appears from the testimony that, after some consultation between the parties in regard to the matter, Mr. McPherson indicated that he would sign the escrow agreement if the appellants would indorse on the contract the following, a form of which was furnished them by McPherson:

"For a valuable consideration, it is hereby mutually agreed by and between the parties to this contract that the time for the completion and payment of the within contract, except as to the payment of the interest, be and the same is hereby extended 2 years and 3 months from the date of this contract, to correspond with the time of sale."

The proposed stipulation was never indorsed on the land sale contract involved herein, but one of similar purport, bearing the date of sale made, was indorsed on the so-called escrow agreements and signed on behalf of appellants, leaving a blank for Mr. McPherson to sign when they were left in the bank. McPherson never signed any of the indorsements, or any of the so-called escrow agreements. The bank received the different deeds executed by P. M. McPherson and his wife to the different purchasers, together with the incomplete escrow agreement, and placed the same in an envelope. A sample of the indorsements made on the envelopes at the bank is as follow:

"Central Land Co.—A. L. Johnson. Escrow No. 747. Consideration, \$——. From Central Land Co., Party of the First Part. to A. L. Johnson, Party of the Second Part. Credit pays. to acct. McPherson Escrow #521."

It seems the appellants made sales of lots in the name of Central Land Company. The sole question raised in this case is: Did McPherson fail to comply with the contract of sale, or was the execution of the different deeds of lots to purchasers and the placing the same in the bank, to be delivered by it to the respective purchasers upon full payment of the purchase price, a full compliance with his contract?

It should be borne in mind that it was stipulated between the parties to the contract that when the second parties, the appellants, should sell a lot or tract on time, according to the stipulations of the contract, the first parties "shall at the request of second parties make and execute good and sufficient deeds therefor." This it is conceded was done. It was further stipulated thus:

"Which deeds shall be placed in escrow in the First National Bank of Springfield, Or., to be delivered to the purchaser upon full payment therefor."

The definition of an "escrow" is given as follows:

"An escrow is a written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promisor, or obligor, or his agent, with a stranger or third

party, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee." 10 R. C. L. § 2, p. 621.

See, also, 11 Am. & Eng. Enc. of Law (2d Ed.) p. 333 et seq.; Davis v. Brigham, 56 Or. 41, 107 Pac. 961; Ann. Cas. 1912B, 1340; Tyler v. Cate, 29 Or. 515, 45 Pac. 800. Delivery as an escrow is defined as a delivery on some collateral condition, which must be consistent with the contract, on the happening of which condition alone the contract is to take effect. No precise form of words is necessary to constitute an escrow. The term "escrow" need not be used, nor will the misuse of that term in designating an instrument necessarily make it an escrow. There can be no escrow, unless the delivery of the instrument by the depositary to the grantee or obligee is conditioned upon the performance of some act or the happening of some event. The condition upon which an instrument is delivered in escrow need not, however, be expressed in writing, but may rest in parole, or be partly in writing and in part oral. 10 R. C. L. § 5, p. 623, citing Couch v. Meeker, 2 Conn. 302, 7 Am. Dec. 274; Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; Manning v. Foster, 49 Wash. 541, 96 Pac. 233, 18 L. R. A. (N. S.) 337, 126 Am. St. Rep. 876, 16 Ann. Cas. 95, and note; Bowker v. Burdekin, 11 M. & W. 128, 12 L. J. Exch. 329, 8 Eng. Rul. Cas. 598; notes, 130 Am. St. Rep. 913, 950, and 10 L. R. A. 470; Fulton v. Priddy, 123 Mich. 298, 82 N. W. 65, 81 Am. St. Rep. 201; Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427; note, 1 Am. St. Rep. 114.

To constitute an escrow it is essential, not only that the grantor and grantee are as one as to the conditions under which the deposit is to be made, but that such conditions should be communicated to the depositary; and it is equally essential that the grantee or obligee is aware of every circumstance in connection with the conditions likely in any way to affect the liability under it. Note, 130 Am. St. Rep. 933. Where the possession of the depositary is subject to the control of the depositor, an instrument cannot be said to be delivered, and it is not an escrow. While the depositor's right of possession may return if the specified event does not happen, or the conditions imposed are not performed, yet to constitute an instrument an escrow it is essential that the deposit of it should be in the meantime irrevocable; that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the depositor, and that he should actually part with all present or temporary right of possession and control over it. In case the deposit is made in furtherance of a contract between the parties, the contract must be so nearly

complete that it remains only for the grantee or obligee or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import. 10 R. C. L. § 8, p. 626.

It appears from the contract above quoted that the conditions upon which the deeds to lots that might be sold by the appellants should be deposited in the First National Bank of Springfield were all contained in that contract for the direction of the parties, except the price to be paid for each of the various lots. Such price in every case disclosed by the record was mentioned in the deed which was deposited in the bank. It appears that the depositary was fully informed as to the conditions, one of the triplicate contracts being left with the bank for its guidance in the matter.

We therefore conclude that the deposit of the several deeds which the McPhersons were requested to execute, and which they executed and deposited in the bank under the circumstances detailed in this case, was a full compliance on their part, to place such deeds in escrow in the bank; that they did not fail to comply with the contract in this respect; that all the conditions upon which the deeds were delivered in escrow by McPherson did not necessarily have to be expressed in writing. He was not required to use the word "escrow" when he deposited the deeds in the bank. The deeds were complete in every respect, and were deposited with the bank pursuant to the sale contract. The vendors thereby relinquished all dominion over them. The condition of delivery to the grantee named therein was specified and understood by the depositary. In so far as shown by the record, such arrangement was understood by, and satisfactory to, the different lot purchasers. The contract provided that the vendees, A. C. Barbour et al., should sell the lots after the tract was platted, and not the McPhersons. That instrument authorized the vendees to make such sales. It was not absolutely necessary for McPherson and wife to sign additional agreements.

Something is said in the argument in regard to the time given to some of the lot purchasers to pay for the lots, thereby extending the time beyond the period of four years for the full payment for the tract according to the terms of the contract of sale involved herein; but it appears that Mr. McPherson was willing that the time for payment for such contract should be extended. This is shown by the indorsement which he proposed to have indorsed on the contract, so there is no real controversy between the parties in regard to the time allowed the different lot purchasers. The plaintiffs, by the execution of the deeds with knowledge of the time of payment, sanctioned such agreement, and this matter need not be further considered.

It is admitted that the appellants were in default in their payments; they had sold, and apparently could sell, only comparatively a few lots. While there may have been some misunderstanding as to the rights and duties of the parties to the contract of sale, the claim of the appellants savors of an attempt to place the vendors in default, in order to obtain a return of the partial payments they had made for the real property. Five persons, who purchased lots of appellants upon the installment plan and had each only partially paid for the lots so purchased, were made defendants in this suit. The decree of the trial court allowed such defendants to complete the payments for their respective lots and receive their deeds therefor. No appeal was taken from that part of the decree. Provision was also made for the appellants to complete payment for the real property within one year from the date of the decree.

After a careful examination and consideration of the record, and the question submitted, we affirm the decree of the lower court.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

RUNNELLS v. LEFFEL et al.

(Supreme Court of Oregon. Sept. 9, 1919.)

PARTNERSHIP — §327(6) — ACCOUNTING — FRAUD—NECESSITY OF PLEADING.

In suit between partners for an accounting of commissions earned on a sale, which sale was not consummated by the buyer, but rescinded, and the property resold to the buyer's wife, to be available as a ground of recovery, fraud, collusion or otherwise, in that such second sale to the wife was a subterfuge to prevent plaintiff from receiving his share of the commission earned on the original sale, must be pleaded.

Bean, Bennett, and Johns, JJ., dissenting.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

On rehearing. Former opinion affirmed. For former opinion, see 176 Pac. 802.

A. S. Cooley, of Enterprise, for appellant. A. W. Schaupp, of Joseph, and Colon R. Eberhard, of La Grande (Cochran & Eberhard, of La Grande, on the brief), for respondents.

BENSON, J. For a general statement of the facts of this case, reference is made to the former opinion of this court herein. Runnells v. Leffel et al., 176 Pac. 802.

The vital issue, as there disclosed by the complaint and denied by the answer, is this:

Was the conveyance to Mrs. Higinotham, executed on August 6, 1917, made to her in consummation of the original contract between Mays and Mr. Higinotham, and at the request of the latter and Leffel, or was it a new and independent deal? The evidence of all the parties who participated in the negotiations of July 7, 1917, tends to establish the following facts: That Mays and Leffel had for some time been importuning Higinotham to make some payment upon his overdue notes, and without success. On the morning of July 7th Mays notified the delinquent vendee that he must either make a substantial payment or that ejectment proceedings would immediately follow. Higinotham replied that he was unable to make payment, and proposed to give up the executory contract and possession of the land in exchange for his notes. Mays accepted this offer, and upon receiving the written contract from Higinotham, returned to the latter his unpaid notes, and shortly thereafter notified Leffel of what had occurred. Leffel then had a conversation with Higinotham and his wife, in which she made a definite offer to buy the land herself for \$39,000. This offer was accepted by Mays, and on August 7th Mays and wife, Higinotham and wife, and Leffel met at the law office of Mr. Slater, in La Grande, at which time Mrs. Higinotham paid Mays \$17,000 in cash, and received a deed for the land in her own name, executing to Mays a mortgage in the sum of \$22,000 for the remainder of the purchase price. She testifies very positively, that her husband did not furnish a dollar of the money which she paid for the land and has no interest therein. She says that Mays and Leffel had importuned her frequently to help her husband in making payments under his contract, and that she had always refused to do so, and that her purchase of the property was entirely independent of any prior negotiations between her husband and Mays and Leffel.

The plaintiff does not undertake to meet this testimony with substantive evidence of any other character, but contends that since Mays always urged his net price for the land was \$39,000, and that he had received that amount, he must necessarily credit Mrs. Higinotham with the \$9,000 in payments which had been forfeited by her husband, and that her relationship to the former vendee, and the circumstances surrounding the transaction, indicate that the second sale to the wife was a deceitful subterfuge, perpetrated by the several parties thereto, in order to prevent the plaintiff from receiving his share of the commission earned by negotiating the original sale. If this contention be the correct one, then the conduct of Leffel, Mays, and the Higinothams amounted to a collusive fraud; but the complaint does not plead fraud of any kind, and no rule of pleading

is more firmly established than that, to be available as a ground of recovery or defense, fraud must be pleaded.

It follows that we must adhere to our former opinion.

BEAN, J. (dissenting). This is a suit for an accounting of the partnership transactions between A. M. Runnells, plaintiff, and W. E. Leffel, defendant, who were partners in the real estate business under the firm name of Leffel & Runnells, from September, 1915, to the last of December, 1916. Each had a one-half interest in the business. There was no written agreement of partnership.

Defendant states that the partnership arrangement was made by degrees. Mr. Runnells kept a law office during the time. As might well be expected, differences arose in regard to expenses, and after the dissolution there was a disagreement as to the division of commissions.

A rehearing has been granted in this case upon a question of fact. The former opinion appears in 176 Pac. 802. Soon after the time of the partnership agreement the firm obtained a contract or option for the sale of 2,400 acres of land near North Powder, Or., for one C. B. Mays for the price of \$39,000. All over that amount obtained for the land was for the benefit of Leffel & Runnells. About November, 1915, a sale of the land was negotiated by the firm to G. P. Higinbotham for \$45,000, making a commission of \$6,000 for Leffel & Runnells. Three thousand dollars in cash was paid to Mays, and about the next March a payment of \$6,000 was made. At the time of sale \$400 cash was paid Leffel & Runnells, and an allowance made to Mays for expenses of \$100, making a payment of \$500 on the commission. A contract of sale from C. B. Mays to G. P. Higinbotham was executed, and also certain notes covering the balance of the purchase price. The notes were dated November 1, 1915, bearing interest at 8 per cent. On the 11th day of December of that year an agreement in writing was entered into between C. B. Mays and Leffel & Runnells for the delivery to J. E. Lenhart as the holder of the following portion of the notes: No. 1, for \$5,000, due November 1, 1916; No. 2, for \$5,000, due November 1, 1917; No. 3, for \$10,000, due January 1, 1918. The holder was to use due diligence in collecting the notes. It was agreed between the parties that the money collected on these notes should be paid in the following manner: Note No. 1, for \$5,000, due November 1, 1916, \$4,000, with interest, to be paid to Mays, and \$1,000, with interest, to be paid to Leffel & Runnells; note No. 2, for \$5,000, due November 1, 1917, \$4,000, with interest, to be paid to Mays, and \$1,000, with interest, to Leffel & Runnells; note No. 3, for \$10,000, due January 1, 1919, \$6,500, with interest, to be paid to Mays, and \$3,500, with interest,

to Leffel & Runnells. It was stipulated as follows:

"That the intent of this agreement is that the party of the first part (C. B. Mays) is the owner of \$14,500 principal of the above notes, and that parties of the second part (Leffel & Runnells) are owners of \$5,500 principal of the above notes."

Attached to the contract of December 11, 1915, was another memorandum signed by Leffel & Runnells and C. B. Mays and his wife to the effect that it was agreed on December 11, 1915, as regards the G. P. Higinbotham notes, "that should said C. B. Mays be compelled to take the ranch back in lieu of payment of the notes given by G. P. Higinbotham, that the interest of W. E. Leffel and A. M. Runnells in the notes in the above-mentioned agreement ceases." This agreement and the \$20,000 in notes were delivered to Mr. Lenhart to hold pursuant to the contract. He so held the notes and the agreement until he left the state, and turned them over to another to hold for the same purposes.

About the time of the sale of the ranch, Mr. Mays sold some live stock and other personal property to Mr. Higinbotham, amounting in value to \$7,000 or \$8,000. The sale of the personal property is not involved in this suit, except as it may have a bearing upon the transactions relating to the real estate. Leffel & Runnells were not interested in the sale of the personality.

The matter drifted along until July, 1917, without any payment of principal or interest being made on the notes. Efforts were made by C. B. Mays and Leffel & Runnells to obtain a loan for Mr. Higinbotham in order to enable him to pay \$20,000 or \$25,000 of the notes. This was without success. An effort was also made to interest Maggie Higinbotham, wife of G. P. Higinbotham, to secure the money for her husband. She was the owner of a valuable ranch in Umatilla county. About June, 1917, Mr. Mays, after repeated requests made at different times, insisted that the interest should be paid and something paid on the principal. On July 7, 1917, apparently for the purpose of making some adjustment of the matter, Mr. Mays and his wife, and Mr. Higinbotham and his wife, together with Mr. Leffel, met in the city of La Grande, Or. Mr. Mays, pursuant to the consent of Mr. Leffel made on behalf of Leffel & Runnells, obtained the contract of December 11, 1915, and the \$20,000 in notes, and took them with him to this meeting at La Grande. Mr. Mays informed Mr. Higinbotham in effect that he must have a part of his money or he would eject him from the land. Mr. Higinbotham had prior to that time encouraged Mr. Mays to believe that he would obtain a portion of the money and make payment, and, when the last demand was made by Mays, Higinbotham stated to Mays, as we understand his language, that if he did not

make payment he did not want any additional expenses made, and that he would deliver possession of the land. After this, largely through the instrumentality of Mr. Leffel, an agreement was made with the consent of Mr. Mays and Mr. Higinbotham that Mrs. Maggie Higinbotham should take the land and pay Mr. Mays \$39,000. As Mr. Mays testifies, the other deal was entirely settled. Mr. Mays stated to Mr. Leffel, when this adjustment was proposed, "that he must have \$39,000 net for the land."

C. B. Mays, as a witness for plaintiff, relates the transaction at length. He states that—

"I talked with Mr. Higinbotham somewhere on the street concerning it, and he told me that his wife would not help him out on it, and asked me to give him a little more time, and talked on just like he always did—started to lie to me about it, just the same as he always did—and I told him I had heard that kind of an harangue long enough, and there was only two things to do—to pay me or I would start ejectment proceedings."

At that time Mr. Mays informed Mr. Leffel of his conversation with Mr. Higinbotham. Mr. Leffel said he would go back to the hotel and have a talk with Mrs. Higinbotham, and see what he could do. Mr. Mays testified further:

"He (meaning Higinbotham) agreed right there to give me back the papers. * * *

"He agreed to give me back the place. * * * I agreed to take it back, because he didn't feel that he ought to go to any extra expense on it, and he didn't know that I ought. That is the amount of it. * * *

Mr. Mays further stated:

"Right there and then we agreed to that kind of an arrangement, and he—I think we walked; I don't know whether we walked right on to Slater's office. Well, he said there he was willing to turn the place back to me; that he could not do anything, and his wife wouldn't help him. So then—well, it is possible Leffel was along then; I don't remember just when we did talk about it, but he and I had talked about it, and he said he would go back to the hotel and have a talk with her, to see if she cared to do anything about it going through, and, if not, he thought the best thing for me to do was to step in and get them off the place; they weren't doing anything anyway. * * *

"Yes; he (Leffel) told me—about dinner time was about the time we had this talk—that the old lady absolutely refused to help the old gentleman, and I think then Leffel and I talked out the conversation he had with them at the ranch. I think that was then, too. * * *

"As well as I remember, it was agreeable to Leffel for me to take these papers back—take this ranch back, I mean, and my contract and things with this land—and he went and had a talk with her and came back to me during the afternoon. I, as I said a minute ago, I don't remember what he and I did then, but I know I talked with Leffel right away after talking with Higinbotham. He came to me again, and

told me, and whether I went on up to the hotel with him or not I can't remember, but we walked about while talking these different things, and he told me that there was absolutely no use trying to do anything further about it, and that he was perfectly willing for me to take the place back, and then later—it seems to me later in the day—I didn't see Leffel for quite a while, and he talked with Mrs. Higinbotham, and he came back and talked to me afterwards; if as I had taken the place back from Mr. Higinbotham, if I would consider selling it—something to that effect; and I said, 'Yes; I would sell it to anybody, so I got thirty-nine thousand out of it;' and a little later he came back, and * * * he says, 'Your ranch is sold, for I will sell it to the old lady'—something like that. I can't remember the exact conversation. * * *

"* * * Anyway, after Higinbotham gave me these papers, we went up to Slater's office. I stated it to him like I would to any other man—if she wanted that ranch, let's get busy while she was in the notion. So we went up to this office, and Higinbotham gave me his papers. He had a copy of this contract still, and I gave him the notes—I think that's it—I gave him the notes about that time."

To the question,

"State whether or not you had possession of the notes of G. P. Higinbotham at the time you got that fifteen hundred dollar check from Mrs. Higinbotham,"

this witness answered,

"No; because we had fully decided and settled that part of it, and then later—some time a little later—we made an agreement there, and I think she paid me fifteen hundred dollars then, but I don't know for sure if she did right then, but she paid me the balance of it at the time the deed was made, anyway—the fifteen thousand."

Mr. Mays states, in effect, that by arrangement with Mrs. Maggie Higinbotham he got even..... \$ 1,500 00

And at the time of the execution
of the deed, August 6, 1917.... 15,500 00
And the balance of the \$39,000 in
notes and the mortgage for.... 22,000 00

Total.....\$39,000 00

The \$1,500 note of Mrs. Higinbotham was, pursuant to an understanding with Mr. Mays, given to W. E. Leffel as for a loan to Mrs. Higinbotham. In addition to that, Mr. Mays paid Mr. Leffel by check \$4,400 making with the amount of \$400 theretofore paid to Leffel & Runnells, \$6,300, besides the \$100 of expenses paid by Mays in settlement of the commission and interest on the portion of the notes which Leffel & Runnells owned, and which were deposited with Lenhart, as shown by the agreement of December 11, 1915.

Mr. Mays also testified as follows:

"Q. And after you turned the land over to Mr. Higinbotham, or after Mr. Higinbotham went on the land and took possession of it, did you again take the land and use it yourself?

A. Well, I took the land back, but I didn't use it.

"Q. What do you mean by taking it back, Mr. Mays? A. I mean that Mr. Higinbotham could not pay for the land, and turned it over to me—turned the papers over to me. That is what I mean.

"Q. When? A. Well, some time in July.

"Q. Who was present? A. That took place at Mr. Slater's office, the same time I mentioned before when we were in his office there at that time.

"Q. Mr. Higinbotham, Mrs. Higinbotham, Mr. Leffel, and Mr. Slater and yourself, you mean? A. And my wife."

Again he states thus:

"A. From the time Mr. Higinbotham took charge of the land, according to his contract, until the time that he turned the papers back to me, I didn't have possession of that place or conduct it.

"Q. But since he turned the papers back have you had possession? A. Well, I had possession of the papers. The man hadn't moved off and I hadn't moved on."

In regard to the Higinbotham notes, Mr. Mays stated:

"Q. In other words, Mr. Mays, I mean, did you at that time, and shortly prior to that time, figure up the interest that had accrued on these notes, and know about what that interest was at that time? A. Yes; I knew at that time about what it should be.

"Q. Well, did you at the time you conveyed to Maggie Higinbotham receive more than the face of these notes? A. More than the face of these notes mentioned here?

"Q. Yes. A. Yes."

Upon being asked when title to the land actually passed from him, Mr. Mays stated that he never did give title to G. P. Higinbotham; that the title actually passed in the forepart of August, 1917, when his wife and himself and Mr. Leffel, Mr. Slater, Mrs. Maggie Higinbotham, and G. P. Higinbotham were present.

"A. In J. D. Slater's office is where I did all of the talking. * * *

"Q. At that time did you pay any commission for the selling of the property? * * *

A. I paid to Leffel the difference in what I asked for the farm and what he sold it for. * * *

"Q. Now when was you asking that certain price for the land?—1915, when the contract was made? A. I didn't ask any different price on the land at any time to different persons.

"Q. In 1915 what was the price you fixed on the land or the property to be sold? A. Thirty-nine thousand. * * *

"Q. And subsequent to that time, and up to the time when you finally made a deed, conveying that property to some one else, did you ask any other or different price than the thirty-nine thousand? A. No."

Mays also states that he lost in the transaction, as some of the cattle, which he had contracted to Higinbotham and the increase thereof, died. It appears that Mr. Mays did

not make a close estimate of the interest on the Higinbotham notes.

As we figure, the principal and interest to August 6, 1917, amounts to \$41,080. Adding the amount paid by Higinbotham, \$9,000, makes a total of \$50,080, the original price of the land, \$45,000, and interest.

Mr. Mays actually received of G. P.

Higinbotham	\$9,000 00
Of Mrs. Maggie Higinbotham.....	39,000 00

Total amount received.....	\$48,000 00
Amount of interest actually deducted in the final settlement.....	2,080 00

Out of the total amount received by Mr. Mays he paid as commission at the time of the contract with G. P.

Higinbotham	400 00
Note of Mrs. Higinbotham.....	1,500 00
Checks	4,400 00
Total amount of commission, including the expenses.....	100 00

Makes\$6,400 00

Taking the interest of Leffel & Runnells in the \$20,000 notes deposited with Lenhart, \$5,500, adding interest at 8 per cent. to August 6, 1917, \$776.12, makes the total amount of the commission due on that date \$6,276.12. The amount deducted on the interest of the notes for the commission was \$376.12.

It is sometimes said there is veracity in figures. Taking these figures, they clearly show that Mrs. Higinbotham not only received the full benefit of the \$9,000 paid by her husband on the ranch, but did not pay the full amount of the interest on the balance. Mrs. Maggie Higinbotham was a witness for defendant. She fixes the time of making arrangements for her taking over the ranch definitely as July 6, 1917. She testified to the effect that she was requested by Mr. Mays to assist her husband financially in the purchase of the ranch about a week before the time they came to La Grande; that she told Mr. Mays that she would not give a mortgage on her ranch at Echo, and that at La Grande Mr. Leffel endeavored to get her to assist her husband, and she refused; that Mr. Leffel first suggested to her to buy the place on the 6th of July, 1917; that she did not know of any final understanding between Mays and her husband as to what was going to happen to her husband at that time. She states that the transaction was, in substance, as follows: Mr. Mays said he would deed me the ranch if I would give him \$15,500 cash, and he would take my notes for the balance; that that was the way the deal went through; that she gave him a note for \$1,500 at the time (this is the note to Leffel, as we understand), and made a cash payment of \$15,500 and gave a note and mortgage for \$22,000; that her husband had nothing to do with the \$15,500, but she thought that he signed the note for \$1,500; that the deal was made

on the 6th day of July. "I had nothing to do with the old deal." She stated that she came to La Grande on the 6th of July for the reason that "Higinbotham was trying to make some settlement with Mays." At page 242 of the transcript she states: "Well, I understood that, from Mr. Higinbotham; he wanted me to kind of help him out on the land." Mrs. Higinbotham understood from Mr. Higinbotham that Mr. Leffel wanted her to come to La Grande on the proposition of making a settlement some way with Mr. May; that she never thought of buying the land until the 6th day of July; that the deed of the land was made to her on August 6, 1917; that there might have been something said about what Higinbotham had paid on the land, she did not recollect it; that the \$1,500 note was given to W. E. Leffel; that it represented that she borrowed \$1,500 from him; "He furnished it to Mays;" that her husband was present when Mr. Leffel suggested that she purchase the land; that it was some time after dinner. "Q. And did you then go to Mr. Slater's office and make a contract concerning your buying the land? A. After I talked it over with Mr. Higinbotham, I did." Mrs. Higinbotham talked with her husband about the advisability of buying the land.

It is the contention of plaintiff, as made by his complaint, that, at the request of Higinbotham and defendant W. E. Leffel, C. B. Mays and his wife conveyed the land to Maggie Higinbotham under and by virtue of the terms and conditions of the contract of December 11, 1915, between Mays and Leffel & Runnells.

The contention of the defendant is that under the agreement of December 11, 1915, the supplemental memorandum attached thereto, that Higinbotham failed to make payment, and turned "the ranch back in lieu of payment of the notes given by G. P. Higinbotham," and therefore the interest of Leffel & Runnells in the notes had ceased, and that there was a separate and independent sale of the ranch made to Mrs. Maggie Higinbotham.

After a careful reading and consideration of all the testimony, we are firmly convinced there was only one price and one sale of the land in question. It was agreeably arranged between Mr. Higinbotham and his wife that she should take title to the land and make payment of the balance of the notes and interest given therefor, after a portion of the interest was "knocked off."

For the notes in question of G. P. Higinbotham, Mr. C. B. Mays received:

Note of Mrs. Maggie Higinbotham..	\$1,500 00
also signed by G. P. Higinbotham.	
And cash of Mrs. Higinbotham....	15,500 00
And notes and mortgage of Mrs. Higinbotham	22,000 00
Total	\$39,000 00

—which was entirely satisfactory to Mr. Mays, and fully satisfied the G. P. Higinbotham notes. Out of this amount received, Mr. Mays paid Leffel, on account of the interest of the firm of Leffel & Runnells, \$5,900.

Plaintiff claims in his complaint, and it is supported by the testimony, that the conveyance of the lands by C. B. Mays and his wife to Mrs. Maggie Higinbotham on August 6, 1917, was made under and by virtue of the contract of December 11, 1915, between Mays and Leffel & Runnells, and in satisfaction of the notes mentioned and described in that agreement, and pursuant to the terms of the contract of sale of the ranch between Mays and G. P. Higinbotham.

The original option or contract for the sale of the land between C. B. Mays and Leffel & Runnells had served its purpose. It had been carried out by Leffel & Runnells in negotiating the sale of the land to G. P. Higinbotham, and has no further force or effect. It should not be confounded with the contract of December 11, 1915, as to the ownership of the notes.

Mr. Mays states that he paid Leffel the difference in what he asked for the farm and what he sold it for. Mays states that his price for the ranch, at all the times mentioned, was \$39,000 net. Mrs. Higinbotham paid that sum. All agree to that. Then if this was what the land was sold for, Leffel was paid nothing. Mr. Leffel states that Mays' price for the land to Mrs. Higinbotham was \$33,100, but we take Mr. Mays' statement in this regard. He appears to be a disinterested witness.

Mr. Mays is a man of business and understood the transaction. He plainly states that his price for the land was \$39,000 net, and that he got what he asked; that he made only one price at any time during the transaction. It was impossible for him to make and receive a net price of \$39,000 from Mrs. Higinbotham, when he only received from her \$39,000, and out of that amount paid as commission \$5,900 to Mr. Leffel. That would leave a net price of only \$33,100. There are several earmarks in the transaction that show that the deal with Mrs. Higinbotham was an adjustment of the contract of December 11, 1915, and settlement of the original deal with G. P. Higinbotham. Mr. Leffel states in his testimony that when he mentioned the matter of negotiating with Mrs. Higinbotham, before Mr. Mays gave him an answer, he and his wife did some figuring; that he left them figuring, and went away and got a cigar. When he returned Mays gave him the terms. Mr. Mays recognized his responsibility for the commission included in the notes deposited with Lenhart, and he only obtained the notes and contract from the holder, who was substituted for Lenhart, by the consent of Mr. Leffel, which could only have been made for Leffel & Runnells. Leffel & Runnells owned

an interest in the \$20,000 of notes deposited under the agreement to the amount of \$5,500, with interest thereon at 8 per cent. This property right could not be obliterated or effaced by a mere juggle of words or turn of the hand. Giving 100 per cent. force to the memorandum attached to the agreement of December 11, 1915, between Leffel & Runnells and C. B. Mays and his wife, Mr. Mays was never "compelled to take the ranch back in lieu of payment of the notes given by G. P. Higinbotham." That contract in regard to the interest of Leffel & Runnells in the notes mentioned in the agreement should be given a fair construction, as intended by the parties thereto when the same was made. Such a construction would be that if the deal was not carried out, and Mr. Mays was compelled to cancel the contract of sale with Higinbotham, and take possession of the land, and never receive his payment of the notes, then he should not pay any more commission on the sale, and the interest of Leffel & Runnells in the notes should be canceled. Further, the contract was never intended to mean, and does not mean, that Mr. Higinbotham did not have the right to sell and transfer his equity in the ranch to any third person. He had a perfect right to turn the place over to his wife, and allow her to make the payment after a small reduction. It was not a matter of concern to either Mr. Mays, Leffel, or Runnells to whom the title of the land was conveyed after full satisfaction of the notes was made. It seems strange that Mr. Leffel would claim that in 1917 he made a new sale of the lands without any written agreement as to his commission. He was an experienced real estate dealer.

The contention arises from the fact that Mr. Leffel, no doubt, attempted to make it appear that there was an independent sale made to Mrs. Higinbotham. As soon as G. P. Higinbotham indicated to Mr. Mays that if he did not make settlement he would turn the ranch back without expense, Mr. Leffel took it for granted that this was actually done. The change in the deal from Higinbotham to Mrs. Higinbotham was made practically all in one transaction, and as we understand Mr. Mays' testimony was all consummated in J. D. Slater's law office. The money collected by Mr. Leffel from Mr. Mays, August 6, 1917, was in satisfaction of the commission earned by Leffel & Runnells in the sale made to G. P. Higinbotham, and the defendant Leffel should account to plaintiff Runnells for one-half thereof.

The statement of Mr. Leffel to Mr. Mays, when he said he would go back to the hotel and have a talk with Mrs. Higinbotham, and if nothing could be done the best thing for Mays to do was to get them off the place,

indicates that no definite action had then been taken to restore Mays to the possession of the land. Nothing was done in regard to taking the "land back" after that until the matter was arranged for Mrs. Higinbotham to take the farm and make the payment. A high rate of interest was provided in the notes, and it may well be that, as the place had run down somewhat, Mays would rather have the \$17,000 and secured notes for \$22,000 than to insist upon all the interest being paid, and run the risk of being compelled to take the land. Leffel & Runnells before that had both indicated they would be glad to take about \$2,000 each for their share in the notes as the balance of their commission. Mr. Leffel did exceedingly well to collect \$5,900.

It was understood in the partnership arrangement that Mr. Leffel should do the most of the work outside of the office in attempting to make real estate deals, and that Mr. Runnells should do the office business and assist in closing deals. Mr. Leffel was traveling a great deal during 1916; made trips to North Powder, Walla Walla, Washington, and elsewhere, and incurred considerable expense.

The partnership trouble seems to have started on account of a purchase of a half interest in 320 acres of grazing land by Mr. Runnells at \$5 per acre. The title was taken in Mrs. Runnells' name. Mr. Leffel was in Walla Walla at the time attending to real estate business. Mr. Runnells telephoned him that he could make the purchase, and that he thought it would be a good thing for them to have the land to trade. There is a dispute between them in regard to the matter. We think that Mr. Runnells led Mr. Leffel to believe that he would make the purchase for the benefit of the firm, and he should be held to his contract. It was a part of the partnership business. The land was sold in a short time for \$8.25 per acre. Runnells should account to Leffel for one-half of the profit, \$520. It is in evidence that on account of this transaction Leffel said "he would get even with Runnells." The dissolution of the bonds between the members of the firm was culminated about the time that Mr. Runnells refused to pay a share of Leffel's expenses while away from home on firm business. The agreement between Leffel & Runnells was somewhat carelessly made, and subject to change. Mr. Runnells claims that he paid out as much for expenses of the firm as Mr. Leffel did. The evidence does not bear this out. Leffel states the expenses to April, 1916, were settled. He itemizes his necessary firm expenses from April 4th to October, 1916, ranging from 50 cents to \$84.50, and amounting in the aggregate to \$489.10, which we find should equitably be shared by Runnells.

Statement of Partnership Account.

Leffel collected of Mays.....\$5,900 00
 Runnells received on land deal..... 520 00

Total\$6,420 00
 First deducting expenses paid by Leffel 489 10

Leaves\$5,930 90
 To be divided equally, or..... 2,965 45
 each partner's share.

Leffel collected of Mays.....\$5,900 00
 Paid out expenses.....\$ 489 10
 Amount to be paid to Runnells 2,445 45

2,934 55

Runnells retained profit on land deal 520 00
 Amount to be paid Runnells by Leffel 2,445 45

Total amount to be received by
 Runnells\$2,965 45

Plaintiff is entitled to a decree against defendant for the sum of \$2,445.45.

The sums of money belonging to defendant Leffel on deposit in the name of defendant's wife, Alice Leffel, should be subject to the satisfaction of this decree.

The decree of the lower court should be reversed, and one ordered entered in the circuit court in accordance herewith; neither party to recover costs in either court.

BENNETT and JOHNS, JJ., concur in the foregoing opinion.

COFFEY v. NORTHWESTERN HOSPITAL ASSN, a Corporation.

(Supreme Court of Oregon. Sept. 9, 1919.)

1. EVIDENCE §71 — PRESUMPTION OF RECEIPT OF MAILED LETTER.

There is a strong presumption that a letter or postal card marked and addressed to defendant, and mailed by plaintiff, was received by the defendant, and whether this presumption was overcome by defendant's evidence was a question of fact for the jury.

2. CONTRACTS §277(1) — ON REFUSAL OF HOSPITAL TREATMENT UNDER CONTRACT ANOTHER REQUEST UNNECESSARY.

Where defendant hospital association, which had contracted to furnish medical, surgical, and hospital service to plaintiff in case of illness, in replying to plaintiff's request for care and service virtually refused to treat plaintiff on the ground that her disease was chronic, and not subject to treatment under the contract, plaintiff was relieved from making further requests for treatment.

3. CONTRACTS §176(3)—WHETHER PLAINTIFF HAD CHRONIC DISEASE WITHIN CONTRACT FOR TREATMENT, FOR JURY.

In an action for breach of a contract to render plaintiff medical and surgical treatment and furnish hospital facilities, whether plain-

tiff's ailment was chronic, and therefore not covered by the contract, was a question of fact for the jury, a chronic disease being one of long duration, or characterized by slowly progressive symptoms; citing Words and Phrases, First and Second Series, Chronic.

4. CONTRACTS §312(3) — FAILURE TO PAY ASSESSMENT NOT BREACH OF CONTRACT.

In an action for breach of a contract to furnish medical and hospital services, the fact that plaintiff did not pay an assessment when due is immaterial, where the contract provided that "no cancellation of membership shall be made while the member is sick," and plaintiff was ill at such time.

5. CONTRACTS §208 — LIMITING PLACE FOR FURNISHING MEDICAL SERVICES NOT AUTHORIZED BY CONTRACT.

In an action for breach of a contract by defendant hospital association to furnish free hospital services where a hospital is provided, and free medical and surgical treatment, without specification as to place to be rendered, held, that an instruction that, under the terms and conditions of the contract, defendant was not bound to render services to plaintiff outside of the city and county in which defendant hospital was located was properly refused.

Department 1.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Carrie W. Coffey against Northwestern Hospital Association. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for breach of a contract to furnish plaintiff medical and surgical services in case of illness. The terms of the contract, or policy, so far as they relate to this case, are as follows:

"Class B. Contract No. 5204.

"Northwestern Hospital Association of the State of Oregon.

"In consideration of a membership fee of one dollar, and of fifty cents a month dues, the Northwestern Hospital Association of the State of Oregon hereby agrees to care for Mrs. C. W. Dennis, residing at Portland, Oregon, in case of sickness or accident, by furnishing her with medical, surgical, and hospital services, as provided herein. This agreement is entered into upon the consideration that the member shall strictly comply with her part of the provisions and conditions herein contained or indorsed hereon.

"Article I. Hospital services, where provided by the association, such hospital service not to exceed one hundred days when caused by any one illness or injury, but after the expiration of said period, necessary treatment may be continued outside of the hospital for six months, subject to the conditions of this agreement.

"Article II. Necessary medical and surgical treatment by any one of the physicians on the medical staff of the association shall be furnished free, subject to the conditions of this agreement, limited to six months.

"Article III. All necessary drugs and prescriptions are furnished free, when prescribed by any member of the medical staff of the association, subject to the conditions of this agreement. * * *

"Article VI. Free ambulance service will be furnished members, when necessary, at any point within corporate limits of Portland Oregon.

"Article VII. All applicants for membership shall subject themselves to an examination by some member of the medical staff of the association, if deemed necessary, before being received into membership, which examination will be furnished free of charge to applicants.

"Article VIII. This agreement does not cover pregnancy, insanity, venereal, alcoholic, narcotic, or chronic diseases, nor persons afflicted with cancer, and the association is under no obligations to treat any of said troubles or diseases. * * *

"Article X. The association may cancel this agreement at any time by a written notice served upon the member personally to that effect, or by letter sent by registered mail to her address, for just and due reasons, and by returning to said member the balance of any monthly fees paid, but no cancellation of membership shall be made while the member is sick, or under treatment by the association, for any reason.

"Article XI. Notice of the injury or illness of any member must be given to the association as soon as possible after the inception of such illness or injury, if the member deems such illness or injury of sufficient importance to need treatment.

"Article XII. No erasures nor changes in this agreement, or waiver of any of its agreements, shall be valid, unless added hereto in writing, and signed by the president and secretary of the association, and the association will not be bound by any lawful statements of any kind or nature."

The plaintiff paid her first dues and received her contract on October 15, 1911, and on October 25, 1915, became sick at Eugene, Or., and sent a postal card by mail to defendant at Portland, Or., stating that fact and demanding treatment. The card was not replied to, and defendant's officers and agents testify that it was never received. On November 4, 1915, plaintiff wrote to defendant as follows:

"N. W. Hospital Ass'n, Portland, Oregon:

"Early in the week I sent an imperative call for help. I am sick and have no money for medicine or doctor. Have been in bed almost a week. It is a shame you have allowed me to lay and suffer without making any effort to assist me. If this is your care of the sick away from home I don't care to spend anything more on my membership. I am a very sick woman and needing help. You have entirely ignored my card and call for help. Mrs. Coffey,

"No. 116 E. 9th St., Eugene, Or.

"I want to hear at once."

On November 5th defendant wrote as follows:

"Portland, November 5, 1915.

"Mrs. C. W. Coffey, 116 East 9th St., Eugene, Oregon:

"Dear Madam: We are in receipt of your letter of the 4th inst., and in reply will say that we did not receive a card from you; therefore do not have any idea what is the matter with you.

"We do not have doctors at Eugene, but if there is anything we can do for you from this office we will gladly do so. Or if you care to come to Portland, we will take care of you.

"Yours very truly,

"Northwestern Hospital Ass'n,

"By R. C. Powell, Manager.

On November 15th plaintiff caused her daughter to write the following letter to Dr. W. E. Stewart, who was the principal physician of the defendant:

"Eugene, Or., Nov. 15, 1915.

"Dr. W. E. Stewart:

"Dear Sir and Friend: I am writing this for mama. She has been lying in bed very sick for two weeks. Has suffered intensely, but has not called a doctor because she has no means. Could not sit up long enough to write to you. To-day she had to call a doctor for an examination. I will tell you how she has suffered, what grandma has done for home nursing, and, lastly, what the doctor said.

"Mama has been working in a department store here, and has been doing her own housework. She was out of bed at six-thirty and never retired until eleven. On her feet continuously all those hours. The store work was very hard; stooping and bending all that time. Last week she suffered untold agony with her left side. At the close of the week she went home and to bed. The left ovary was so painful she could not stand the weight of the hand on it. Could not relax the sphincter muscle for a bowel movement without screaming. Could not urinate without intense pain, and getting down on her hands and knees. All night long she was bathed in perspiration, even her hands being soaking wet. She had no appetite. Grandma is here. She placed hot fomentations of turpentine over the left ovary, first thoroughly cleansing her bowels, later giving Captogen tablets. During the time her monthly period came. She had been having a bad discharge all the time and taking salt douches for it. Taking her cleansing douche after her monthly, upon removing the douche point found it covered with pus. Since then her napkin has been daily covered with pus. Pain around the rectum and vagina simply maddening.

"To-day Dr. Scaife, of Eugene, made an examination, and found her in a terrible shape. He says the left tube is pussy, and ovary and tube will have to be removed. Says he is very fearful of peritonitis. Uterus is out. He packed her with cotton and melierne, gave her two kinds of medicine to take, one a capsule, the other a liquid, taken alternately every one and one-half hours. Told her he would do what he could, but did not encourage her. She asked when she would go back to work, and he told her, 'Not at all.' She will have to be operated on. Mr. Powell wrote her last week to come home and the N. W. H. A. would take care of

her. She wants you to attend to the operation yourself. Arrange with the Good Samaritan Hospital and get a bed in Ward H. H. Get arrangements made and let us know at once. Mama will go straight from train to hospital.

"Trusting that everything has been made plain, and that we will hear from you at once, I am,

"Yours truly, Mrs. L. E. Henika.

"Address: Mrs. C. W. Coffey, Apt. 6, 116 E. 9th St., Eugene, Or.

"P. S. Doctor says the perspiration is caused by toxine poisoning from the pus, and would be very serious if the perspiration should stop. V. H."

To which defendant answered as follows:

"November 16, 1915.

"Mrs. C. W. Coffey, 116 East 9th St., Eugene, Oregon:

"Dear Madam: Your letter to Dr. W. E. Stewart was referred to me, and in reply will say that you have been examined by our physicians for this condition, and upon their advice I will inform you that this condition has been chronic with you for some years before entering the Hospital Association, and does not come under our contract; however, if you desire to come to Portland and have our doctors examine you, and if it is a case that comes under the Hospital Association's contract, we will be glad to take care of you.

Yours very truly,

"Northwestern Hospital Ass'n,

"By R. C. Powell, Manager."

On November 26, 1915, plaintiff wrote inclosing dues from November 15th to December 15th, and on the 27th the money was returned, with a note stating the plaintiff's contract had been canceled for nonpayment of dues. On February 9, 1916, plaintiff brought this action, alleging compliance on her part with all the conditions of the contract, and failure and refusal on the part of the defendant, after notice and request, to furnish the necessary medical, surgical, and hospital services, as required by the contract. The complaint further alleged that plaintiff had been unable to procure such services elsewhere, and that by reason thereof the plaintiff had been damaged in the sum of \$750, which she claimed was the reasonable cost and value of the medical, surgical, and hospital services necessary to treat and cure plaintiff of her sickness and disease. Then follows the following allegation:

"That notwithstanding the defendant was informed and well knew, at the time plaintiff entered into the aforesaid contract with the defendant, that, in entering into the aforesaid agreement with defendant, plaintiff was providing herself with expert medical services in event plaintiff became afflicted with sickness or disease in the future, and to protect and prevent herself from becoming an object of charity in such event, and notwithstanding that at the time plaintiff notified defendant of her said sickness, as aforesaid, defendant was informed and well knew that plaintiff was wholly without money or funds, and was unable to secure the money or funds with which to procure medical,

surgical, and hospital services to treat her aforesaid sickness and disease, said defendant failed and refused to give, furnish, or render plaintiff with medical, surgical, and hospital services, as aforesaid, and by reason thereof plaintiff was compelled to make application to the county court of Lane county, Oregon, for medical and surgical services, and also for hospital services to treat her said sickness and relieve herself from bodily pain and suffering, but the county court of Lane county refused to give plaintiff said medical services for the reason that plaintiff had not been a resident of Lane county for six months prior to her aforesaid application for said services, and by reason thereof plaintiff has been unable to procure treatment for her said disease and sickness and relieve herself from bodily pain and suffering, and has thereby sustained, and does now sustain, great bodily suffering, humiliation, and mental anguish, to her damage in the further sum of \$2,000."

The complaint concludes with a prayer for \$2,750 damages.

Defendant answered, admitting its corporate capacity and the execution of the contract; denying that plaintiff had paid her monthly assessments and dues as therein stipulated; denied, on information and belief, the allegations as to plaintiff's sickness; and denied generally every other allegation of the complaint, except the allegation that it had canceled the contract.

For a further and separate defense defendant alleged that it had at all times been ready and willing to take care of plaintiff, in strict accordance with its contract, but that plaintiff never applied for treatment at Portland, Or., and that if she had been sick, and needed treatment, she never notified defendant, and the defendant did not know she was sick and needed treatment in Portland, Or.; that about the 15th day of November, 1915, plaintiff wrote from Eugene, or caused a letter to be written by her daughter, stating that plaintiff was sick and needed treatment, and the association immediately, and on November 16, 1915, wrote plaintiff that if she would come to Portland, and have the hospital doctors examine her, and her sickness was such as came within the terms of their contract with her, the defendant would be glad to take care of her. Plaintiff wrote some two or three letters from Eugene, but was informed that the defendant had no doctors in Eugene, and that, if she wanted an examination and necessary treatment, she must come to Portland, Or., where defendant was prepared to take care of its members; but defendant alleges that it has not heard from said plaintiff since November 27, 1915, and the plaintiff was then in Eugene, and this defendant had no knowledge that plaintiff had come to Portland until served with the papers in this action; that plaintiff well knew that the defendant could not and would not treat her at Eugene, as she states in paragraph "V" of her complaint, and she

was accordingly notified of that fact, and requested to come to Portland, and the Association would take care of her, but that she never did call for help in any way at Portland, Or., but began this action without having first demanded treatment at Portland, Or.; that plaintiff failed, neglected, and refused to make her monthly payment for dues for the month ending November 15, 1915, and her contract with the association was thereby terminated, canceled, and annulled, and plaintiff was so notified in writing that her policy was canceled and annulled, and that at the time said notice was so given the plaintiff she was not under treatment by defendant.

The new matter being put at issue by an appropriate reply, the case came to trial, and there was a verdict and judgment for plaintiff for \$1,500, from which defendant appeals.

C. D. Christensen, of Portland, for appellant.

Wm. P. Lord, of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] Plaintiff's evidence tended to show that she was taken sick, as alleged in the complaint, and that she mailed a card to defendant, as alleged. There is a strong presumption that a letter so marked was received, and whether this presumption was overcome by the evidence of defendant was a question of fact for the jury. The receipt of the letter of November 15th is admitted by defendant, in which the condition of the plaintiff was fully described, and there is no question raised in the testimony that it was not substantially a correct statement of her condition.

[2] The reply was substantially a refusal to treat her under the contract for the disease under which she was suffering, upon the ground that it was chronic, and therefore not within the contract. It said, in effect: "Your disease is chronic, and not subject to treatment under our contract; but come down, and if we find it is not chronic we will treat you." No person in plaintiff's then condition would have gone after having been informed that, if she had the sickness which she claimed to have had, she would not be treated. Defendant claimed then, claimed at the trial, and claims here, that plaintiff was afflicted with a chronic disease, which it was not required to treat, and it is plain that, if she had gone to defendant after receiving this letter, it would have declined to treat her. If the trouble was, in fact, a chronic one, defendant was justified; otherwise, its refusal was a breach of the contract which renders it liable in damages.

[3] The evidence introduced as to the disease from which plaintiff was suffering indicates that in 1910 plaintiff suffered from prolapsus uteri, and that as a result of an

operation she was completely cured of that trouble, and was in sound health when she became a party to the contract with defendant; that this condition continued for about two and a half years; that later, when plaintiff did hard work or lifting, she had temporary prolapsus, but that her condition always becomes normal upon ceasing such work. The effect of plaintiff's testimony is that she has had frequent attacks or recurrences of the trouble at intervals, produced by overwork or lifting, but that the trouble is not continuous. The evidence on behalf of plaintiff indicates that she is much more susceptible to attacks of this character than the ordinary woman, but this fact alone does not render the disease chronic.

It is a fact well known, even to laymen, that there are persons whose bones are so brittle from disease or malnutrition that they are broken by blows or falls which would do no particular injury to a person whose bones are normal; but it does not follow that such persons have chronic broken arms or legs. Some persons are poisoned by the slightest contact with poison ivy, while others are not at all affected by it; but it does not follow that the susceptible person is afflicted with chronic ivy poisoning.

It appears here that plaintiff's first attack was cured in three weeks by an operation; that she remained in good health for over two years; and that subsequent attacks were cured by avoiding the causes which produced them. A chronic disease is one of long duration or characterized by slowly progressive symptoms. Sec. 2, Words and Phrases, "Chronic." Whether plaintiff's ailment was chronic was a question of fact for the jury, who were instructed, in substance, that the burden of proof was upon the plaintiff to show that she was not suffering from a chronic ailment.

[4] The fact that plaintiff did not pay her assessment due on November 15th is immaterial, as article X of the contract provides that "no cancellation of membership shall be made while the member is sick, or under treatment by the association, for any reasons."

[5] It is urged the court erred in not giving the following instruction requested by defendant:

"You are further instructed that under the terms and conditions of the contract herein the defendant was not bound to render any services to the plaintiff outside of the city of Portland, Multnomah county, Oregon."

It is a forced construction of the contract to say that it requires defendant to render services in the city of Portland only. Article I of the contract stipulates for furnishing hospital services "where provided," by which we understand that such services were to be rendered only where the defendant had provided hospitals; but article II provides for

medical or surgical services by any one of the physicians of the association staff, and does not limit such services to a place where hospitals have been provided. Three things are promised the members of the Association: (1) Free hospital service where a hospital is provided; (2) free medical treatment, without any specification as to where it is to be rendered; and (3) free surgical treatment under the same conditions. In addition to this, defendant had practically refused to treat plaintiff for prolapsus anywhere, and had unlawfully canceled its contract with her while she was sick; so it is in no position to claim immunity because plaintiff did not come to Portland to receive their refusal to treat her. Plaintiff's final demand was for treatment in Portland, coupled with an offer to come to Portland to be treated. Defendant's response was a refusal to treat her in Portland for the disease from which she was suffering, coupled with a crafty invitation to come and be examined and treated, in case defendant found that she was afflicted with some different ailment than that from which she claimed to be suffering, and with the assumption that, if she were suffering from the ailment described in her communication, she would not be entitled to the treatment stipulated in the contract.

The judgment of the circuit court is affirmed.

BURNETT, BENSON, and HARRIS, JJ., concur.

RALSTON v. BENNETT, as Superintendent of Banks of State of Oregon, et al.

(Supreme Court of Oregon. Sept. 16, 1919.)

1. JUDGMENT \Leftrightarrow 423 — ERRONEOUS DECREE OF SUPREME COURT CANNOT BE SET ASIDE BY SUIT TO VACATE.

An erroneous decree of the Supreme Court cannot be set aside, merely because erroneous, by an original suit, where the court had jurisdiction of the parties and of the cause.

2. COURTS \Leftrightarrow 1—"JURISDICTION" DEFINED.

"Jurisdiction" is the power to hear and decide.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

In Banc.

Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Suit by L. O. Ralston against Will H. Bennett, substituted for S. G. Sargent, as Superintendent of Banks of the State of Oregon, on behalf of the creditors of the American Bank & Trust Company of Port-

land, Or., insolvent, and the American Bank & Trust Company of Portland. From an adverse decree, plaintiff appeals. Affirmed.

This is a suit in the nature of a bill of review to impeach and set aside a previous decree against the plaintiff herein and in favor of the defendant Sargent, as Superintendent of Banks, wherein it was decreed that the said Superintendent of Banks should recover from the plaintiff herein the sum of \$24,200, and his costs and disbursements, etc.

The original suit was brought by the defendant Sargent against the plaintiff Ralston to recover upon his liability for 245 shares of the capital stock of the American Bank & Trust Company of Portland. It was alleged, in substance, that the corporation was insolvent, and was in the hands of Sargent, the plaintiff, as Superintendent of Banks, and that said corporation had issued the shares in question to Ralston; that defendant Ralston, in payment of the same, agreed to transfer certain real property in the city of Portland, which it is alleged he represented to be of the value of \$22,200, and to which, according to the allegations of the complaint, he represented that he had a good merchantable title, which he would transfer by warranty deed to said corporation.

It is further alleged that these representations were false, and as a matter of fact that he had at the time only a tax title to the land in question, of practically no value; that he never has executed the warranty deed which he agreed to execute; and that thereafter said Ralston caused the manager and cashier of the corporation to execute in his favor an unauthorized release against all claims due from him to the corporation.

This suit finally went to trial in the circuit court for Multnomah county, and was decided in favor of the plaintiff and against the defendant, who is now plaintiff herein. Ralston, plaintiff herein, appealed to the Supreme Court. The case, being a suit in equity, was tried de novo, and a decree, which is sought to be set aside herein, was adjudged by this court, and afterwards, by order and mandate of this court, was entered in the circuit court for Multnomah county.

Thereafter another suit, brought by the Bank Examiner against Waterbury and other subscribers to the stock of the corporation, was decided by the circuit court of Multnomah county, and in its turn came up on appeal to this court. It was here heard before Department No. 1, and it was held that the complaint in that cause was insufficient to support a decree or state a cause of suit, because it did not allege that

the defendants were stockholders of the corporation at the time of the commencement of the suit. The court in the latter case distinguished between that case and the Ralston Case, 80 Or. 16, 154 Pac. 759, 156 Pac. 431, upon the grounds that the latter, which may be referred to as the Waterbury Case, 83 Or. 159, 161 Pac. 443, 163 Pac. 416, was in the nature of a winding-up suit against the original subscribers upon their unpaid liability, while the suit in the Ralston Case was of a different nature, being brought against Ralston individually to recover the purchase price which he had agreed to pay, and actually attempted to pay, by the fraudulent transfer of the alleged worthless title to the Portland property.

After the Waterbury Case was decided the plaintiff herein brought this suit to set aside the decree in his case, claiming that the decision in the Waterbury Case was inconsistent with that in his own case, and that, under the law as stated in the latter case, the complaint in his case did not state facts sufficient to constitute a cause of suit.

Jay Bowerman, of Portland (Charles A. Johns, of Salem, and Fulton & Bowerman, of Portland, on the brief), for appellant.

Sidney J. Graham, of Portland, for respondents.

BENNETT, J. (after stating the facts as above). [1] As we view it, it is entirely unnecessary to inquire as to whether or not the decision in the Waterbury Case and the principles of law there announced are inconsistent with the decision in the Ralston Case, sought to be set aside herein. It seems to be entirely settled that, however erroneous a decree of the Supreme Court may be, it cannot be set aside, upon the ground of such errors alone, by an original suit, if the court had jurisdiction of the party and the cause.

In the work of Mr. Freeman on Judgments it is said:

"A court of equity will not lend its aid unless the party claiming its assistance can impeach the judgment by facts or on grounds of which he could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fraud on his own part. When a party has once an opportunity of being heard, and neglects to do so, he must abide the consequences of his neglect. A court of equity cannot relieve him, though the judgment is manifestly wrong." Volume 2 (2d Ed.) § 486.

Mr. Black states the rule thus:

"The doctrine is fully established that a court of equity will not, on the application of the defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense

over which the court pronouncing the judgment had full jurisdiction, set aside the judgment or enjoin its enforcement, simply on the ground that it was unjust, irregular, or erroneous." Black on Judgments (2d Ed.) vol. 1, § 367.

It is true the learned writers referred to had particularly in mind suits to set aside judgments in actions at law rather than decrees in an equity suit; but it is obvious the same principles apply to both.

In *Washington Bridge Co. v. Stewart*, 8 How. 413, 425 (11 L. Ed. 658), the Supreme Court of the United States, by Mr. Justice Wayne, says:

"The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. * * * Both are conclusive of the rights of the parties thereby adjudicated."

[2] There is no claim that the court did not have jurisdiction of the parties in this case, and it seems clear that the subject-matter also was within the jurisdiction of the court. Jurisdiction is defined as "the power to hear and decide," and there is no room for question that this court, in the original Ralston Case, had power to hear and decide as to whether or not the complaint in that case was sufficient to state a cause of suit.

In *Brown on Jurisdiction of Courts* (2d Ed.) § 2, p. 7, it is said:

"If there be a petition that is subject to be assailed by demurrer, if so attacked, and the court having its power called in question, or rather in action, decides that the petition is sufficient, even although in law it is insufficient, still the court is exercising jurisdiction; and, although the decision and finding of the court is clearly erroneous, it nevertheless is exercising its judicial power, and its failure to correctly decide on the question of the sufficiency of the petition does not deprive it of jurisdiction; its decision is simply erroneous."

This seems to be the principle uniformly declared by the authorities.

It may seem plausible at first glance that a court should always correct its own errors, whenever called to its attention; but when we remember that such a doctrine would lead to repeated and unending litigation, in which the rights of the parties would never be finally determined, such a rule becomes at once impracticable and impossible. There would seldom be a case in which the losing party would not believe the court had declared the law erroneously, and no number of decisions would be likely to disabuse a disappointed litigant of such a belief.

In this case, if Ralston has a right to bring an original suit to set aside the decision in his case, upon the ground of error, the Superintendent of Banks would have the right to bring a like suit against the

winning defendants in the Waterbury Case, and relitigate the questions involved therein. Indeed, in this very case, if the court had such jurisdiction, and should attempt to review the previous decision, in whichever way we might decide it the losing party would be at liberty to come into court again for a third time, on the claim that we had erred or were mistaken in our decree; and so the processes of litigation would go on interminably, and would never reach a final and ultimate decision. As long as there are courts and human tribunals mistakes and errors will sometimes occur; but it is better that such occasional errors shall stand than that all litigation should be left unending and interminable.

It must not be supposed that we are assuming in any way that the Ralston Case was not properly decided, or that the distinction between that case and the Waterbury Case was not sound and well taken. We are simply refusing to relitigate these cases, or to inquire further as to whether the principles announced therein were just and correct, when the causes have been once finally decided upon appeal.

Affirmed.

JOHNS, J., takes no part in the consideration of this case.

RICE et al. v. DOUGLAS COUNTY et al.

(Supreme Court of Oregon. Sept. 16, 1919.
Rehearing Denied Sept. 30, 1919.)

1. HIGHWAYS \S 19—SAVING CLAUSE OF REPEALING STATUTE PRESERVES ALL ROAD IMPROVEMENTS PENDING.

The saving clause of the county road act of May 20, 1917, providing that, notwithstanding repeal of existing statutes, such statutes should continue in force for purposes of completion of any highway proceedings previously instituted, covers the case of a highway proceeding instituted under Laws 1903, p. 264, § 11 (L. O. L. §§ 6284-6286), the intention of the Legislature having been to preserve all pending proceedings for establishment of roads.

2. STATUTES \S 263—STATUTES SHOULD NOT BE CONSTRUED RETROSPECTIVELY TO INTERFERE WITH JUDICIAL PROCEEDINGS.

Unless there is a clear intent to the contrary, statutes should not be construed retrospectively, or so as to interfere with pending judicial proceedings.

3. HIGHWAYS \S 19—WHEN COURT OPENING HIGHWAY MAY FOLLOW OLD OR NEW PROCEDURE.

In view of the saving clause of the Highway Statute of May 20, 1917, after the going

into effect of such new statute, repealing prior statutes, the county court, in opening a county road, could follow either the old or the new procedure in a pending proceeding instituted under the old statutes.

4. HIGHWAYS \S 30(5, 7) — WHEN EVIDENCE OF POSTING OF NOTICES FOR ESTABLISHING HIGHWAY SUFFICIENT.

In a proceeding to establish a county road, instituted under Laws 1903, p. 264, § 11 (L. O. L. §§ 6284-6286), and continuing under the new and repealing statute of May 20, 1917 (Laws 1917, p. 588), posting of notices in three public and conspicuous places in the vicinity of the road, and one on the bulletin board at the county courthouse, held a compliance with law, so that an affidavit stating that one copy of the notice was posted in a public and conspicuous place near the center of the proposed road was sufficient proof, the center of a road being a point in the middle of the road equidistant from the termini.

5. TIME \S 10(1)—FILING REPORT OF ESTABLISHMENT OF HIGHWAY DAY AFTER HOLIDAY SUFFICIENT.

It being impossible to file on June 5th, the day of the general primary election, and a public holiday by proclamation of the Governor, the report of viewers and county surveyor directed to locate a proposed county road, a filing on the next day was sufficient, and the court did not lose jurisdiction because the report was not filed on the holiday, as prescribed in the order.

6. HIGHWAYS \S 41(2) — WHEN NOTES OF VIEWERS AND SURVEYOR SUFFICIENT.

Where field notes of the county surveyor and viewers of a proposed county road showed the beginning point and terminus of the road, and every angle, direction, and distance between the point of beginning and the terminus, their preliminary report substantially complied with the act of May 20, 1917 (Laws 1917, p. 588), and the road was duly established by order to that effect; the placing of permanent monuments, etc., not being necessary to constitute the road a public highway, while failure to make final survey and to monument the road does not avoid the order of establishment.

7. HIGHWAY \S 58(1) — RIGHT TO REVIEW ESTABLISHMENT NOT WAIVED BY APPEAL FROM ASSESSMENT.

The right to review proceedings to establish a county road or highway is not waived by an appeal from the assessment of damages to premises through which the road is laid out.

8. HIGHWAYS \S 41(1) — QUALIFICATION OF VIEWERS SUFFICIENTLY SHOWN BY REPORT.

The recital in the report of viewers of a proposed county road or highway that before commencing their labors they took an oath faithfully and impartially to discharge the duties of their appointment is sufficient showing that the viewers qualified as required.

Department 1.

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Petition by Lela S. Rice and Vera A. Rice against Douglas county and others, constituting the county court, to review the action of the court in establishing a county road. From an adverse judgment, petitioners appeal. Affirmed.

This proceeding was brought to review the action of the county court of Douglas county in establishing a county road through plaintiffs' premises. On the 23d day of April, 1917, a petition was filed in the county court, sufficiently specifying the termini and general route of the proposed road, with the following proof of posting of notices, omitting the formal parts of the affidavit:

"I, G. O. Willis, being first duly sworn, on oath say that I posted three notices (a copy of which is hereto annexed) of the proposed road in the following places, to wit: One at the beginning of said proposed road, one at the termination of said proposed road, and one near the center of said proposed road, all being public and conspicuous places in the vicinity of said proposed road, and in Douglas county, Oregon, and one at the courthouse door in Roseburg, Douglas county, Oregon, 80 days prior to the presentation of the petition herewith, to wit, on March 23d, 1917."

On May 2, 1917, the county court made an order in the usual form, appointing M. R. Germond county surveyor, and J. B. Large and John L. Chapman viewers, and directing them to meet at the beginning point of said road, as described in the petition, on the 25th day of May, 1917, and view out and locate said road upon the most practicable and feasible route, to assess damages and benefits, and to make an estimate of cost of opening the road, and to make such other recommendations, or give such information for or against the location thereof, as might be useful, and file their report on or before June 5, 1917. June 5, 1917, being a public holiday, the report was filed the next day, June 6th.

The method of procedure required at the time the petition was filed is set forth in section 11, p. 284, Gen. Laws 1903, which section constitutes sections 6284, 6285, 6286, L. O. L. We quote the original statute, as the sectionizing is somewhat confusing.

"Section 11. It shall be the duty of the board of county road viewers, after receiving at least five days' previous notice by one of the petitioners to meet at the time and place specified in the notice of the county court aforesaid, or within five days thereafter, and after taking an oath or affirmation, if not already a sworn officer, faithfully and impartially to discharge the duties of their appointment, shall take to their assistance such persons as they may deem necessary, and proceed to survey, view, lay out, alter, straighten, or re-establish such road in the following manner: Starting at the initial point asked for in the petition, and following the most practical route, a preliminary line shall be run for the purpose of determining the practicability of said road. All trees on the line of such road shall be marked on each of the

sides corresponding with the direction of the road with three notches cut through the bark, and at least one inch into the wood, and all trees adjacent to the line shall be plainly blazed on the side facing the road. The beginning and termination of such road and the termination of each mile thereon shall be designated by a tree, if one is found at the point, if not, then by a stone containing at least one thousand seven hundred and twenty-eight cubic inches, if such stone can be found in the vicinity, if not, then by a post of durable wood, at least four inches square and three and one half feet long, firmly planted not less than eighteen inches in the solid ground. When posts are used, two bearing-trees shall be chosen, the course and distance of each of which from the post, the diameter of the tree and the kind of wood shall be noted by the surveyor. If no stones can be obtained, and no trees suitable for bearing-trees can be found, the surveyor shall cause a mound to be erected by compact earth around the post, eighteen inches high and four feet square. The beginning and terminating points of the road, whether trees, posts, or stones, shall be marked by the letter 'R.' The termination of each mile shall be marked by a figure indicating the number of the mile from the beginning of the road followed by the letter 'M.' The marks required by this section, if occurring on stone, shall be cut legibly at least one eighth of an inch deep; if occurring on trees or posts, they shall be plainly cut at least one fourth of an inch deep in the solid wood, the bark having been first removed. All bearing-trees shall be marked on the side facing the post to which they correspond with a figure and letter, the same as that on the post cut into the solid wood in the same manner as other trees are required to be marked. The surveyor shall, after the completion of the preliminary survey, make such a plat as is necessary to show the alignment of the proposed route and the general topography adjacent, together with a profile showing the grade obtainable; and he shall also mark, out of the material obtainable along the proposed route, the character of the ground, together with any other information bearing upon the subject in hand. If the route is found to be practicable, the board of county road viewers shall proceed to make the final location of the road, and upon the completion of the same, the surveyor shall deposit with the county clerk of the county where said road is located, a complete set of field notes, showing the ties to the government corners along the route, the location and witnesses to the mileposts, and the beginning and terminating points of the road. He shall also deposit a plat showing the alignment of the proposed road, which plat shall show all the courses, the location of all the mileposts, the ties to the government corners, where obtainable, the location and approximate size of all creeks, rivers, swamps, cuts, and fills. He shall also deposit with the county clerk a profile showing the grades and their per cent., the location of all water courses, rivers, swamps, and other natural features that may be important. The location of all culverts, box drains, bridges, tide boxes, and all highway, railroad, and other crossings, and the amount of excavation and embankment, and an estimate

of the total cost of construction, together with any other information and details that may be useful in connection with the improvement of such road. The other members of the board of county road viewers shall also make out a report, in writing, stating their opinion in favor of or against the establishment or alteration of such road and set forth their reasons for the same, which report shall be delivered to the said county clerk at the same time and in the same manner as that prescribed for the surveyor: Provided, that when the board of county road viewers are of one opinion they may each sign the report. It shall be the duty of the county court on receiving the said report, or reports, to cause the same to be publicly read on two different days of the same term; and if no remonstrance with a greater number of remonstrators than there is of the petitioners upon the petition (be received) (provided, however, that no one shall be deemed a remonstrator except a freeholder residing in the road district where such road is located) and no petition for damages be filed, and the court is satisfied that such road will be of public utility, the report of the viewers being favorable thereto, they shall cause said reports, survey, profile, and plats to be recorded in suitable books kept for that purpose, and from thenceforth said road shall be considered a public highway, and the court shall issue an order directing said road to be opened. In case the board of county road viewers shall file conflicting reports, the county court may elect which report they will accept, and thereafter proceed as though the report accepted were unanimous."

Under this statute a road was not definitely established until the final report of the viewers was filed and approved. In February, 1917, the Legislature passed a new act (Laws 1917, p. 588), providing for the procedure in the laying out and location of county roads, and repealing, among others, sections 6284, 6285, 6286, L. O. L., with a reservation hereafter to be considered. This law became effective May 20, 1917, which was five days before the viewers met to lay out and locate the road in question. The procedure, under the 1917 law, while similar to that required by the 1903 law, was in some respects different. The method of survey prescribed by the latter statute (section 12) was as follows:

"Starting at the initial point designated in the petition or resolution, and following the most practicable route, a preliminary line or other lines may be run for the purpose of definitely locating the center line of said road and determining the practicability of said road and the necessity therefor. Said board shall assess and determine how much less valuable the premises through which the said road is located, or is to be located, are, and set forth the same in their report; and such report, when adopted by the county court, shall be taken and considered to be the true damages suffered by any one through whose premises such road is located. The board of county road viewers shall also make out a report, which shall be

in writing, stating its recommendation in favor of or against the establishment or alteration of such road, and shall set forth the reasons for the same. In the event that all members of the board of county road viewers fail to agree, separate reports may be filed, and the county court may elect which report it will accept, and thereafter proceed as though the report accepted were unanimous. The surveyor member of said board of county road viewers shall make a plat of the preliminary line or other survey, showing the alignment of the proposed road and the general topography adjacent, and showing the ties to government corners along the road where available. Said plat and the report or reports shall be filed in the office of the county clerk on or before the date fixed by the county court in its order for the appointment of said board of county road viewers."

Section 13 of the act of 1917 required the report of the viewers to be read on two different days of the next regular term following the filing of the report.

Section 14 provided that persons interested might file remonstrances or claims for damages at any time before the expiration of the day upon which the report should be read the second time.

Section 15 is as follows:

"Report Considered by Court. On the day following the second reading of said report, the county court shall consider said report, and if no petition for damages, or remonstrance with a greater number of remonstrators than there is of the petitioners upon the petition, be filed within the time hereinbefore prescribed, and if the court is satisfied that such road will be of public utility and the amount of the damages assessed is just and equitable, and the report of the viewers being favorable thereto, said court shall thereupon adopt said report and enter an order directing warrants to be issued to the persons and in the amounts designated in the report, and further directing said road to be finally surveyed and opened, and from the date of said order such road shall be a public highway."

Section 16 provided that, if a claim for damages should be filed, the court should direct the board of viewers to consider the same; and for that purpose the court might, from time to time, postpone the hearing to a day certain, but no longer than two consecutive terms. It was further provided that if the petition for damages should be allowed wholly or partly, and such award should be accepted by the claimant, the county court should make an order adopting said report as modified, and should make an order establishing the road; but that, if the petition should be denied, the court should enter an order establishing the road, but no such order should be final, or operate to establish the road, unless the time for taking an appeal to the circuit court should have expired. There were provisions for immediate opening of the road under certain circumstances not material here.

Section 19 of the 1917 law is as follows:

"County Surveyor to Monument Road and Prepare and File Permanent Record Thereof. When a proposed road is established, upon the final hearing thereon, the county court shall notify the county surveyor thereof, who shall forthwith proceed to survey and monument said road along the alignment established by the final order of the county court, and prepare and file final records thereof.

"In the final survey the termini of said road, and where practicable, the beginning and ending of each curve or each angle point thereon, shall be designated by permanent monuments or posts, bearing trees, or compact earth mounds in such positions that they will not be disturbed by the construction of said road. Where lettered, all monuments shall be marked by the letter 'R.' Any monument of iron shall be a rod or pipe at least thirty inches in length and five-eighths inch in diameter, and any monument of stone shall contain at least one thousand cubic inches and shall be at least twelve inches in one dimension. All monuments shall be fully described in the field notes of such survey and their courses and distances given from the points to which they refer.

"The county surveyor shall make and file with the county clerk of the county, a complete set of field notes, together with a plat and a profile. The plat shall show the alignment of the road, the courses and distances, ties to government corners, and natural watercourses and any other available and necessary data [data]. The profile shall indicate the grades obtainable and natural topography. The grade shown on said profile shall not be deemed established, but shall be subject to change as circumstances require."

Section 21 provides for the initiation of proceedings to lay out and locate county roads by resolution of the county court without petition. The proceedings, as to notice, etc., are similar to like proceedings by petition. A like provision is contained in chapter 847, Laws 1913. There was a repealing clause to the act of 1917, which practically purported to repeal all the law in relation to procedure in laying out county roads then in existence, but the act contained the following reservation:

"Saving Clause. Notwithstanding the repeal of the existing statutes of this state by the provisions of this act, the said original sections and statutes shall continue in force and effect for the purpose of the completion of any highway proceedings heretofore instituted by the officers herein designated."

B. L. Eddy, of Roseburg, for appellants.
George Neuner, Jr., Dist. Atty., of Roseburg, for respondents.

McBRIDE, C. J. (after stating the facts as above). [1, 2] We are of the opinion that the saving clause above mentioned is broad enough to cover the proceeding at bar, and that the intent of the Legislature was to preserve from destruction all pending proceedings for the establishment of county roads. The petition may fairly be construed to be a

request, in legal form, to the county court to cause the machinery of the law to be set in motion to lay out a county road, and, if necessary, to condemn land for that purpose. The petitioners do not technically institute the proceedings, but request the county court to do so. After such petition, with proof of notice, is filed, the county becomes the active party, and may fairly be said to institute all the proceedings, as between itself and the parties over whose land the proposed road is to pass. It is a rule of statutory construction, as well as of sound public policy and justice, that, unless there is shown a clear intent to the contrary, statutes should not be construed retrospectively, or so as to interfere with judicial proceedings then pending. *Lewis' Sutherland on Stat. Cons. § 238.* This rule, we must assume, was known to the Legislature when the act of 1917 was adopted. The legislators must have known and appreciated the fact that, as a matter of course, many unfinished road proceedings were pending in the counties of this state, and it is unthinkable that it was the legislative intent to ruthlessly deprive the county courts of the jurisdiction to complete these and to require the whole proceedings to be begun over again. The savings clause, while crudely drawn, was no doubt intended to preserve the jurisdiction to complete the proceedings already begun under the old law.

[3] The new law, while preserving the jurisdiction, provided a new procedure for its exercise. The jurisdiction being preserved, the county court, after May the 20th, had a choice of procedure. If necessary, it could follow the previous law; but if the procedure under the new law were deemed more convenient at the particular stage to which the proceeding had gone, there is no reason in the world why it should not be employed. The latter procedure was chosen in this case, and, if it has been substantially followed, the road has been lawfully located. *Drainage Dist. v. Bernards*, 89 Or. 539, 555, 174 Pac. 1167.

[4] It is objected that the proof of posting notices of the proposed road is insufficient because the affidavit states, among other things, that one copy of the notice was posted in a public and conspicuous place "near the center of the proposed road." It is contended that the affidavit is indefinite, in that the term "near" is merely a relative term, and, in the connection used, does not locate any particular point. The center of a road would be a joint in the middle of the road, equidistant from the termini. The proposed road not having been surveyed, it was of course impossible to locate such point with mathematical exactness. The affidavit further shows that the place where the notice was posted was in the "vicinity of the proposed road and in a public place." The finding of the court is that "the notices were posted in three public and conspicuous places

in the vicinity of said road, and one on the bulletin board at the Douglas county courthouse." We think this complies with the requirements of the law, as laid down in the later decisions, and particularly with *Lattimer v. Tillamook County*, 22 Or. 291, 29 Pac. 734; *Cameron v. Wasco County*, 27 Or. 318, 324; 41 Pac. 160. In the latter case there was no averment in the affidavit that the places where the notices were posted were public places, nor any finding to that effect by the court. In an opinion sustaining a writ of review, Justice Moore said:

"Had the journal entry of the county court recited that satisfactory proof had been given by advertisement, posted at the place of holding the county court, and also in three public places in the vicinity of the proposed road, it would be presumed that jurisdiction had been acquired, though the affidavit of posting was ambiguous in its statement of facts."

It is true that the court in *Minard v. Douglas County*, 9 Or. 206, and in *King v. Benton County*, 10 Or. 512, speaking through Justice Waldo, announced a rule that would, if now adhered to, reject the proof of posting offered in the case at bar. In fact, the requirements as to notices were so technical, as announced in these opinions, that they have been disregarded, if not expressly overruled, in later decisions.

In *Vedder v. Marion County*, 22 Or. 264, 29 Pac. 619, *Strahan, C. J.*, referring to *Minard v. Douglas County*, *supra*, says:

"We deem it a fitting occasion to say in relation to that case, as well as the case of *King v. Benton County*, 10 Or. 512, which followed it, that they introduced a degree of strictness and technicality into the practice in the matter of the location of county roads that renders it unnecessarily onerous and expensive, and which is at variance with the entire course of procedure which had prevailed here since the territorial days and up to the time those cases were decided. Nor did the court seem to notice or give any weight whatever to the principles of contemporary construction in such case, which is frequently allowed to have a controlling effect in such matters. Viewing these cases in that light, the tendency is now to limit their doctrines, or at least to see that they are not extended."

[5] It is claimed that the court lost jurisdiction because the report was not filed on the day prescribed in the order, namely, June 5, 1917. June 5th was the day of the general primary election, and was a public holiday by proclamation of the Governor. It being impossible to file the report on that day, we think a filing on the next day was sufficient. Whether it was filed before or after court convened does not appear. *McMillan v. Mason*, 70 Or. 133, 140 Pac. 446, is cited as sustaining plaintiffs' contention. In that case the viewers allowed three months and two terms of court to pass before filing their report. And there was no sufficient affidavit

or finding by the court to show a compliance with the law in regard to posting. Justice Moore held the proceedings void for this reason, and by way of dictum remarked in substance: "It is believed" that a proper construction of the statute required the viewers to make and file their report before the commencement of the next term of court. The question was not necessarily involved, and the conditions were different from those existing in this case, where the intervention of a holiday rendered it impossible to file the report upon the return day.

The question is one not free from difficulty, but we are of the opinion that the report was filed in time. It is very evident that plaintiffs were not injured in any way by the failure of the viewers to file their report a day earlier, and while this circumstance would not avail if there were an injunction of the statute requiring the report to be filed at a particular time, yet we do not feel inclined to construe into the law a requirement which it does not contain, in order to defeat a proceeding which seems fair and regular.

[6, 7] The preliminary report of the viewers and surveyor seems substantially to comply with the Laws of 1917. The field notes show the beginning point and terminus of the road, and every angle, direction, and distance between the point of the beginning and the terminus. This shows the thread of the road, which is all that the law of 1917 requires, before directing its permanent location and declaring it a public road. The placing of permanent monuments, mile-stones, etc., is a matter of detail, to be attended to later, and is not necessary to constitute the road a public highway. The failure to make a final survey and monument the road does not render the order establishing it void. If that work is unduly delayed by the surveyor, the county court, or perhaps any citizen interested, may bring appropriate proceedings to compel him to perform his duty, but such failure cannot be urged upon a review of the proceedings relative to the location and establishment of the road. While a reference thereto is probably not required here, it is proper, in view of the importance of the subject, to say that the right to review the proceedings is not waived by an appeal from the assessment of damages.

[8] It is also contended that there is no sufficient showing that the viewers qualified, as required by law. The report of the viewers states that before commencing their labors they took an oath to faithfully and impartially discharge the duties of their appointment. According to the weight of authority, such a recital in the report is sufficient. *Husted v. Town of Greenwich*, 11 Conn. 383; *Wood v. Campbell (Ky.)* 14 B. Mon. 422; *Town of Huntington v. Birch*, 12 Conn. 142; *Dollarhide v. Bd. of Com. of Muscatine Co.*, 1 G. Greene (Iowa) 158. The

latter case intimates that, even if there had been no mention of the fact in the report, the presumption would have been that the viewers complied with the law, and took the necessary oath of office before entering upon their duties.

It is unusual for an officer to state in his return that he has taken the oath required by law, and it seems to the writer that it is wholly unnecessary, where the law does not require a record of such oath, to make any return concerning it. However, the decision of that question is unnecessary, as the report complies with the requirements of the better authorities on that subject.

We fail to find any failure of jurisdiction, or any error affecting the substantial rights of the plaintiffs; therefore the judgment of the circuit court is affirmed.

BURNETT, BENSON, and HARRIS, JJ.,
concur.

LE VEE v. LE VEE et al.

(Supreme Court of Oregon. Sept. 9, 1919.)

1. TENANCY IN COMMON §8—WHEN DEVISEES BECOME TENANTS IN COMMON.

Where a mother died seized of land with her son as tenant in common, the other children, the will devising to the son a life estate in the mother's share of the tract, subject to payment of certain charges, became tenants in common with the son; joint tenancy having been abolished by L. O. L. § 7175.

2. TENANCY IN COMMON §11—NO TENANT CAN DO ACT AFFECTING TITLE OF ANOTHER.

Tenants in common hold their interest in the realty independently of each other, and neither one can do an act respecting the title which will bind the others.

3. TENANCY IN COMMON §43—GRANTEE OF TENANT IN COMMON BECOMES SUCH.

The grantee of a tenant in common becomes merely a new tenant in common with the remainder of the original holders.

4. TENANCY IN COMMON §55(1) — SINGLE COTENANT CAN RECOVER POSSESSION OF WHOLE LAND AGAINST STRANGER.

As against a stranger, one tenant in common may recover possession of the whole of the land held by himself and his cotenants.

5. APPEAL AND ERROR §1173(2)—REVERSAL AS TO SOME DEFENDANTS DID NOT AFFECT THOSE NOT APPEALING.

Where a mother for consideration agreed to convey to a son her share of land owned by them in common, and after her death he sued his sisters and brother, to whom the mother had devised the land subject to a life estate

in his favor, and some of the children made no resistance, defaulting or withdrawing appearance, and decree was rendered for the son against all the other children, part of whom appealed, the reversal of the decree as to the children who appealed did not necessarily work a reversal as to those who did not contest the complaint.

Department No. 1.

Appeal from Circuit Court, Benton County;
G. F. Skipworth, Judge.

On petition for rehearing. Petition denied.
For former opinion, see 181 Pac. 351.

McFadden & Clarke, of Corvallis, for appellants.

Hewitt & Sox, of Albany, and B. A. Kliks, of McMinnville, for respondent.

BURNETT, J. The plaintiff claimed he had a contract with his mother whereby, in consideration of his caring for her during her life, etc., she agreed to convey to him either by deed or by will an undivided half in fee of a tract of land which they owned in common. He charges in his complaint that she violated the contract and devised to him only a life estate in her half of the tract, conditioned upon his paying her debts and a mortgage upon the land. After her death he instituted this suit against his sisters and his brother and the spouses of those married, to compel a conveyance of the property. Some of the defendants made no resistance to his suit, either defaulting or withdrawing their appearance. The circuit court, after hearing the testimony on the issues presented by the parties appearing, rendered a decree in favor of the plaintiff against all of the defendants according to the prayer of the complaint. Three of the sisters, answering defendants, and their husbands, together with the executor of the deceased mother's will, appealed, serving their notice upon the plaintiff only. Upon consideration of the testimony and the argument of counsel, it was determined here that the proof offered in support of the agreement relied upon by the plaintiff was not sufficient to establish the same. The conclusion was that, so far as it affects the parties who have appealed, the decree of the circuit court should be reversed, but that it should stand as to the defendants who did not contest the complaint. The petition of appellants for a rehearing urges that the decree should be reversed as to all the defendants, irrespective of whether they resisted the suit or not. It substance their argument is that the final decree on the merits determines the rights of the defaulting defendants, and inures to their benefit, the same as if no decree pro confesso had been rendered against them. The contention of the movants for a rehearing is that the defendants

are jointly liable, entailing a joint decree in any event whatever, and that if the suit falls as to one it must fail as to all.

The principle governing the matter is thus succinctly stated in 16 Cyc. 497:

"Failure of one defendant to answer and a decree pro confesso against him do not entitle plaintiff to take the allegations of his prayer as true against him who has answered. A final decree upon the merits cannot then be entered either against the defaulting defendant or those not in default, without proof of the material allegations of the prayer. And even where a decree pro confesso has been entered against a defaulting defendant as upon issue joined by a codefendant and trial had it turns out that the bill ought not to be sustained as to either defendant, it will be dismissed as to the defaulting defendant as well as to the defendant not in default. This rule, of course, does not apply where the allegations in the bill against the defaulting defendants and the defenses of the answering defendants have no necessary connection, so that upon the trial it turns out that a final decree on the merits against the defaulting defendants is not inconsistent with a decree dismissing the bill as against the defendants not in default."

Sections 180 and 181, L. O. L., read thus:

180. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

181. "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others."

[4] It well may be conceded that as a general rule there can be but one recovery upon a joint liability, and that the release of one who is jointly liable with others will discharge his co-obligors. The fallacy in the argument for a rehearing lies in the assumption that the defendants here are jointly liable. Without dispute, the mother died seized of the title to the property in question. Naturally, unless the course of descent was changed by her will, the land would descend to her children as tenants in common. The will itself does not appear in evidence, and from the record we obtain no knowledge of its provisions beyond the fact that it devised to the plaintiff a life estate in the mother's moiety of the tract, subject to the payment of the charges mentioned. In this state of the case we are bound to treat the defendants, children, as tenants in common. Joint tenancy has been abolished in this state. L. O. L. § 7175. Tenants in common hold their interest in realty independent of each other. Neither one can do an act respecting the title which will bind the others. Even if he essays to convey the whole estate it will operate only to pass the title to his own share.

His grantee becomes only a new tenant in common with the remainder of the original holders. It is true that as against a stranger one tenant in common may recover possession of the whole of the land held by himself and his cotenants, but this is because of the only unity which is an ingredient of such an estate, viz. that of possession. In the present instance no defendant is liable directly on the contract alleged in the complaint, because neither of them is a party to that stipulation. Although its validity might be thoroughly established and decreed, no single defendant is liable for either of the others on account of its breach. He can be held only for that part of the estate which came into his possession or which he acquired by descent from his ancestor. It is analogous to the situation described in section 485, L. O. L., which says:

"The next of kin of a deceased person are liable to a suit in equity by a creditor of the estate to recover the distributive shares received out of such estate, or to so much thereof as may be necessary to satisfy his debt. The suit may be against all of the next of kin jointly, or against any one or more of them severally."

[8] The plaintiff has a right to secure the title for which he had contracted by conveyance from such of the defendants as would convey to him and by suit against the others. Moreover, having instituted suit against all of them, he had a right to recover from such as he could, by default or by decree pro confesso, and it is no concern of those who thus surrendered at discretion that the others successfully resisted his demand; neither are the latter affected by the result of the litigation as to the former. Within the meaning of the latter clause of the excerpt from 16 Cyc., supra, there is no necessary connection between the defendants inconsistent with a decree in favor of some of them and against the others.

The cases cited in support of the petition for rehearing are uniformly those in which the liability sought to be enforced was joint. For example, *Frow v. De La Vega*, 15 Wall. 552, 21 L. Ed. 60, the leading case cited in support of the petition, was one where 14 defendants were charged with conspiracy to defraud the plaintiff of certain lands. Of course, in such an instance there was a joint liability. There could be but one recovery, and the release of one tort-feasor would exonerate the others. The principle does not apply here, for the defendants are each liable only pro tanto, if at all, without reference to either of the others, and the plaintiff may enforce his claim against any one of them as he may be able to establish it, whether by their consent or otherwise, without affecting his litigation with the others. The text-writer in 15 R. C. L. 1032, after treating of the effect of judgments against part of a number of individuals who are jointly liable according to

the contention of the petition before us, uses this language respecting cotenants.

"Tenants in common are not privies, and are therefore not bound by judgments rendered in actions brought by one of their cotenants respecting the common property."

As the estoppels of judgments are mutual, the rule is the same on the other hand, so that the tenants in common cannot claim the benefit of a decree in favor of their cotenants. An illuminative case supporting the text on the relation of tenants in common to each other is *Allred v. Smith*, 185 N. C. 443, 47 S. E. 597, 85 L. R. A. 924. In that instance the maternal ancestor of the litigants had conveyed her land to one of them, G. A. Allred. After the mother's death Willie Allred instituted a suit against the grantee in the deed, and succeeded in having it set aside and declared void on the ground of the mother's mental incompetence. The plaintiff in that suit afterwards joined with her other brothers and sisters in a suit against G. A. Allred to partition the land into nine equal parts; that being the number of the children in the family of the deceased grantor. After an exhaustive examination of the case the court held that the other children could claim no advantage by reason of the decree between the litigants in the suit to cancel the deed, the reason being that tenants in common were independent of each other, and that neither of them could charge or estop the others, and hence neither could take advantage of anything done by the others respecting the title to the realty involved. There, as

here, it was argued that as the contract by which title passed to the grantee was declared void, it was void as to everybody. The court, however, held that it was void only as to those who were engaged in contesting it.

The only concern which the executor of the will in the present instance has in relation to the real estate is about that which does, indeed, belong to the estate of his decedent, and even then only for enough of it to pay the claims and charges against the estate after the exhaustion of personalty for that purpose. It is enough to say in that respect that he is not interested in the distribution of the realty among those entitled to claim under the will. The plaintiff is entitled to such proportion of the property as he has obtained by the pro confesso decree against the defendants who did not resist this suit. He is also entitled to what may come to him under the will. The remainder will descend, as provided by the will, to those of the children who successfully resisted the plaintiff's claim in this suit. The plaintiff stands in the shoes of those over whom he has prevailed.

The nonanswering defendants are not here complaining. Indeed, they are not before this court, because the notice of appeal was not served upon them. As to them we cannot, for want of jurisdiction, disturb that which they are willing should stand. We can deal only with those parties who are before us, and the successful defendants must be satisfied with the decree we have rendered. The petition for rehearing must be denied.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

WELCH v. JOHNSON et al.

(Supreme Court of Oregon. Sept. 9, 1919.)

1. PLEADING \S 34(7)—COMPLAINT, THOUGH DEMURRABLE, SUFFICIENT AGAINST OBJECTION NOT RAISED BELOW.

A complaint, in a suit to reform a deed by striking out a purported obligation of purchaser to pay a note and mortgage, and relieve him from liability to a deficiency judgment (L. O. L. \S 426), although subject to demurrer for not giving a more specific explanation of plaintiff's own conduct to show that the mistake did not arise from his own gross negligence, held sufficient as against an objection thereto urged for the first time upon appeal, as every reasonable inference should be given in favor of the complaint that can be drawn therefrom.

2. PLEADING \S 166—NEW MATTER IN SUBSTANCE DENIALS REQUIRES NO REPLY.

Where following the words, "This defendant admits and alleges," the answer makes affirmative statements which in form are new matter, but in substance amount merely to denials, a reply is unnecessary.

3. APPEAL AND ERROR \S 1010(1)—FINDING OF LOWER COURT WILL NOT BE DISTURBED.

In a suit to reform a deed, finding of trial judge, who heard and saw the witnesses, that there was a mistake, should not be disturbed, the contrary evidence consisting only of a few suspicious circumstances.

4. MORTGAGES \S 280(3)—MORTGAGEE CANNOT URGE ASSUMPTION CLAUSE INSERTED BY MISTAKE.

Mortgagee cannot avail himself of assumption clause inserted through mistake or oversight of the scrivener, and without the knowledge or consent of either grantor or grantee.

5. REFORMATION OF INSTRUMENTS \S 25 — WHEN AUTHORIZED FOR MISTAKE OF STENOGRAPHER OF PARTY.

Where both plaintiff, seeking to reform a deed by striking out a clause assuming a mortgage made by his grantors to mortgagee, and his grantors, agree that the clause was inserted by mistake, and no element of estoppel being available to the mortgagee, who was not induced by the assumption provision to change his position to his disadvantage, held, that purchaser was not guilty of such negligence in failing to read the deed prepared by his own stenographer, and executed and recorded by his grantors, as would prevent reformation of the deed.

6. APPEAL AND ERROR \S 1036(3) — REFORMATION OF INSTRUMENTS \S 33 — WHEN DEFECT IN NECESSARY PARTIES DEFENDANT IS IMMATERIAL.

In a suit to reform a deed by striking out the clause obligating purchaser to pay a note and mortgage, purchaser's grantors, as well as their mortgagee, should be made parties, but, on mortgagee's appeal from a judgment for purchaser, the cause need not be remanded for

failure to make grantors parties, where they, as witnesses for plaintiff, testified that he did not agree to assume the note and mortgage, which estops their denial thereof.

Department 1.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Suit by A. Welch against John R. Johnson and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

The object of this litigation is to determine whether a deed, delivered to A. Welch, should be reformed by striking out a provision which purports to obligate Welch to pay a note and mortgage held by John R. Johnson. On October 28, 1911, John R. Johnson sold and conveyed a tract of orchard land in the Hood river section to Lillie J. Scott Ricord for the agreed price of \$13,500. Lillie J. Scott Ricord paid \$3,000 in cash, and she and her husband gave their note to Johnson for \$10,500 for the balance of the purchase price. The note was payable five years after October 28, 1911. The Ricords secured the note by giving a mortgage on the land purchased from Johnson. On November 1, 1912, the Ricords conveyed the land to Katherine Vreeland. The deed received by Katherine Vreeland was made subject to the mortgage held by Johnson, and also contained these words:

"The payment of which said promissory note, and the release of the said mortgage, executed to secure the same, is hereby assumed by the said Katherine Vreeland."

On November 7, 1912, Katherine Vreeland and her husband, George Vreeland, deeded the land to her father, A. Welch, and this deed contained the following provision:

"The payment of which said promissory note, and the release of said mortgage executed to secure the same, is hereby assumed by the said A. Welch, the grantee hereunder; and that we will, and our heirs, executors, and administrators shall, forever warrant and defend the same from the lawful claims and demands of all persons whomsoever, save and except as to the said mortgage and promissory note, which the said A. Welch hereby assumes and agrees to pay."

On February 3, 1914, Welch conveyed the property to the Pacific Land Company, a corporation. The Pacific Land Company quit the property, and afterwards, on March 15, 1915, because of the fact that the fruit trees and the strawberry plants needed care and attention, Johnson entered upon the premises, and since that time has been in possession.

Claiming that the assumption clause in the deed from the Vreelands to Welch made the latter liable for the payment of the note, Johnson began an action against Welch for the recovery of \$10,500, the principal due on

the note, together with accrued interest and \$1,000 attorney's fees. Welch answered the complaint in the action, and then commenced this suit by filing a complaint in the nature of a cross-bill. A second amended complaint was afterwards filed, and this pleading contains five alleged causes of suit. In the first cause of suit the plaintiff avers that negotiations between Welch and the Vreelands resulted in an agreement to the effect that the Vreelands were to convey to Welch their equity in the property, and that Welch should take the premises subject to the mortgage; that there was never any understanding or agreement that Welch was to assume or pay the note and mortgage; that in the preparation of the deed, and through the mistake of the scrivener, and without the knowledge or consent of the Vreelands or of Welch, the assumption clause was inserted in the deed; that Welch did not read or know the contents of the deed, and that neither the Vreelands nor Welch had any knowledge of the assumption clause being in the deed until about January 1, 1917; that it was not the purpose or intent of the Vreelands to insert the assumption clause in the conveyance; and that it was not the purpose or intent of Welch to accept a deed containing an assumption clause.

In the second cause of suit the plaintiff avers that Johnson commenced his suit against the Pacific Land Company, as the sole defendant, for the foreclosure of the note and mortgage, and that on December 5, 1916, the suit terminated in a stipulated and final decree against the land for the amount of the note, and that because of the rendition of that decree Johnson is estopped to prosecute the action at law against Welch.

The third cause of suit contains a recital of the prosecution of the foreclosure suit to a final decree, and an allegation that when Johnson elected to prosecute the suit in foreclosure his act constituted an election of remedies, and deprived him of the right subsequently to maintain the action at law.

The fourth cause of suit does no more than to assert that—

"The sole purpose and intent of the commencement and prosecution of such action at law is to enforce a personal liability on the said recitals in the deed against this plaintiff, and to avoid and nullify the force and effect of" section 426, L. O. L.

The fifth cause of suit is to the effect that Johnson failed to issue an execution on the decree obtained in the foreclosure suit, and that therefore he ought not to be allowed to prosecute the action at law until the mortgaged premises are first sold on execution.

Johnson demurred to the second, third, fourth, and fifth causes of suit. The demurrer was sustained, and then Johnson filed his answer to the first cause of suit. No reply was filed by Welch.

Process was not served upon Katherine Vreeland or George Vreeland, nor did they appear in the suit except as witnesses for Welch. Johnson was the only person upon whom summons was served, and he alone answered. This suit was tried upon the issues made by the first cause of suit and the answer filed by Johnson. The trial resulted in a decree striking out the provision concerning the assumption of the mortgage. Johnson appealed, but Welch did not appeal from the order sustaining the demurrer to the second, third, fourth, and fifth causes of suit.

Ernest C. Smith, of Hood River (Huntington & Wilson, of Portland, and Ernest C. Smith, of Hood River, on the brief), for appellant.

W. A. Robbins, of Portland (Charles A. Johns, of Salem, and W. A. Robbins, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1] The appellant contends that the allegations in the first cause of suit do not comply with the rule that the complaint, in cases of this kind, should distinctly show what was the original agreement of the parties, and should point out with clearness and precision wherein there was a mistake, and should show that the mistake did not arise from the gross negligence of the plaintiff, *Lewis v. Lewis*, 5 Or. 170, 177. The complaint does distinctly show what was the original agreement, and it also points out precisely wherein there was a mistake. A demurrer to the first cause of suit might have required the plaintiff to give a more specific explanation of his own conduct in order sufficiently to show that the mistake did not arise from his own gross negligence. There is not, however, a complete absence of allegations concerning the lack of negligence on the part of the plaintiff, and at the most the only criticism that can be made of the averments in the complaint is that it contains a defective statement of a good cause of suit; and consequently, when the objection is for the first time urged on the hearing in this court, "every reasonable inference should be given in favor of the complaint that can be drawn therefrom." *Hyland v. Hyland*, 19 Or. 51, 58, 23 Pac. 811, 814; *Osborn v. Ketchum*, 25 Or. 352, 357, 35 Pac. 972.

[2] It is argued that by failing to reply the plaintiff admitted the appellant's claim. Following the words, "This defendant admits and alleges," are affirmative statements which in form are new matter, but in substance amount merely to denials; and hence a reply was not necessary. *Kabat v. Moore*, 48 Or. 191, 195, 85 Pac. 506; 31 Cyc. 244.

[3] The plaintiff maintained an office in Portland. Katherine Vreeland, the daughter

of plaintiff, and George Vreeland had been married in July, 1911, and we infer from the record that they lived in or near Hood River. Welch owned an "equity" in a tract of land in the Hood River valley. Soon after the Vreelands purchased the Johnson land they expressed a desire to secure the tract in which Welch owned an "equity"; and, according to the testimony of Welch, "they suggested they would like to turn in their equity in this place; and, as she was my daughter, I told her I would take that equity, the equity in the piece of property in the Hood river orchard lands, for the piece they desired." In the language of George Vreeland, the parties "just switched equities." A. Welch, George Vreeland, and Katherine Vreeland all testified in positive terms that they agreed to exchange equities, and that there was no agreement that Welch should assume the payment of the note and mortgage held by Johnson. Welch and the Vreelands were the only persons who had actual knowledge of the terms of the agreement. No witnesses testified that Welch agreed to pay the note or to procure a release of the mortgage. The only evidence contradicting the story told by Welch and the Vreelands consists of alleged suspicious circumstances, including the relationship between Welch and the Vreelands, the assumption clause in the deed from Welch to the Pacific Land Company, and the like. It must be remembered that this is not a case where the grantee is asserting, and the grantors are denying, that there was a mistake; but here not only the grantees, but also the grantors, are unreservedly agreed that a mistake was made in the preparation of the deed. The fact that all the persons who knew about the terms of the agreement testified that there was a mistake made in the preparation of the deed, and there was no evidence to the contrary, except a few suspicious circumstances, and the fact that the trial judge saw and heard the witnesses, and on that account was in a better position to pass upon the credibility of those witnesses, present a situation where the findings of the trial judge are peculiarly entitled to respect; and we therefore conclude that the findings of the trial judge concerning the fact of mistake should remain undisturbed. *Tucker v. Kirkpatrick*, 86 Or. 677, 679, 169 Pac. 117; *Rowe v. Freeman*, 89 Or. 428, 435, 172 Pac. 508, 174 Pac. 727.

[4] The deed which the plaintiff seeks to have reformed was prepared in his office by his stenographer. Welch testified that, when the Vreelands said that "they wanted the other place," he "told them, 'All right.' They said, 'Fix up the deed and send up to them.'" Continuing his testimony, Welch stated: "I had my stenographer prepare a deed for an equity in a certain piece of property. It was sent up there and signed, and

put on record in Hood River county." When asked whether the clauses concerning the assumption of the mortgage were inserted in the deed by his authority or with his knowledge, he answered: "They were not. They were inserted there by copying a deed." Although Welch stated that he had no recollection of having seen the deed from the Records to Katherine Vreeland, nevertheless, if the presence of the assumption clause in the deed to Welch is to be accounted for by saying that it was "inserted there by copying a deed," the reasonable inference is that the stenographer had the deed which the Records gave to Katherine Vreeland. At any rate, the testimony of Welch is to the effect that the paper was prepared by his stenographer upon his instruction to "prepare a deed for an equity in a certain piece of property," and presumably the stenographer had in her possession and copied from the deed which the Records had made. After the paper had been prepared by the stenographer it was forwarded to the Vreelands at Hood River, and they appeared before a notary public on November 7, 1912, and signed and acknowledged the instrument. George Vreeland caused the deed to be recorded on November 9, 1912, and at some subsequent time he returned it to Welch. On December 28, 1916, Welch received a letter from the attorney for Johnson, advising him that Johnson had obtained a decree against the Pacific Land Company "foreclosing the mortgage on the property [describing it], which together with the note, you assumed and agreed to pay in the deed given to you by your daughter, * * * on November 7, 1912"; and saying also that "you are personally responsible for the payment of this claim in full," and "that Mr. Johnson looks to you for payment of this indebtedness." According to the testimony of Welch, he did not know of the existence of the assumption provision in the deed prior to the receipt of that letter. George Vreeland did not know, when he signed the deed, that the document contained the assumption provision; and Katherine Vreeland said, in substance, that she supposed that the deed merely transferred the equity. Welch did not ask for or receive an abstract of title.

It is not surprising that Welch did not ask for an abstract, or that the Vreelands did not read or notice the assumption provision in the deed signed by them, because, in the language of George Vreeland, "it was a family agreement." If, as the trial court expressly found, the assumption clause was inserted in the paper "by and through a mistake or oversight of the scrivener, and without the knowledge or consent of either the grantor or grantee," Welch is entitled to a reformation of the deed, and Johnson cannot avail himself of the assumption clause. *Bradshaw v. Provident Trust Co.*, 81 Or. 55,

62, 158 Pac. 274; Lloyd v. Lowe (Colo.) 165 Pac. 609, L. R. A. 1918A, 999; Parchen v. Chessman, 53 Mont. 430, 164 Pac. 581.

[5] The appellant argues that Welch was negligent, and on that account cannot ask for a reformation of the deed. It is true that, stated in broad terms, the rule is that equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence (2 Pom. Eq. Juris. [3d Ed.] § 839); and yet, as pointed out by Prof. Pomeroy in his legal classic, it is not correct to say that a mistake resulting from the complaining party's own negligence will never be relieved, but—

"It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but, even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances. It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby. In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake if the party could, by reasonable diligence, have ascertained the real facts; nor where the means of information are open to both parties and no confidence is reposed; nor unless the other party was under some obligation to disclose the facts known to himself, and concealed them. A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisites for all species of relief. Their operation is, indeed, quite narrow; it is confined to the single relief of cancellation, and even then it is restricted to certain special kinds of agreements." 2 Pom. Eq. Juris. (3d Ed.) § 856.

The principle discussed by Prof. Pomeroy was recognized and approved in Howard v. Tettelbaum, 61 Or. 144, 149, 120 Pac. 873, 875, where it is said:

"Negligence, in order to bar equitable relief, in case of mutual mistake, clearly established, must be so gross and inexcusable as to amount to a positive violation of a legal duty on the part of the complaining party."

See, also, 34 Cyc. 949.

But, repeating the language of Prof. Pomeroy, "each instance of negligence must depend to a great extent upon its own circumstances." To the same effect are Powell v. Heisler, 16 Or. 412, 416, 19 Pac. 109; Farwell v. Home Ins. Co., 136 Fed. 93, 98, 68 C. A. 557; Shields v. Mongollon Exploration

Co., 137 Fed. 539, 550, 70 C. C. A. 123. Nor is the failure of a complainant to read an instrument conclusive evidence, as a matter of law, that the mistake was due to his negligence. West v. Suda, 69 Conn. 60, 62, 36 Atl. 1015; Hitchins v. Pettingill, 58 N. H. 3; Bradshaw v. Provident Trust Co., 81 Qr. 55, 59, 158 Pac. 274; Lloyd v. Lowe (Colo.) 165 Pac. 609, 610, L. R. A. 1918A, 999; 6 Pom. Eq. Juris. § 680. See, also, Albany City Savings Institution v. Burdick, 87 N. Y. 40; Story v. Gammell, 68 Neb. 709, 94 N. W. 982; Taylor v. Glens Falls Ins. Co., 44 Fla. 273, 32 South. 887.

The record does not present any element of estoppel as between Johnson and Welch. If, instead of being the mortgagee, Johnson were an assignee of the mortgagee, and had purchased the mortgage after the delivery of the deed to Welch on the faith of the added security afforded by the assumption clause, or if Johnson had changed his position to his disadvantage by reason of the assumption provision in the deed to Welch, quite a different case would confront us. International Mortgage Bank v. Matthews, 92 Wash. 180, 158 Pac. 991. Johnson paid nothing on account of the assumption clause; he neither did, nor omitted to do, any act on account of it; and, so far as he is concerned and for all practical purposes, any advantages reaped from it by him are gratuitous. We conclude from the circumstances disclosed by the record, and especially in view of the fact that the grantors and grantee named in the deed agree that there was a mistake as alleged by the complainant, and in view of the further fact that there is no element of estoppel available to Johnson, that Welch was not guilty of such negligence as will prevent a reformation of the deed. Stone v. Moody, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799.

[8] The Vreelands had, by the assumption clause in the deed from the Ricords, obligated themselves to pay the note and mortgage, and they were therefore vitally interested in any change that might be made in the deed to Welch. Stover v. Tompkins, 34 Neb. 465, 51 N. W. 1040.

The Vreelands were necessary parties, and ought to have been served with summons and complaint, so that any decree which might be rendered would bind them as well as Johnson and Welch. All the parties to a deed who are affected immediately or consequentially by a mistake should be made parties, as they are entitled to be heard upon any matter that might affect their rights under the decree. Center Creek Water & Irrigation Co. v. Lindsay, 21 Utah. 192, 60 Pac. 559; First National Bank v. Fessler, 84 N. J. Eq. 166, 92 Atl. 914; Taylor v. Holmes (C. C.) 14 Fed. 498, 514; Cole v. Fickett, 95 Me. 265, 269, 49 Atl. 1066; Hellman v. Schneider, 75 Ill. 422, 425; De Groot v. Wright, 9

N. J. Eq. 55, 58; *Oliver v. Clifton*, 59 Ark. 187, 190, 26 S. W. 817; *Bonvillian v. Bodenheimer*, 117 La. 794, 815, 42 South. 273.

The facts here are unlike the facts in *Beasley v. Shively*, 20 Or. 508, 20 Pac. 846, and hence we would not be justified here in dismissing the suit, as was done there. Nor need we remand the cause with general directions, or with special directions, like those given in *Mangin v. Kellogg*, 22 Idaho, 137, 124 Pac. 651, 653. *Katherine Vreeland* and *Georgé Vreeland* appeared as witnesses for Welch, and as such witnesses testified that Welch did not agree to assume the note and mortgage, and that the assumption provision was inserted in the deed to Welch through a mistake. This testimony, given by the Vreelands, estops them from denying Welch's right to a reformation of the deed, and dispenses with the necessity of remanding the cause. *Vial v. Norwich Fire Ins. Society*, 172 Ill. App. 134, 140, affirmed in 257 Ill. 355, 100 N. E. 929, 44 L. R. A. (N. S.) 317, Ann. Cas. 1914A, 1141; *Gardner v. Kinney*, 60 Or. 292, 296, 117 Pac. 971. See, also, *De Vol v. Citizen's Bank*, 181 Pac. 985.

The decree appealed from is affirmed.

McBRIDE, C. J., and BURNETT and BEAN, JJ., concur.

IRWIN v. KLAMATH COUNTY.

(Supreme Court of Oregon. Sept. 23, 1919.)

1. COUNTIES \Leftrightarrow 189—DISTRICT ATTORNEY UN-AUTHORIZED TO CONTRACT FOR SERVICES IN PROCURING EVIDENCE.

Laws 1915, c. 141, § 24, requiring district attorneys to prosecute diligently persons violating the act prohibiting the sale of intoxicating liquors, and section 25, providing for payment by the county court of expenses and disbursements incurred therein by and under the direction of the district attorney, do not authorize a district attorney as the county's agent to make a specific contract for services in procuring evidence specifying the amount the county shall pay, in the absence of statutory provision therefor, in view of L. O. L., § 937, placing the contract power with the county court. (Per Johns and McBride, JJ.)

2. COUNTIES \Leftrightarrow 189—DISTRICT ATTORNEY UN-AUTHORIZED TO EMPLOY AGENTS TO FERRET OUT VIOLATIONS OF LIQUOR LAW.

The words, "expenses incurred and disbursements made by and under the direction of district attorney," in Laws 1915, c. 141, § 25, have reference to ordinary expenses, including amounts actually disbursed, or for which he made himself personally liable, such as hotel bills, railroad fare, etc., incurred while prosecuting violators of Prohibition Law, but does

not include employment of agents by the month to travel over the county to ferret out possible offenders and gather evidence. (Per Bennett, J.)

Bean, J. dissenting.

Department No. 2.

Appeal from Circuit Court, Klamath County; F. M. Calkins, Judge.

Action by John Irwin against Klamath County. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff alleges that at all times hereinafter stated he was the duly elected, qualified, and acting district attorney in and for Klamath county, and that as such district attorney and as agent of the defendant, under the provisions of chapter 141 of Laws of 1915, he employed one Wynn "to do and perform labor for the defendant in and about procuring evidence in the matter of the illegal sale of intoxicating liquors in Klamath county, Or., and obtaining and attempting to obtain evidence in prosecuting violators" of the prohibition law, at an agreed and stipulated price of \$85 per month from January 19, 1916, to February 19, 1916; and from February 19, 1916, to May 19, 1916, "at the agreed and stipulated price at the rate of \$100 per month."

There are four causes of action, all of a like nature and founded upon similar allegations, making a total of \$911.10, assigned to the plaintiff, who was then such district attorney, and for which he prays judgment against the county. It appears from the complaint that the plaintiff as district attorney audited and approved the claims against the county for such alleged services, and that the claims were presented to and disallowed by the defendant.

The answer admits that the plaintiff was district attorney at the time alleged, but denies "that John Irwin was the agent of the defendant under the provisions of chapter 141 of the General Laws of the state of Oregon, for the year 1915, or under the provisions of any other law." It further denies that he employed Charles D. Wynn or any other person for and on behalf of the defendant, denies every allegation in paragraph 2 of the complaint, "excepting defendant admits that the claim mentioned was filed, and that the defendant disallowed the same," and denies each and every other allegation of the complaint. Similar denials are made to each cause of action.

As a further and separate answer, the defendant alleges that at such times Marion Hanks was the duly elected and qualified county judge; that F. H. McCornack and John Hagelstein were commissioners of such county; that as such officers they had "the general care and management of the county property, funds, and business of Klamath county, Or."; that C. C. Low was the sheriff,

and that John Irwin, the plaintiff, was the district attorney; that the defendant never employed Wynn, Otis, Moore, or Bardin, the assignors of the plaintiff, or either of them, "to do or perform any labor for the defendant in and about procuring evidence in the matter of the sale of intoxicating liquors or in obtaining, or attempting to obtain, evidence in prosecuting violators of the laws of the state of Oregon"; that the plaintiff was never authorized to employ them, and that neither of them ever rendered any service to Klamath county, as alleged or otherwise. As an affirmative defense it is alleged that the officers of Klamath county were at any and all times ready and willing to aid and assist the district attorney in obtaining evidence and prosecuting violators of the prohibition law, and the employment of such individuals for this purpose was unnecessary and unauthorized.

After his motion to strike was overruled, the plaintiff filed a general demurrer to the further and separate answer, which was overruled, and the defendant then filed a reply in the nature of a general denial. A jury was waived, and trial was had before the court, which found for the defendant. Judgment was entered against the plaintiff for costs, from which he appeals, assigning 16 different errors, the substance of which is that the court "erred in determining the facts in the case," and "should have rendered judgment for the plaintiff."

W. H. A. Renner, of Klamath Falls, for appellant.

C. J. Ferguson, of Klamath Falls, for respondent.

JOHNS, J. (after stating the facts as above). [1] The complaint is founded upon a specific contract between the plaintiff as district attorney and agent of the defendant, to recover the agreed and stipulated price of alleged services rendered by Wynn and others to the defendant. It is contended that the plaintiff as such district attorney had legal authority to make such contracts; that he did make them, and that by reason thereof the county is liable for the amount of the agreed price. In a measure this involves the construction of chapter 141, Laws 1915, known as the prohibition act, and the powers and duties of the district attorney under this act. The primary purpose of this law is to prohibit the manufacture and sale of intoxicating liquors, and to make it the duty of city, county, and state officers to see that it is enforced. Section 24 of the act provides that "It shall be the duty of the district attorneys in this state to diligently prosecute any and all persons violating any of the provisions of, and otherwise to enforce, this act in their respective counties;" that for any

failure or neglect to perform such duty the officer shall be deemed guilty of a misdemeanor, and subjected to fine and imprisonment; and that whenever any prosecuting officer shall fail or neglect to enforce these provisions, the Governor, as the chief executive officer of the state, shall appoint prosecutors in his discretion, who shall perform like duties and have like powers as the district attorney. Section 25 provides:

"All expenses incurred and disbursements made by or under the direction of the district attorney, or the prosecutor appointed by the Governor, in obtaining or attempting to obtain evidence, or otherwise, in prosecuting violators of this act, shall be paid by the county court of the county in which violation shall be alleged to have been committed, upon the voucher of said district attorney or prosecutor appointed by the Governor, out of the general fund of said county."

The alleged services were performed at the instance and request of the district attorney, and not by a prosecutor appointed by the Governor.

There was a general denial of the contract and the performance of services. The case was tried without a jury by the court, which found for the defendant. Assuming, without deciding, that all expenses incurred by the district attorney should be paid by the county court, the statute does not authorize the district attorney, as the agent of the county, to make a specific contract for such services, or to define or specify the amount which the county shall pay, and in the absence of statutory provision the district attorney would not have the legal right to execute a contract which would be binding on the county. Section 937, L. O. L., enacted in 1862, provides that the county court has the authority and powers pertaining to county commissioners to transact county business, and that it shall have "the general care and management of the county property, funds, and business, where the law does not otherwise expressly provide." Without an express provision in the statute or an authorized contract, a county should be required to pay only the reasonable value of any services or labor performed. In the case of *Brewster v. Springer*, 80 Or. 68, 156 Pac. 433, upon which the plaintiff relies, the statute expressly provided the compensation in dispute. There is no such provision in section 25 of the prohibition act. If the county is liable for the alleged services, it is liable only for the reasonable value thereof. The plaintiff seeks to recover upon a specific contract for services rendered at an agreed and stipulated price, and does not allege or prove the reasonable value thereof.

The judgment of the circuit court is affirmed.

McBRIDE, C. J., concurs.

BENNETT, J. (concurring in result). I concur in the result reached by Mr. Justice **JOHNS**.

[2] I think the words "expenses incurred and disbursements made by or under the direction of the district attorney" had reference to ordinary expenses and disbursements of such officer, which he either actually disbursed or for which he made himself personally liable, such as hotel bills, railroad fare, etc., which were incurred while in the prosecution of violators of the prohibition law.

It was not, it seems to me, the intention of the Legislature to give the district attorney power, under this clause, to employ agents by the month to travel over the country in the ferreting out of possible offenders of this kind.

If the district attorney has this power it must also belong to any of the special prosecutors appointed by the Governor, as the two are coupled together in the clause in regard to expenses. Again, if both the district attorney and any other prosecutor appointed by the Governor have the power to employ agents and fix their fees, then these other agents, if directed by the district attorney or the special prosecutor, may in their turn appoint still other agents and so the process might go on unendingly.

It seems to me this construction should not be given to the act unless the language employed by the Legislature is entirely plain and compelling. If the Legislature had intended anything of this kind it would no doubt have plainly provided that the district attorney might appoint and employ other agents. Any such authority to involve the counties in liability by the wholesale ought not to be implied from any doubtful or uncertain words.

BEAN, J. (dissenting). This appeal is taken by the plaintiff. It involves the payment of expenses incurred in 1916 under the direction of the district attorney for that county in obtaining or attempting to obtain evidence of a violation of chapter 141, Laws of 1915, relating to intoxicating liquors. The district attorney employed certain persons to act as detectives. They were to make an investigation and endeavor to obtain such evidence. That officer duly certified to the claims for such expenses, and the same were presented to the county court for that county and disallowed, whereupon an assignment of the claims was made to the plaintiff, and an action instituted to collect the amounts. As indicated in the brief on behalf of defendant, there is no dispute in regard to facts. The defendant contends that the claims are not legal claims against the county, principally for the reason that they were never authorized by the county court. It is also urged that the incurrence of the indebtedness was unnecessary, that the regular officers of the

county were able and willing to give every assistance to the district attorney in the enforcement of the law, and that consequently the district attorney was without power to bind the county or to engage the services of the so-called detectives.

It is also asserted on behalf of the defendant that the plaintiff failed to show that there had been violations of the prohibition law in Klamath county, or that the regular officers of the county and city of Klamath Falls refused or failed to assist the prosecutor in the enforcement of the law.

It seems that it is a sufficient answer to the contention made on behalf of the defendant that the very language of the act (section 25) plainly requires the county court to pay such expenses "upon the voucher" of the district attorney or prosecutor, appointed by the Governor, out of the general fund of the county. That section, *inter alia* commands that:

"All expenses incurred and disbursements made by or under the direction of the district attorney, or the prosecutor appointed by the Governor, in obtaining or attempting to obtain evidence, or otherwise, in prosecuting violators of this act, shall be paid by the county court of the county in which violation shall be alleged to have been committed, upon the voucher of said district attorney or prosecutor appointed by the Governor, out of the general fund of said county."

In other words, the statute is mandatory, and the county court under its terms, when such expenses have been incurred and properly certified to and vouched for by the district attorney or prosecutor, has no other recourse except to allow them to pay the same. It is urged on behalf of the county that the employment of a detective or attempting to obtain evidence in regard to the violation of the statute rests solely with the county court; that it is a judicial matter, and the district attorney is not authorized to perform such a function. The application of the principle involved is not new. In *Brewster v. Springer*, 80 Or. 63, 156 Pac. 433, a similar question was involved. There the water commissioner incurred expenses of a water master, and vouched the same to the county court under section 6619, L. O. L., and the county resisted the payment of the amount. In that case, Mr. Justice Eakin said:

"Where the claim is properly presented in the manner hereinbefore indicated, we think the county court has no discretion to refuse to allow it. Section 6619, L. O. L., is mandatory. It provides that upon the presentation by the water master of his claim, approved by the division superintendent and accompanied by the written demand of the water users, the county court shall allow it. A claim so approved and accompanied with the demand, if the services were rendered upon the demand

of the water users, is absolutely conclusive upon the county court. If the services were rendered upon the order of the division superintendent, the claim, if approved by him, is likewise conclusive, and the court cannot go behind such approval."

The same question was before this court again in *Brewster v. Crook County*, 81 Or. 435, 159 Pac. 1031, and the principle announced by Mr. Justice Eakin was applied and the statute enforced. As to the act being a judicial one for the county court instead of for the district attorney, a similar question was passed upon by this court in *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106. In that case it was urged that the act in question conferred judicial and legislative functions upon the Industrial Accident Commission, and was therefore in the contravention of section 1, article 3 of the Constitution. Mr. Justice McBride disposed of the question at page 515 of the opinion (154 Pac. 1, 10) in the following language:

"This identical question is passed upon adversely to plaintiff's contention in *Re Willow Creek*, at pages 610, 611, of 74 Or. [144 Pac. 505, 146 Pac. 475], and that opinion and the authorities there cited are so conclusive as to render further discussion of the subject unnecessary."

On page 516 of 78 Or. on page 110 of 154 Pac., the same learned jurist said, after quoting section 1, article 7, of the Constitution as amended in 1911 (see Laws 1911, p. 7):

"It would appear that the power of the Legislature or of the people to confer judicial powers upon any tribunal which it or they may select is, by the force of this amendment, practically an unlimited one so long as the different functions of government, executive, legislative and judicial are not so blended as to contravene section 1, article 3, of the Constitution, which, as shown in the case last cited, is not the case here."

We apprehend that the same rule of construction would be adopted in considering a statute enacted for the purpose of decreasing the use of whisky as a beverage that would be applied to one passed to facilitate the use of water. Indeed, section 937, L. O. L., providing that the county court shall have authority and powers pertaining to county commissioners to transact county business, and that it shall have "the general care and management of the county property, funds, and business, where the law does otherwise expressly provide," seems to contemplate that the Legislature may at any time enact a law for the management of the county business by an official, or a tribunal, other than the county court. In *Flagg v. Marion County*, 31 Or. 18, 48 Pac. 693, it was held that the power ex-

pressly conferred on the county clerk by section 47 of the statute commonly known as the "Australian Ballot Law" (Laws 1891, pp. 14, 23) to cause the official ballots to be printed, implies the power to bind the county by a contract for such printing, subject to the limitation that the price agreed to be paid must be reasonable. And in the case of *Burrell v. City of Portland*, 61 Or. 105, at page 111, 121 Pac. 1, at page 8, this court said:

"Whenever a power is given by statute, everything necessary to make it effectual is implied. It is a well-established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted. *Lewis, Sutherland, Statutory Construction, § 508.*"

As to the contention that the district attorney could only incur such expenses after an indictment was returned or a complaint filed and a prosecution was actually pending for a violation of the statute, a reading of the statute indicates that it contemplates that the investigation to be made, or the endeavor to obtain evidence of the violation of the law, is for the purpose of ascertaining whether or not there has been an infraction of the statute; and if a breach of the law is detected that the evidence thus obtained will be used in the prosecution of the violator. While it may be true that the lawbreakers would desire that no means be afforded for obtaining evidence of a violation of the prohibition law before a criminal action was actually pending in court, as in that event there would probably be few, if any, prosecutions for a violation of this statute, it would not be charitable, to entertain the view that the lawmakers had any such intent in mind. The law is drastic, and plainly provides for a rigid enforcement thereof. By section 24 the district attorney is enjoined to diligently prosecute all persons violating any of the provisions of the act, and to enforce the law. If any district attorney, or prosecuting officer fails, neglects, or refuses faithfully to perform any duty imposed upon him by the act, provision is made that upon conviction thereof such official shall be punished by a fine or imprisonment in the county jail, and such conviction requires a forfeiture of his office. It provides that in case of the inability or neglect, or refusal of any prosecuting officer to enforce the provisions of this act, the Governor shall appoint as many prosecutors as he may deem necessary, and designate their salary or compensation. Section 25 plainly provides that the salary or compensation allowed under this act shall be paid by the county court of the county to which said prosecutor may be assigned,

and also in compulsory terms requires that all expenses incurred and disbursements made by or under the direction of the district attorney, or the prosecutor appointed by the Governor, in obtaining or attempting to obtain evidence, or otherwise, in prosecuting violators of this act, shall be paid by the county court of the respective county. The law does not make it necessary that the district attorney shall show that there have been violations of the law, nor that there has been a failure on the part of the regular officers to assist in the enforcement thereof, as a condition precedent to the employment of a detective and the incurring of expenses to be paid by the county. That part of the statute relating to expenditures like those involved herein was obviously inserted to overcome the difficulty portrayed in the case of *Cunningham v. Umatilla County*, 57 Or. 517, 112 Pac. 437, 37 L. R. A. (N. S.) 1051. There the payment of the services of a detective employ-

ed in procuring evidence against the offenders against the local option law which were ordered to be paid by the county court was contested by a taxpayer.

It seems to the writer that it was plainly the intent of the lawmakers not only to require a diligent investigation and enforcement of the prohibition law, but also to provide the means of defraying expenses thereby incurred by the prosecutor. The result of the efforts made under the direction of the district attorney and some of the prosecutions instituted are mentioned in the record. The reasonableness of the amount of the expenses incurred is not questioned in this proceeding. The facts are practically undisputed.

Under the authority of the cases above cited heretofore presented to this court, the judgment of the lower court should be reversed, and judgment entered as prayed for in the complaint.

STATE ex rel. MARBLE v. CAREY et al.
(No. 950.)

(Supreme Court of Wyoming. Sept. 29, 1919.)

PUBLIC LANDS \approx 187½, New, vol. 8A Key-
No. Series—PURCHASER FROM STATE MUST
PAY FOR WATER IMPROVEMENTS BY PRIOR
LESSEE.

The purchaser of school land from the state must, as provided by Comp. St. 1910, § 632, pay prior lessee thereof the appraised value of irrigation ditches made by him thereon and water rights acquired by him therefor, and not the state, as indicated by section 616; the provision of section 632 to that effect being the later enactment, and so controlling.

Original proceeding in mandamus by the State, on the relation of A. H. Marble against Robert D. Carey and others, constituting the State Board of Land Commissioners, and A. Baker, Commissioner of Public Lands. Writ allowed.

Clark & Haggard, of Cheyenne, for plaintiff.

D. A. Preston, former Atty. Gen., for defendants.

BEARD, C. J. This is an application to this court by the relator for a writ of mandamus requiring the defendants to issue to him a certificate of purchase for section 16, township 21 north, range 67 west, in Platte county. The case was commenced while the predecessors of the above-named defendants were in office, and during the pendency of the action the present officers were duly, by order of court, substituted as defendants. The case has been submitted on a general demurrer to the petition, and presents the single question of law, viz.: Is the purchaser of school lands from the state required to pay to the lessee of said lands the appraised value of irrigation ditches constructed by said lessee, and water rights acquired by him during the period of his lease or leases for the irrigation of less than one fourth of said land, or must said purchaser pay said appraised value to the state? The relator paid to the proper state officer the first payment required at the time of the sale and purchase of the land, and paid to the lessee or lessees the appraised value of the ditches which had been constructed thereon and the water acquired by them during the terms of their leases, and delivered to the proper officer the receipts of the said lessees for such payments, and demanded that a certificate of purchase for said lands be issued to him. This the defendants refused, claiming that the state was entitled, and not the lessees, to the appraised value of said ditches and water rights.

The provisions of the statutes which we are required to construe and apply are sections 616 and 632, Compiled Statutes 1910, which read as follows:

"Sec. 616. All water rights which shall have become appurtenant to the lands leased aforesaid shall, upon the expiration of the leases given to the lessee who made the irrigation and improvements thereto, become the property of the state, and shall not be considered as being improvements which any subsequent lessee or purchaser thereof shall be obliged to reimburse or pay such original lessee who made such improvements thereon."

"Sec. 632. If any state lands be sold upon which surface improvements, including irrigation works of any kind, have been made by a lessee, or for which water rights or proportionate interests in irrigation reservoirs, canals, or systems, have been acquired, said improvements, irrigation works and water rights shall be appraised under the direction of the board. The purchaser of said lands, upon which improvements and irrigation works have been made, or for which water rights have been acquired as herein provided for, shall pay the owner of such improvements, irrigation works or water rights, as the case may be, the appraised value thereof, and take a receipt therefor, and shall deliver the same to the commissioner of public lands before he shall receive a patent or certificate of purchase. All such receipts shall be filed and preserved in the office of the commissioner of public lands."

If both of those sections of the statute were in force at the time of the transaction in question, which was February, 1917, there is at least an apparent conflict between them. Section 616 was originally section 24 of chapter 79, Session Laws of 1890-91, and has remained unamended or directly repealed to the present time. Section 632 was likewise originally section 32 of the same chapter of the Laws of 1890-91. That section, as originally enacted and as it remained until amended and re-enacted, read as follows:

"If any state lands be sold upon which surface improvements have been made by a lessee (except irrigating ditches and irrigation works), said improvements shall be appraised under the direction of the board. The purchaser of state lands upon which improvements have been made, as herein provided for, shall pay the owner of such improvements the appraised value thereof, shall take a receipt therefor, and shall deliver the same to the register before he shall receive a patent or certificate of purchase. All such receipts shall be filed and preserved in the office of the register."

Thus the law remained until 1909. By section 2 of chapter 132, Session Laws of 1909, the last above quoted section was amended so as to read as it now appears as section 632 of the Compiled Statutes of 1910, as above set out. By omitting from the section, as originally enacted, the exception of "irrigating ditches and irrigation works,"

and inserting in lieu thereof the words "including irrigation works of any kind," it seems clear that it was the intention of the Legislature to include irrigation works and water rights in the improvements to be paid for by the purchaser to the lessee who had constructed and acquired the same. Prior to the amendment of 1909, surface improvements, other than irrigating ditches and irrigation works, were required to be appraised and the purchaser was required to pay the owner of such improvements the appraised value thereof. By the amendment the improvements which are required to be appraised include, not only those mentioned in the original act, but also irrigation works and water rights, and no provision is made for a separate appraisal of the different kinds of improvements, and all are to be paid for by the purchaser to the owner, and receipts for such payment delivered to the commissioner of public lands before the purchaser shall receive a patent or certificate of purchase. These requirements that the appraisal of improvements shall include irrigation works and water rights add to the force of the plain language of the statute, and render it certain that the Legislature intended thereby to place irrigation works and water rights on exactly the same footing and in the same situation with respect to payment therefor as other surface improvements placed upon the land by the lessee.

There is, therefore, such repugnance or conflict between the provisions of sections 616 and 632, Compiled Statutes of 1910, that they cannot be harmonized or reconciled. Repeals of statutes by implication are not favored, and as stated in 36 Cyc. 1072:

"To justify the presumption of an intent to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed."

In the present case we find, not only that the two statutes are irreconcilable, but also, as we think, a clearly expressed intent by the Legislature to substitute the provisions of the later act for those of the former. It is also said in the work last above cited, on page 1073:

"Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause."

That rule is so well established that it requires no further citation of authorities to support it. We are therefore of the opinion that the provisions of section 632, Compiled Statutes 1910, govern this case, and that the relator is entitled to a certificate

of purchase for said lands, and that it is the duty of the defendants to issue and deliver to him such certificate of purchase. A writ of mandamus will issue, directed to said defendants, commanding them to perform that duty.

Writ allowed.

POTTER, J., and BURGESS, District Judge, concur.

BLYDENBURGH, J., being unable to sit, Hon. JAMES H. BURGESS, Judge of the Fourth Judicial District, was called in and sat in his stead.

H. E. WRIGHT & CO. v. DOUGLAS. (No. 961.)

(Supreme Court of Wyoming. Sept. 29, 1919.)

1. PLEADING \S 343—JUDGMENT ON PLEADINGS FOR WANT OF REPLY TO NEW MATTER IN ANSWER DENIED.

In an action to enjoin the foreclosure of a chattel mortgage by notice and sale, a motion for judgment on the pleadings on the ground that new matter constituting a complete defense was pleaded in the answer, to which no reply was filed, was properly denied, where the alleged new matter merely amounted to an allegation that a tender set out in the complaint was insufficient because attorney's fees were not tendered, where the notice of foreclosure as set out in the petition shows its publication three days after tender, and does not purport to be the act of an attorney.

2. CHATTEL MORTGAGES \S 115—MORTGAGE AFTER TENDER NOT ENTITLED TO ATTORNEY'S FEES ON FORECLOSURE.

Where maker of notes and mortgage tendered the amount thereof, showing an honest desire to pay such amount, both at maturity and thereafter, and the holder was at all times demanding more than the notes and mortgage called for, and it did not appear that the holder's attorney took any action toward the collection of the notes other than to publish notice of foreclosure, if in fact he did so, three days after tender in gold of more than the principal and interest then due on the notes, the holder was not entitled to an attorney's fee under a provision in the notes for 15 per cent. additional as an attorney's fee if placed in the hands of an attorney or collected by an attorney, with or without suit.

3. BILLS AND NOTES \S 124—HOLDER OF NOTE PAYABLE AT DENVER OR NEW YORK NOT ENTITLED AT DENVER TO NEW YORK EXCHANGE.

A note payable at the option of the holder at a banking house in Denver or at a bank in New York does not entitle the holder, demanding payment at Denver, to add to the principal and interest "handling charges to New York," or the cost of New York exchange.

4. EVIDENCE \Leftrightarrow 80(1) — STATUTES OF SISTER STATE PRESUMED SIMILAR TO THOSE OF FORUM.

As to interest after maturity the laws of Colorado, where notes were made payable, will be presumed the same as laws of Wyoming until the contrary is shown.

5. TENDER \Leftrightarrow 15(6) — OBJECTION TO CHARACTER OF MONEY TENDERED WAIVED.

Where tender of payment of notes is refused for reasons other than that it does not constitute an offer of lawful money, or is not the kind of money or property in which payment is to be made by the terms of the contract, the creditor waives that objection.

Error to District Court, Weston County; Ernest C. Raymond, Judge.

Action by Robert S. Douglas against H. E. Wright & Co. From a judgment granting a perpetual injunction the defendant brings error. Affirmed.

H. S. Ridgely, of Cheyenne, and C. E. Wampler, of Denver, Colo., for plaintiff in error.

David A. Fakler, of Newcastle, and Jesse G. Northcutt, of Denver, Colo., for defendant in error.

BEARD, C. J. This is an action brought by the defendant in error, Robert S. Douglas, against the plaintiff in error, H. E. Wright & Co., to enjoin the foreclosure by notice and sale of a certain chattel mortgage given by Douglas to one Frank W. Keeler. A temporary injunction was issued, and on final hearing was made perpetual. Wright & Co. bring error.

Douglas alleged in his petition, in substance:

(1) That on July 10, 1917, he executed and delivered to Frank W. Keeler, his two promissory notes, one for \$5,000, and one for \$4,259.18, each due six months after date, with interest at 5 per cent. per annum from date until paid, and payable at the option of the holder at the banking house of Keeler Bros., in Denver, Colo., or at the National Bank of Commerce, in the city and state of New York.

(2) That to secure the payment of said notes he executed and delivered the mortgage in question.

(3) That before the maturity of said notes he caused to be tendered the full amount due on said notes, namely, the sum of \$9,259.18, as principal, and the further sum of \$236.62, in all the sum of \$9,495.80, at the banking house of Keeler Bros., at Denver, Colo., the place selected by the holder of said notes, where payment should be made, which said Keeler Bros., refused to accept, to surrender said notes and satisfy and cancel the mortgage securing their payment.

(4) That thereafter, and on February 18, 1918, he again caused to be tendered to H. E. Wright & Co., the defendants, the sum of \$9,495.80 and the further sum of \$120.37, which latter amount defendants claimed as interest since the maturity of the notes, which tender so made defendants refused to accept.

(5) That notwithstanding said tender as aforesaid, defendant wrongfully begun foreclosure proceedings, and has advertised a "Notice of Chattel Mortgage Foreclosure," giving notice that on March 15, 1918, it would sell at public auction all of the cattle described in said mortgage. (A copy of the notice is set out in the petition, and states:) "The first publication of this notice shall be on Thursday, to wit, the 21st day of February A. D. 1918." and signed, "H. E. Wright & Co., Denver, Colorado, Present Holder of Mortgage."

(6) That unless restrained by order of the court, the defendant will proceed to sell the property as advertised.

(7) That he stands ready and willing to pay the amount due on said notes on January 10, 1918, and as tendered, and to do all things which he offered to do, and tendered, at any time prior to the bringing of this action.

For answer defendant pleaded, in substance, that the notes by their terms drew 5 per cent. interest per annum from date until maturity, and that by the terms of the mortgage the notes should draw interest at 12 per cent. per annum after maturity until paid; denied that plaintiff tendered before the maturity of the notes the full amount due thereon at the banking house of Keeler Bros.; denied that plaintiff at any other time tendered the full amount due on said notes at any place; denied that plaintiff tendered or caused to be tendered the full amount due on said notes, or that he caused to be tendered at any time the sum of \$9,495.80, but stated that about the date of maturity of said notes plaintiff tendered in full payment of the principal and interest thereon at the banking house of Keeler Bros. at Denver, Colo., a draft drawn by some bank in Nebraska on a bank in Omaha for \$9,495.80; that by the terms of said notes they were payable in gold coin; denied that plaintiff, at any time, tendered or caused to be tendered, the full amount due on said notes, in such gold coin. Answering paragraph 4 of the petition, defendant admitted each and every allegation therein contained, and further alleged that said notes contain an agreement to pay 15 per cent. additional as an attorney's fee if placed in the hands of an attorney or collected by an attorney, with or without suit; that prior to the tender mentioned in paragraph 4 of the petition, de-

fendant had placed said notes in the hands of its attorney for collection, that said attorney had undertaken the collection of said notes, and had caused the "notice of chattel mortgage foreclosure," set out in paragraph 5 of the petition, to be published as alleged in said paragraph 5. Answering paragraph 5 of the petition, defendant admitted each and every allegation therein contained, except it denied that said foreclosure proceedings were wrongfully begun.

[1] Defendant filed a motion for judgment on the pleadings on the ground that new matter constituting a complete defense was pleaded in its answer, to which no reply was filed. The motion was denied, and that ruling is assigned as error. What is claimed to be new matter is stated in the motion as follows:

"That, as set forth in paragraph 3 of the answer, the notes secured by the chattel mortgage described in the petition were and are, by their terms, payable in gold coin of the United States of America, and that as set forth in said answer the plaintiff did not pay, and did not offer to pay, in such gold coin, at or prior to the maturity of said notes, the amount due thereon; that as set forth in paragraph 4 of the answer the plaintiff did not, subsequent to the maturity of said notes, tender the full amount due thereon according to the terms thereof, all as set forth in said answer and the exhibits attached thereto, and made a part thereof."

For the purpose of deciding the correctness of the court's ruling on the motion it is necessary to consider the answer to the tender of February 18, 1918, which the answer admits was made as alleged. But defendant denied its sufficiency in amount, alleging that an attorney's fee was due in addition to the amount tendered. While it is alleged that prior to the tender the notes had been placed in the hands of an attorney, the only action claimed to have been taken by him was the publication of the notice of foreclosure, which the answer alleges was published as stated in the petition. The notice is set out in the petition, and shows on its face that it was not published until three days after the tender, and does not purport to have been the act of an attorney. It is signed "H. E. Wright & Co.," and states, "The first publication of this notice shall be on Thursday, to wit, the 21st day of February A. D. 1918." In that state of the pleadings we think the motion was properly denied.

[2] Whether or not the defendant was entitled to an attorney's fee on the notes is the real question to be determined. The facts as shown by the evidence are: That on December 1, 1917, Keeler Bros., wrote plaintiff as follows:

"In answer to your letter of November 29th, we have been notified by the holder of the papers that he will expect payment of principal and

interest on your notes when they mature—January 10, 1918. We do not feel like carrying this paper ourselves. So advise you to make immediate arrangements elsewhere in order that the present holder of your notes will not have them protested at maturity."

And on December 10, 1917, they wrote to plaintiff as follows:

"With further reference to our letter to you, dated December 1, 1917, we shall expect you to pay promptly on or before January 10, 1918, at our office in Denver, your cattle paper which matures at that date. As these papers have been rediscounted in the East and you undoubtedly want to protect yourself from having them protested for nonpayment, it is advisable that you remit as much in advance of the maturity date as possible. You must remit in New York exchange by the terms of your notes. The following are the amounts necessary to make up the amount you must send us in order to take care of your paper:

Principal of your notes.....	\$9,259 18
Interest, 5% (184 days).....	236 62
Handling charges to New York (25¢ per \$100)	23 75
Total	\$9,519 55

[3] It will be observed that the notes were not, by their terms, made payable in New York Exchange, nor do they provide for exchange or "handling charges to New York." They were payable at the banking house of Keeler Bros. in Denver, in gold coin. Keeler Bros. were not only insisting on prompt payment, but requesting payment before due, and demanded, in addition to unauthorized "handling charges," \$5.14 more interest than the notes called for. The interest on \$9,259.18 at 5 per cent. for six months is \$231.48, not \$236.62. On January 7, 1918, plaintiff caused to be mailed to Keeler Bros., a draft drawn by the Elgin State Bank of Elgin, Neb., on the Stockyards National Bank of Omaha, Neb., for \$9,495.80, being the amount claimed in Keeler Bros. letter of December 10, 1917, less said "handling charges." January 14, 1918, Keeler Bros. returned said draft to the bank from which it was received, and wrote as follows:

"We are returning herewith your No. 45186 on the Stockyards National Bank of Omaha, to our order for \$9,495.80, which accompanied your letter of recent date, for the reason that the Robert S. Douglas notes are payable in New York exchange, and in as much as the notes matured January 10th, it will be necessary that your remittance be for an amount sufficient to pay the total principal and interest due on January 10th with 12 per cent. therefrom to date of actual payment as provided for in the notes and mortgage. Before making any remittance to take up the notes, it would be well for you to consult with Mr. Douglas, as according to our records there are certain commissions due us, and which we are making a request that Mr. Douglas settle at this time."

The parties stipulated in writing: That on February 18, 1918, plaintiff tendered to H. E. Wright & Co., \$9,616.17 in gold. That said tender was made in payment of the principal of said notes, \$9,259.18; interest from July 10, 1917, to January 10, 1918, \$236.62; interest from January 10, 1918, to February 18, 1918, \$120.37. That said tender was refused by said Wright & Co., and the reason given for such refusal was that it could not accept the money or the tender thereof unless there was added thereto an attorney's fee in the sum of \$300.

[4] We have thus at length set forth the facts for the purpose of showing the good faith of plaintiff in an honest desire to pay the amount due on the notes, both at maturity and thereafter; also to show that Keeler Bros. and the defendant were at all times demanding more than the notes and mortgage called for. We have already referred to the item of \$5.14; and the 12 per cent. interest after maturity is not provided for either in the notes or mortgage. The only place where 12 per cent. is mentioned is in the mortgage, where it attempts to describe the notes secured thereby, but erroneously described them as bearing 5 per cent. from date to maturity and 12 per cent. thereafter. Nowhere in either of the instruments can be found any agreement to pay 12 per cent. after maturity. According to the statutes of this state the notes would draw 8 per cent. after maturity; and the laws of Colorado are presumed to be the same until the contrary is shown. There is no evidence that an attorney took any action toward the collection of the notes other than to publish the notice of foreclosure, if in fact he did so, three days after the tender in gold of more than the principal and interest then due on the notes.

[5] Again referring to the tender of the draft, it is a well-settled rule of law that, if a tender is refused on grounds and for reasons other than that it does not constitute an offer of lawful money, or is not the kind of money or property in which payment is to be made by the terms of the contract, the creditor waives that objection, and cannot thereafter insist that the tender was not good for that reason. *Schaeffer v. Coldren*, 237 Pa. 77, 85 Atl. 98, Ann. Cas. 1914B, 175, and notes. In this case Keeler Bros., in their letter of January 14, 1918, in returning the draft, stated, as the reasons for nonacceptance, not that the notes were payable in gold coin, but for the reason stated in their letter of January 14, 1918, above quoted. Had Keeler Bros., who were handling the matter, stated that the notes were payable in gold, as in fact they were, and for that reason they could not accept the draft, plaintiff would then have had opportunity to have

tendered the gold as he afterwards did before foreclosure proceedings were commenced by the publication of notice of foreclosure.

In the case of *Graves et al. v. Burch*, 181 Pac. 354, decided by this court June 3, 1919, the question of the allowance of attorney's fees was fully considered, and the authorities cited and reviewed. The principles therein announced and the authorities cited are applicable to the facts in this case, and need not be repeated here. By the judgment the defendant was awarded somewhat more than it was rightfully entitled to; but the plaintiff is not here complaining. The court found the facts to be that there was due on the notes and mortgage on February 18, 1918, the sum of \$9,616.17, and that on said day plaintiff tendered to H. E. Wright, a member of the firm of H. E. Wright & Co., that amount in gold coin of the United States. By the judgment plaintiff was required to pay that amount to the clerk of the court for the use and benefit of the defendant; enjoined defendant from foreclosing the mortgage; required it to surrender the notes to said clerk for cancellation; that it cancel and satisfy said mortgage of record, and pay the costs of the action. We are satisfied that the judgment is just and equitable, and is therefore affirmed.

Affirmed.

POTTER, J., and BURGESS, District Judge, concur.

BLYDENBURGH, J., being unable to sit, Hon. James H. Burgess, Judge of the Fourth Judicial District, was called in and sat in his stead.

NATIONAL BANK OF SAN MATEO v. WHITNEY. (S. F. 8377.)

(Supreme Court of California. Sept. 3, 1919.)

1. BANKS AND BANKING §112—PAYMENT OF NOTE BY CHECK TO CASHIER'S ORDER SUFFICIENT.

Where the cashier of plaintiff bank demanded payment of the note sued on, and such payment was made by a check payable to such cashier and applied to cashier's own overdrawn account, the form of payment was immaterial, and the fact that the cashier requested a check payable to himself was without significance, where the request was made in his capacity as cashier.

2. BANKS AND BANKING §112—MAKER'S RIGHT TO RELY ON CASHIER'S REPRESENTATIONS ON PAYMENT OF NOTE.

Although bank cashier's demand for payment of a note, made about 24 hours after the note's execution, by personally coming to defendant maker's office and requesting check payable to himself, was unusual, yet, where defendant

knew his company had borrowed to the limit, and while an officer thereof he had given this personal note to the bank for money put into the company, the cashier's statement that the bank examiner objected to the bank's carrying the note was sufficient to allay all suspicion of defendant, who was not by such demand put on notice that the cashier was trying to defraud defendant or the bank.

3. BILLS AND NOTES ¶538(7)—INSTRUCTIONS NOT APPLICABLE TO ISSUES INVOLVED ERRONEOUS.

In a bank's action to recover on a note, defended on the ground that it had been paid by the check of a company of which defendant was a stockholder, payable to plaintiff's cashier, an instruction that, in the absence of contrary evidence, the jury were entitled to believe such check was given in payment of an obligation due from the company to the cashier, when the real issue was whether the check was given plaintiff by delivery to its cashier, or to the cashier personally, was erroneous, being a misapplication of Code Civ. Proc. § 1933, subd. 7.

4. TRIAL ¶194(12) — INSTRUCTION ON WEIGHT OF EVIDENCE ERRONEOUS.

In a payee bank's action on a note, defended on ground of payment by a corporation in which defendant maker was a stockholder, by check to plaintiff's cashier, an instruction that the drawing of such check was not in the ordinary course of business between defendant company and the bank was erroneous, as being an instruction on a question of fact, and particularly where this was the only note paid by the defendant, although the company had drawn checks payable to the bank.

5. TRIAL ¶243—CONFLICTING INSTRUCTIONS AS TO PAYMENT OF NOTE.

In payee bank's action against maker of a note, defended on ground of payment by check to order of plaintiff's cashier, drawn by a corporation in which defendant was a stockholder, and made upon the cashier's false representation that it was required by the bank examiner, an instruction that cashier's requirement of making check payable to him was notice putting defendant on inquiry held erroneous, as conflicting with another instruction that defendant was entitled to rely upon the cashier's integrity.

6. APPEAL AND ERROR ¶1050(2)—BANKS AND BANKING ¶111—DEMAND BY CASHIER OF PAYMENT OF NOTE WITHIN HIS AUTHORITY.

In payee bank's action on a note, defended on ground of payment by check of corporation in which maker was a stockholder, payable to plaintiff's cashier, on the latter's misrepresentation that the bank examiner required it to be paid, testimony of the bank's directors that they had not authorized a demand for payment of the note was immaterial, as the position of cashier carried such authority, and was harmful, where it was shown that the cashier had appropriated it to his own use.

7. BANKS AND BANKING ¶107—AUTHORITY OF CASHIER AS TO COLLECTION OF NOTE.

The rule that, where the payee of a promissory note pays an agent who does not produce

the note, payment is at the maker's risk, has no application to a payment made to a bank cashier subject to his order, since he has authority to collect notes due the bank.

In Bank. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the National Bank of San Mateo against St. John Whitney. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 180 Pac. 845.

Norman A. Eisner, of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, and Ross & Ross, of Redwood City, for respondent.

WILBUR, J. This is an action upon a promissory note executed on September 13, 1915, to the plaintiff for \$3,000. The case was tried before a jury. Plaintiff recovered judgment, and defendant appeals. The sole issue presented to the jury was whether or not the promissory note was paid on September 14, 1915, by a check of the Leslie Salt Refining Company, drawn on the Bank of California for \$3,000. This check was issued by the defendant as secretary of the Salt Company, and was received by W. M. Roberts, cashier of the plaintiff. That it was deposited by him to his credit with the plaintiff bank is admitted. The plaintiff, in support of its contention that the note was not paid by the check in question, relies upon the possession of the note as *prima facie* evidence of its nonpayment, and upon the fact that the check was made payable to W. M. Roberts, instead of to the bank, and was a check of the Leslie Salt Refining Company, instead of the defendant, and in support of its claim presented instructions to the jury, which were given by the court, to the effect that its possession of the note raised a presumption of its nonpayment; that the giving of the check to W. M. Roberts personally gave rise to the presumption that it was in discharge of an obligation owing to Roberts.

In order to understand fully the assignments of error made by the appellant, it will be necessary to state additional facts. The defendant was a stockholder and the secretary of the Leslie Salt Refining Company. W. M. Roberts, plaintiff's cashier, was a director of the Leslie Salt Refining Company, holding five shares of stock to qualify him as such director. The Salt Company was a borrower from the plaintiff, and, having borrowed to the limit of its credit, the defendant negotiated a loan for \$3,000 on the 18th day of September, 1915, and gave his personal note, herein sued upon, as evidence of such indebtedness. Miss Zula

Clements, stenographer and general office assistant of the Leslie Salt Refining Company, testified that, on September 14th, William M. Roberts, plaintiff's cashier, called at the office of the Salt Company in the Flat-iron Building, in San Francisco, between 3 and 4 o'clock in the afternoon and left a message for the defendant to the effect that the bank examiner had been at the bank and had questioned the loan, and that it was necessary for the bank to have a check for \$3,000 to take up the note, and that the check was to be made out personally to him and mailed down that night without fail, as he expected the examiner would be there again in the morning; that about 4:30 of that afternoon she gave this message to the defendant; that the check in question for \$3,000 was made out at that time. The defendant testified that in pursuance of this message he wrote the check in question and mailed it to Mr. Roberts at the bank; that the check was made payable to W. M. Roberts, because it was requested in that form, although other checks in payment of moneys borrowed from the plaintiff had been made payable to the plaintiff bank; that neither the defendant nor the Leslie Salt Refining Company owed anything to Mr. Roberts personally, nor was there any debt to Mr. Roberts in which the defendant or the Salt Company was interested; and that the \$3,000 check was not sent as a loan to Mr. Roberts. Roberts testified that he received the check in question for the purpose of taking up a note of the defendant for the sum of \$3,000, that he received the check at the bank, that he had no personal transaction with the defendant, and that the defendant owed him no money and loaned him no money.

[1] It will be observed, then, that the only persons who have any knowledge as to the purpose for which the check in question was given by the defendant, namely, the defendant, his stenographer, and Roberts, all testified that it was given in payment of the note herein sued upon, and for no other purpose. The authority of Roberts, as cashier, to receive the payment of the note must be conceded. *McBoyle v. Union National Bank*, 162 Cal. 277, 279, 122 Pac. 458; *Morse on Banking* (5th Ed.) vol. 1, § 159, pp. 356, 357; 7 *Corpus Juris*, § 160. His application of the check to his own overdrawn account was a confessedly fraudulent misappropriation of the check, and the only question involved in the case is as to whether the plaintiff or defendant must suffer by reason of the cashier's dishonesty. If we assume that both the plaintiff and defendant were equally innocent of wrong in connection with the transaction, and that the loss resulted by reason of the fraud of the plaintiff's agent in misapplying the proceeds of the check paid to him by the defendant, then,

under a familiar principle of the law, the bank, for whom Roberts was acting, would be required to bear the loss, for "where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss." *Mundorff v. Wickersham*, 63 Pa. 89, 3 Am. Rep. 531, cited in *Schultz v. McLean*, 93 Cal. 329, 356, 28 Pac. 1053. Still assuming equal innocence of both parties hereto, the loss resulted from the fact that the plaintiff had in its employment in a position of trust and confidence a dishonest employé, who dishonestly utilized his position of trust and confidence to appropriate \$3,000 paid to him as such agent for and on behalf of the principal. Where the agent of a depositor of a bank utilized his position of trust and confidence to fraudulently raise certain checks intrusted to him, and thereby secured from the bank larger sums than called for by the checks, it was held that, although such conduct amounted to forgery, and the bank would ordinarily be responsible to the depositor for payment of such forged checks, nevertheless, by reason of the fact that the crime was committed by the depositor's agent, the depositor and not the bank should bear the loss, upon the theory that the principal was liable "for the fraud, torts, or other wrongful acts committed by such agent in and as part of such business." *Otis Elevator Co. v. First Nat. Bank of San Francisco*, 163 Cal. 31, 39, 124 Pac. 704, 707 (41 L. R. A. [N. S.] 529). Similar reasoning would require us to hold the bank liable for the misconduct of its cashier, Roberts.

Plaintiff, however, contends that both parties are not equally innocent in the transaction; that the defendant, by making the check payable to the cashier, and by acceding to the unusual demand of the cashier, either had notice of the cashier's fraud, or thus put it within his power to commit the wrong, and that therefore the defendant must suffer the loss. In view of the law that the cashier, by virtue of his office, had authority to collect the note, does the fact that he asked for and received a check payable to himself in payment so far inculpate the defendant in the wrongdoing of the cashier as to change the rule? It is undoubtedly true that the form of the check received by Roberts may have enabled him to deposit the same in his own name in the bank without arousing suspicion, which might have resulted from the deposit by Roberts to his own account of a check payable to the plaintiff. But this would have been equally true in case the payment had been made by money, or by the transfer of negotiable paper by indorsement in blank, or, in short, by any form of payment other than by negotiable paper payable to the order of the plaintiff. It cannot be said, there-

fore, that the form of the payment facilitated the fraud of the cashier, but rather that the payment by a check drawn to the order of the bank might have made it less easy to effectuate the fraud. Even if the check had been payable to the order of the plaintiff, the cashier, by virtue of his agency, would have had authority to indorse the same and thus gain the possession of the proceeds thereof. *Dyer v. Sebrell*, 135 Cal. 597, 67 Pac. 1036; *McBoyle v. Union Nat. Bank*, supra, 162 Cal. 279, 122 Pac. 458. Where, as here, the duly authorized agent of the plaintiff bank was demanding payment, and such payment was made by a negotiable instrument, the proceeds of which were subsequently secured by the agent, the form of the payment is immaterial. Nor was the fact that the agent requested the payment by check to his own order of any significance, for the reason that he made such request in his capacity as agent for the plaintiff, and such request was, in effect, the request of the plaintiff. The defendant was not bound to view with suspicion the conduct of plaintiff's agent.

[2, 3] It is next contended that the facts and circumstances surrounding the payment were such as to put the defendant upon inquiry; in other words, to cause the defendant to suspect the intended fraud of the cashier. It being conceded that the demand for payment of a note 24 hours after its execution, at the office of the defendant in San Francisco, instead of at the bank, by the cashier personally coming to the office, was unusual, and not in the ordinary course of business, the character of the demand was such as might justly allay all suspicion of the defendant. The defendant knew that the Salt Company had borrowed up to its limit from the bank, and that the \$3,000 represented by the promissory note had been secured by him while an officer of the Salt Company for the Salt Company. Defendant knew that the plaintiff bank was supervised by the bank examiner, and therefore that the demand of the bank for payment was not, under the circumstances, unreasonable. Bearing in mind that Roberts came to the defendant for the purpose of demanding payment by the defendant of an obligation owed by defendant to plaintiff for reasons peculiarly applicable to the business of the plaintiff, there was apparently nothing in the transaction to put defendant upon notice that Roberts was trying to defraud either defendant or the bank. The fact that the statements were untrue, and were made for the purpose of allaying the suspicion of the defendant concerning the unusual demand, was not known to the defendant. Defendant had a right to rely upon the truth of these representations in determining his course of conduct, and such representations must be deemed to have been made by the plaintiff. As the question involved is the fact of pay-

ment, the representations are wholly immaterial, except as they tended to allay the suspicion which might be aroused in the defendant by reason of the demand for payment and a request that the check be made to the order of the cashier. Upon the issue of payment it is true that there was a conflict of the testimony, arising not only from the fact that the plaintiff had possession of the note, but also because of the fact that the plaintiff was justified in relying upon certain circumstances brought out in the testimony of the defendant concerning the delay of the defendant in notifying the bank that the note had been paid, thus tending, together with other things, to discredit in some measure the testimony of the defendant. If the issue of payment had been submitted to the jury under proper instruction and evidence, the finding of the jury would be binding on this court. But in the light of the foregoing discussion some of the instructions must be held erroneous. For instance, at the request of the plaintiff the court gave the following instruction:

"(2) The court instructs you that the presumption of law is that money paid by one person to another was due the latter, and therefore in this action, if you believe from the evidence that the Leslie Salt Refining Company issued its check, payable to W. M. Roberts, and delivered or sent said check to said Roberts, then the presumption of law is that said Leslie Salt Refining Company did so because it wished to make the check payable to said Roberts."

The jury were thereby instructed that under the circumstances and proof in the case, in the absence of evidence to the contrary, they were entitled to believe that the check given to Roberts was in payment of an obligation due from the Salt Company to Roberts. The real question in issue was whether or not the check was given to the plaintiff by the delivery of the same to its cashier, or whether it was given to Roberts personally for some other purpose. Under these circumstances the instruction of the court, based upon the form of the check, was an erroneous application of the presumption "that money paid by one to another was due to the latter" (Code Civ. Proc. § 1963, subd. 7), for the very question involved was: To whom was the money paid?

[4] At the request of the plaintiff the court instructed the jury as follows:

"(7) The court instructs you that if you believe from the evidence in this case that W. M. Roberts went to the office of the Leslie Salt Refining Company in San Francisco, and there made a demand for the payment of the note here in question, and directed that any check drawn for the purpose of payment thereof be made payable to him, said W. M. Roberts, and that no other check for the payment of any note to said bank by the defendant, or by said Leslie Salt Refining Company had been made payable

to said W. M. Roberts, but had been made payable to the plaintiff, then you are further instructed that the drawing of the check here in favor of W. M. Roberts was not in the ordinary course of business between the defendant and the Salt Company and the bank, and that therefore the direction to have said check made payable to said W. M. Roberts was sufficient notice to put the defendant on inquiry as to why said check should be made payable to said Roberts instead of to the plaintiff bank."

This instruction was erroneous, for the reason that it was an instruction upon a question of fact, namely:

"That the drawing of the check here in favor of W. M. Roberts was not in the ordinary course of business between the defendant and the Salt Company and the bank."

[5] It is true that the evidence showed that the Salt Company usually paid the bank by checks drawn in favor of the bank, but the instance under consideration is the only one in which the defendant paid an obligation of his own. But, however that may be, the ordinary course of business, so far as involved in this case, was the payment to the cashier of the bank, and not the form of said payment. It was in the ordinary course of business, so far as this case is concerned, for payments to be made to the cashier of the bank. It was also an instruction which, in effect, informed the jury that—

"The direction to have said check made payable to W. M. Roberts was sufficient notice to put the defendant on inquiry as to why said check should be payable to said Roberts, instead of to the plaintiff bank."

As has been above stated, there was no reason why the check should not be made payable to Roberts. The only legal question properly involved by the form of the check given in payment was whether or not the payment was made to Roberts as cashier of the bank, or to him in his personal capacity and for his personal benefit. This instruction is particularly objectionable, in view of an instruction given at the request of the defendant, as follows:

"A bank's client or customer, dealing with the cashier of the bank permitted by its directors to have complete control of the business relations with its clients and customers, may trust in the integrity of such cashier in transacting its banking business with him, when there is nothing in the known state of the affairs of the bank, or of his relation to it, to excite suspicion that he is using his position to the prejudice of his bank."

Under these instructions, upon the admitted facts, the jury must have understood, as a matter of law, that the defendant was not entitled to rely upon the integrity of the cashier, or, in other words, that defendant could not claim the check to be a payment if the cashier misappropriated it, as

it is conceded he did. These instructions were erroneous. The question as to whether the suspicions of the defendant were or should have been aroused was a question of fact for the jury. Other instructions were given, at defendant's request, tending to modify, in some degree, the effect of these instructions; but we cannot say that they cured the basic error of the instruction that defendant's suspicions must necessarily have been aroused by the facts stated in instruction No. 7.

[6] The testimony of the directors of the plaintiff bank was received, over the objection of the defendant, to the effect that they had not authorized the cashier to demand payment of the note in question, and that no examination was made or was to be made by the bank examiner. The effect of this evidence was merely to prove that the statements made by the cashier to the defendant at the time he demanded payment of the note in question were false. The defendant had a right to rely upon the representations of the plaintiff's agent, and the plaintiff could not take advantage of their falsity. It was therefore immaterial whether or not such representations were true. The evidence, being immaterial, might be regarded as harmless, were it not for the fact that in this case the considerations involved are so evenly balanced that it is difficult to say what the effect of such testimony might be upon the mind of the jury. It showed that the bank was being imposed upon by its own agent, and might therefore give the impression to the jury that the bank was to that extent "innocent," while as a matter of law the bank must be deemed to have made such representations. Nor was it proper to show that there was no express authority on the part of Roberts to collect the money. That authority resulted from his official position as cashier, and, in the absence of an express prohibition by the directors, he had authority, as such, to make the collection in question. The evidence should not have been admitted.

The defendant complains of those rulings of the court upon the admissibility of evidence which precluded his proving a transaction by which Roberts sought to reimburse the plaintiff for his wrongdoing. Under proper pleading and offers of proof it would no doubt be permissible for the defendant to show that the plaintiff had received the fruits of the check given by the defendant, if such was the fact. We cannot say, however, that there was error in sustaining the objections to the particular questions that were asked.

[7] Respondent relies upon the rule that where the payee of a promissory note pays an agent who does not produce the note—

"the payment is at the risk of the maker of the note, and if such person were not, in fact, en-

titled to receive payment of the note, the maker of the note must bear the loss, for it is his duty to demand the production of the note before he made payment."

The principle, however, has no application here, for the reason that the cashier of a bank has authority to collect notes due to the bank.

In view of the necessity of a new trial it perhaps should be noted that the evidence in this case is not entirely clear as to what became of the credit of \$3,000 which the cashier secured to himself by the deposit of the check given by the defendant. If such deposit was used by him to reduce an overdraft, and was not subsequently withdrawn by the cashier for his own purposes, the bank, of course, having received the benefit of the check, could not now collect upon defendant's note, upon the theory that the same had not been paid, for it would in fact have received the benefit of the check in the form of a payment upon the indebtedness of the cashier, and the remedy of the bank would be against the cashier, and not against the defendant in that event.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

In re DOW'S ESTATE.

CASEY et al. v. HANLEY et al.
(S. F. 9122.)

(Supreme Court of California. Aug. 25, 1919.
On Petition for Rehearing in Bank, Sept. 22, 1919.)

1. WILLS §123(5)—ATTESTATION AND SIGNATURE BY WITNESSES — PRESENCE OF WITNESSES.

Under Civ. Code, § 1276, requiring two attesting witnesses to sign at testator's request and in his presence, it is unnecessary that the witnesses sign in the presence of each other.

2. WILLS §52(1)—MENTAL CAPACITY—PRESUMPTION.

It will be presumed that deceased was of sound mind when her will was executed.

3. WILLS §289 — EXECUTION — PRESUMPTIONS.

The presumption that deceased was of sound mind when her will was executed justifies the conclusion, in absence of testimony to the contrary, that she was neither unconscious nor asleep when will was witnessed.

4. WILLS §302(1)—SIGNING IN TESTATRIX'S PRESENCE—SUFFICIENCY OF EVIDENCE.

Conflicting evidence, and the presumption that testatrix was of sound mind, held to sustain finding that she was neither unconscious nor asleep when the will was witnessed.

5. WILLS §302(1) — EXECUTION — SUFFICIENCY OF EVIDENCE.

The written declaration of subscribing witnesses in attestation clause of a will that they signed at testatrix's request, the direct testimony of one witness that they signed at such request, which was later modified or retracted, testimony that other witness had been requested by testatrix's brother to sign, etc., held to sustain a finding that will was witnessed at testatrix's request.

Department 2.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceeding by George E. Hanley and Ernest Hanley to probate the will of Alice Dow, deceased, opposed by George E. Casey and W. J. Anderson, as executor. From a judgment admitting the will to probate, the contestants appeal. Affirmed.

James H. Boyer, of San Francisco, for appellants.

Pierre A. Fontaine and W. J. Hennessey, both of Oakland, for respondents.

WILBUR, J. This is a contest over the will of the deceased, on the ground that the same was not executed as required by law. The will having been admitted to probate, contestants appeal, basing their appeal upon three grounds: (1) That the subscribing witnesses did not sign the attesting clause to said will in the presence of each other; (2) that the finding of the trial court that the subscribing witness, Jennie Kinsman, signed the attesting clause while in the presence of the testatrix, is not supported by the evidence; (3) that the finding that the subscribing witnesses signed at the request of the testatrix is not sufficiently supported by the evidence.

[1] With reference to the first contention, it is sufficient to say that section 1276 of the Civil Code does not require that the subscribing witnesses shall sign in the presence of each other. The requirement in that regard is:

"There must be two attesting witnesses, each of whom must sign the same as a witness at the end of the will, at the testator's request and in his presence."

The Supreme Courts of New York and Connecticut, under similar statutes, have held that it is not required that the witnesses sign in the presence of each other. *Hoysradt v. Kingman*, 22 N. Y. 372; *Gaylor's Appeals*, 43 Conn. 82; 1 Williams, *Executors*, 93; 6 Surg. Real Property St. 342; 1 Jarman on Wills, 85. There is nothing in *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83, and *Estate of Cartery*, 56 Cal. 470, in conflict with this view. The question was not there involved.

[2-4] The evidence was sufficient to sustain the finding that the witnesses were requested

by the testatrix to sign the same as subscribing witnesses. One of the witnesses, Belle Brush, testified:

"At the time she signed this document she said it was her will. Mrs. Dow requested me and the other witness to sign her will as a witness, and I signed my name as a witness."

On cross-examination, in detailing the circumstances, she said:

"I went in the room and she asked me if I would sign her will. * * * I think Mrs. Dow was the first one to speak when I went in that room. She asked me if I would sign her will. * * * When she asked me that, I said, 'Certainly.' Then I went over to the stand in the front window, the bay window, and signed it. * * * Mrs. Dow had just simply asked me if I would sign her will. She asked me if I would sign her will before she signed it. She said, 'Belle,' that is the name she always called me, 'Would you sign my will?' I said 'Certainly.'"

In response to a question of the court she repeated:

"* * * The only thing she said was, 'Will I sign the will?'—her will. Q. She didn't declare it to be her will in so many words? A. Didn't declare that it was. When she said, 'Will you sign my will?' I didn't see it just then. I saw it about a minute after. * * * I don't know where the document was at the time Mrs. Dow asked me if I would sign her will. She signed the document after she said to me, 'Will you sign my will?' Mrs. Dow signed the will, then a very short time after she said to me 'Will you sign my will?'"

When recalled by the proponents, she testified as follows:

"The Court: Mrs. Brush, are you quite positive that Mrs. Dow said to you, at the time or about the time she signed the will, 'Will you sign this will?' A. I didn't say at that time. This might have been a week before. I could not say just when. She said, if she made a will, would I be a witness. I said, 'Certainly.' I didn't say at that time. That was about a week before. Neither at the time it was signed, or before or after it was signed by Mrs. Dow, did she ask me to sign it as a witness. No, sir; not at that time. She didn't ask me to sign her will at that time. She didn't say anything about its being her will at that time. Q. Did she ask Mrs. Kinsman to sign it? A. Mrs. Kinsman, I believe, brought the will in. I am not sure. Mrs. Kinsman asked her; said her brother had given her that paper and said it was a will, and asked if she could read the will, if she knew what it was, and she said 'Yes.' She asked her if she wanted to sign it. Mrs. Dow said, 'Yes.' That was about all I can remember that was said. Q. You are quite sure Mrs. Dow didn't ask you to sign the will? A. Not at that time; no, sir, not at that time. And she didn't ask Mrs. Kinsman to sign the will; I don't think so. That is my best recollection. She didn't ask me, just before she signed the will, 'Will you sign my will?' Not at that time; no, sir. You misunderstood me if you think I said at that time."

It should be stated that at the time that the will was executed the testatrix was very ill; that Mrs. Kinsman, one of the subscribing witnesses, had been called as a nurse; that Mrs. Brush had been specially called for the purpose of witnessing the will. The will had been prepared during the morning at the request of the testatrix, and had been read to her by her brother, and had then been typewritten, and was returned in the afternoon by the brother, who handed it to Mrs. Kinsman, the nurse, with the request that she have the will signed and that she witness the will. The will was then taken into the sickroom; the only persons present being the testatrix and the two subscribing witnesses. They were together in the room only about 5 minutes. The testimony of the brother, if accepted by the trial court, would justify the conclusion that both witnesses signed at that time in the presence of the testatrix. His testimony is to the effect that he looked into the room and saw Mrs. Kinsman sitting over a desk as though writing, and that the will was handed to him immediately upon being brought into the sickroom, and was at that time in the same condition that it was when presented in court; i. e., signed by the two subscribing witnesses. The court, however, found that it was not signed by the witnesses in the presence of each other. Mrs. Kinsman testified that after Mrs. Brush, the other subscribing witness, had left the room, she remained in attendance upon the testatrix until about 15 minutes had elapsed from the time she first entered the room; that she at that time took the will to Mr. Hanley, the brother of the testatrix, who handed it to her and asked her to have it executed, and that he observed that she had not signed it, and requested her to sign it; that she re-entered the sickroom, sat down at a table within four or five feet of the testatrix, and signed the will and returned it to Mr. Hanley.

The only question raised by the contestants with reference to this signing being in the presence of the testatrix grows out of the testimony of Mrs. Kinsman. At the time she re-entered the sickroom the testatrix was lying in bed with her eyes closed, and she did not know whether or not the testatrix observed or had knowledge of the fact that she was signing the will as a subscribing witness. The attitude of this witness was somewhat peculiar in connection with her signing the will. She testified that, the first time she saw the will, it was handed to her by George Hanley, the proponent.

"He said, 'Mrs. Kinsman, it is a will of my sister's,' or 'that my sister has made,' or something to that effect; but anyway this was a will of hers. 'I have read it to her. She knows what it is. It is all right, but she has not signed it yet. Will you have her sign it?' And then he says, 'Mrs. Brush will be a witness.' I said, 'Very well,' and went and took it in to Mrs. Dow."

She then said, when she took it to the testatrix to have it signed in the presence of Mrs. Brush and herself:

"I just said to her, 'Your brother says this is a will, that he read it to you; do you know what it is—do you know how it is made out?' She said, 'Yes.' * * * I says, 'Is everything fixed as you want it?' I put it that way to her on account of a remark, a little talk that we had had before, several weeks before, about the will. She says, 'Yes.' I said, 'Do you want to sign it?' She said, 'Yes.' 'Do you want to sign it now?' She said, 'Yes.' I said, 'Very well, sign it there;' and then I pointed to it and put it on; it was turned, your honor, but it was turned—she signed it there. At the time of this conversation Mrs. Brush was at the foot of the bed, and I was at the side, and Mrs. Dow was upon the bed. When Mrs. Dow signed it, I took it from her; she didn't hand it to me. Absolutely nothing was ever said in the room."

The witness then directed Mrs. Brush to sign as a subscribing witness, and she testified:

"Then I took it and gave it to the brother. I knew how to direct Mrs. Brush where to sign this will, because the next place was a space there to sign, and I thought that Mrs. Brush should sign next. I didn't intend to sign it. There was still another place later on, and I left it there. I didn't sign it, because it was turned so I didn't know what I was signing, and I don't sign my name to something, unless I know what I am signing it to. The brother said: 'Mrs. Brush will be a witness.'"

She further testified:

"When I first entered Mrs. Dow's bedroom, to have Mrs. Dow execute this will, I suppose I knew that I was to sign this will as a witness, but didn't intend to do it without knowing what it was about and know what it was. I have been a witness to wills before, and the lawyer always read them before the party and before me, and I knew what I was signing. I knew enough to ask Mrs. Brush and indicate to her where to sign. As I understood, Mrs. Brush was an old friend of Mrs. Dow's. She was a stranger to me, and it mattered not to me who signed it."

She further testified with reference to taking the will to the proponent after it was signed by the testatrix and Mrs. Brush:

"I was carrying the document with pen and ink in my hand, because I took that out when I went out the first time, not intending to sign it unless I was asked the second time."

She repeatedly testified, in effect, that when she handed the will to the proponent he said:

"Mrs. Kinsman, you have not signed it.' I says, 'No.' He says, 'Will you?' 'If you wish.' I took it back in the room. The reason I didn't sign the first time was the paper was turned. I didn't know what I was signing, and I never sign anything unless I know what I am signing. Then I took it back, and went

into the room, and went over to the table and signed it, and took it back to the brother. * * * When I went into the room, as I remember, Mrs. Dow had her eyes shut. She was very sick, as I told you."

Again, on cross-examination, she testified:

"When I went into Mrs. Dow's room, there was no one in the room besides Mrs. Dow and me. I closed the door when I went in there. Mrs. Dow had her eyes shut then. She was asleep as far as I know. I don't know whether she was asleep; she had her eyes closed, though. * * * She may have opened her eyes. That I couldn't swear to, but her eyes were closed when I came into the room. I don't know whether she opened her eyes after I turned my back or not. I didn't speak to her at any time on this second occasion when I entered the room to sign the will, and she didn't speak to me at all on that occasion."

When the witness was asked by the court whether she was prepared to say that the deceased could not have seen her sign the will she answered:

"No; I am not prepared to. She might have, but I turned my back to her."

The proponent, George E. Hanley, testified that, when he first gave the will to Mrs. Kinsman, he asked her if she would take it in, and told her "that my sister wanted her to sign as a witness." Accepting the finding of the trial court upon this conflicting testimony, to the effect that Mrs. Kinsman did not sign the will as a witness while Mrs. Brush was in the room, and taking the view most favorable to the proponent in support of the finding that the will was signed by the witness in the presence of the testatrix, we have this somewhat unique situation: Mrs. Kinsman entered the sickroom with the will in her hand, having been requested to sign the same as a witness, and, knowing that it was expected by the testatrix that she would sign as a witness; that she prepared the will for the signature of the testatrix after having ascertained her intention to execute the will, provided the testatrix with pen and ink, and secured her signature thereto, and thereupon handed the will to the other subscribing witness, requesting her in an audible tone of voice in the presence of the testatrix to sign the same as a subscribing witness, and thereafter seated herself at the same table, with pen and ink in hand, and went through the motion of subscribing the same as a witness, and either did so sign after the other subscribing witness had retired from the room, or purposely refrained from so doing for the reason that she did not feel herself sufficiently advised as to the contents of the document, and returned the document to the proponent, whereupon, again being requested to sign as a witness, she returned to the sickroom, and in the presence of the testatrix and within a few feet of the bed actually signed the document and returned the same

to the proponent. That the will was actually signed in the bodily presence of the testatrix is testified to by the very witness relied upon by the contestants to establish the fact that it was not signed in her presence, by reason of the fact that she was asleep or unconscious at the time it was signed.

The most that can be said in favor of the appellant on the question as to whether or not the subscribing witness, Kinsman, signed the will when the testatrix was asleep, is that the evidence upon this point is so conflicting that the finding of the trial court upon the question is conclusive on this court. The evidence of the witness Hanley, if believed, would have justified the court in wholly disregarding the testimony of Mrs. Kinsman as to what occurred after the time she handed the will to Hanley on first leaving the sickroom. It is true that the express finding of the court that Mrs. Kinsman did not sign the will in the presence of the other subscribing witness justifies the inference that the court accepted the testimony of Mrs. Kinsman rather than that of Hanley as to the time when the will was signed by this subscribing witness; but in view of the testimony of Mrs. Brush that she did not see the will signed by Mrs. Kinsman, and the uncontroverted fact that Mrs. Kinsman remained in the room after Mrs. Brush retired therefrom, we cannot say that the court did not arrive at the conclusion that the will was signed by both witnesses before it was returned to Hanley, as he testified, and wholly disbelieved the testimony of Mrs. Kinsman in relation to the time and circumstances under which she signed as a subscribing witness. Moreover, it was the duty of the trial court to "closely scrutinize" the testimony of Mrs. Kinsman in so far as that testimony tended to discredit her solemn act of attestation. *Estate of Tyler*, 121 Cal. 405, 413, 53 Pac. 928. The most that can be said of the testimony of this witness adverse to the will is that she made no effort to attract the attention of the testatrix to the fact that she was about to subscribe the will as a witness; that she observed the eyes of the testatrix were closed, and thereupon signed the will with her back to the testatrix, without noticing or being able to testify whether the testatrix did or did not observe her act of signing. She returned the will to the brother, the principal beneficiary under the will, who had intrusted her with the direction of the execution thereof, without notifying him that the testatrix was asleep or unconscious, and thus placed it entirely in her own hands to discredit or destroy the efficacy of the will by an inference wholly inconsistent with her position as a subscribing witness. Opposed to this we have the presumption that at the time of the execution of the will the deceased was of sound mind; a presumption which obtains during the entire process of the execution of the will, in the absence of

credible evidence to the contrary. This presumption justifies the conclusion, in the absence of affirmative and credible evidence to the contrary, that the testatrix was neither unconscious nor asleep during the execution of the will. In view of the foregoing consideration, the finding of the trial court that the witness Kinsman signed the will in the presence of the testatrix is conclusive on this court.

[5] With reference to the question of whether or not the finding of the court that the will was signed by the subscribing witnesses at the request of the testatrix is correct, we have the attestation clause so declaring and the direct testimony of Mrs. Brush that at the time and place of the execution of the will the testatrix requested both of the subscribing witnesses to sign. It is true that on cross-examination she said that she did not intend to make this statement, but the record hardly bears out the latter statement. It also appears that she had been asked some time before by the testatrix to sign as a witness, and that Mrs. Kinsman, in the presence of the testatrix, requested Mrs. Brush to sign the will as a subscribing witness, and that she did so sign in the presence of the testatrix. " * * *

A request may be implied by acquiescence in the request of another that the will be signed." 40 Cyc. 1118. Mrs. Kinsman was requested to sign the will as a subscribing witness by the brother, who had been intrusted by the testatrix with the preparation of the will, including, no doubt, the necessary formalities in connection with the execution thereof, and this request, he stated to Mrs. Kinsman, was so made by him at the instance of the testatrix. There is no direct testimony as to whether the testatrix did or did not request the brother to request Mrs. Kinsman to sign the will as a witness. The written declaration of both subscribing witnesses in the attestation clause, together with the facts and circumstances surrounding the execution of the will, and the evident desire of the testatrix communicated to the subscribing witnesses, justified the trial court in its conclusion that the will was attested by the subscribing witnesses at the request of the testatrix. *Estate of Cullberg*, 169 Cal. 368, 146 Pac. 888; *Estate of Silva*, 169 Cal. 120, 145 Pac. 1015; *Estate of Clark*, 170 Cal. 422, 149 Pac. 828.

Judgment affirmed.

We concur: LENNON, J.; MELVIN, J.

On Petition for Rehearing in Bank.

PER CURIAM. In the petition for rehearing it is claimed that the decision in department, in effect, overrules the decision by the court in bank in the *Estate of Emart*, 175 Cal. 238, 165 Pac. 707, L. R. A. 1917F, 868. The distinction between that case and this

seemed too obvious to require discussion. It is true in that case that the witnesses did not sign in the presence of each other. But the decision against the validity of the will was not based upon that fact, but upon the fact that both witnesses were not present together at the time the testator signed or acknowledged his signature, or published the will. In this case these formalities as to signing and acknowledgment by the testatrix were complied with, but one witness left the room before the other subscribed as a witness. If it be said, that the reasoning of the *Emart* Case leads us to the conclusion that both witnesses should sign in the presence of each other, it is a sufficient answer to say that we are not disposed to follow it to that conclusion, which would place our law out of harmony with that of nearly every other state in the Union. 40 Cyc. 1121, note 70. Moreover, if we assume that this court is committed by the decision in *Estate of Emart* to the English interpretation of the Victorian Act therein referred to, it would appear from the note (13) to our decision in *L. R. A. 1917F, 868, 877*, that the English courts have held that under the latter act it is not essential that witnesses sign in the presence of each other. See *In the Goods of Jane Webb*, 1 Jurist. N. S. (Eng.) 1096. To hold that the witnesses must sign in the presence of each other would be to write into the statute a requirement that is not there, and would be digging another pitfall for those unfamiliar with judicial decisions who rely upon what seems to be the plain letter of the Code.

The application for rehearing is denied. All concur.

In re MCCLELLAND'S ESTATE.

MCCLELLAND v. ALTHOUSE et al.
(L. A. 5760.)

(Supreme Court of California. Sept. 8, 1919.)

1. HUSBAND AND WIFE \S 278(1)—VALIDITY OF SEPARATION AGREEMENT CAN BE DETERMINED ONLY BY DIRECT PROCEEDING.

Neither petition of widow to set aside probate of will, nor her petition to determine heirship, nor her objection to the final account, brings into issue the validity of the separation and settlement agreement between her and deceased; but this can be raised only in a direct proceeding attacking it.

2. DESCENT AND DISTRIBUTION \S 71(7) — FINDING THAT WIDOW HAD NO INTEREST, A FINDING THAT SEPARATION AGREEMENT WAS VALID.

A finding, in proceedings to determine heirship, that widow was not entitled to any part of estate, held to import a finding that settlement agreement between widow and deceased had not been obtained through duress or undue influence.

3. HUSBAND AND WIFE \S 279(4)—SEPARATION AGREEMENT SUFFICIENT TO BAR WIFE'S RIGHT TO INHERIT FROM HUSBAND.

Separation and settlement agreement between husband and wife held to bar her right to inherit from him.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of David S. McClelland, deceased. From a decree of distribution therein in favor of Harry Althouse and others, against Lettie J. McClelland, widow, she appeals. Affirmed.

A. Schapp, of San Francisco, and Chas. E. Hobart, of Los Angeles, for appellant.

Foster C. Wright, of Los Angeles, for respondents.

LAWLOR, J. This is an appeal from the decree of distribution in the matter of the estate of David S. McClelland, deceased, entered by the superior court of Los Angeles county, in which Lettie J. McClelland, the widow of the deceased, was denied the right of inheritance on the ground that she was barred by a certain separation and settlement agreement entered into between the decedent and his wife on December 21, 1906.

It appears that decedent and Lettie J. McClelland intermarried in Los Angeles on August 21, 1906, and ever since up to the time of the death of the decedent, June 11, 1916, were husband and wife. At the time of the marriage Mrs. McClelland owned property of the value of about \$10,000, and had cash on hand in the amount of \$2,800, and a monthly income of \$87 from her other property. Decedent at that time owned a one-half interest in a saloon in Los Angeles, as well as certain residential property also situated in that city, which was at that time being improved. It also appears that the decedent was rather heavily in debt, though the amount and nature of the indebtedness does not appear. Either at the time of their marriage or shortly before, appellant gave to the decedent the \$2,800 cash which she had on hand. This, it is alleged, decedent used to pay his debts. The union proved to be an unhappy one, and on December 21, 1906, decedent and appellant agreed in writing to separate and live apart; the agreement being in terms as follows:

"This agreement made this 21st day of December, 1906, between David S. McClelland, the party of the first part, and Lettie J. McClelland, wife of said David S. McClelland, the party of the second part, witnesseth:

"That whereas the said first party and the said second party were legally and lawfully married on the 21st day of August, 1906, and are now and ever since said 21st day of August, 1906, have been husband and wife, and

"Whereas, the said first party and the said

second party are mutually desirous of severing their marital relations without coercion or undue influence or fraud or misrepresentation of any kind whatever, and

"Whereas, there has been no community property acquired since the said marriage, and

"Whereas, there are certain articles of furniture, to wit, piano, draperies, bureau and dining room chairs, table and rugs and other furniture acquired by each contributing of their separate funds for the purchase of the same, exclusive of certain personal effects and wedding presents belonging to said first party which are herewith specifically exempt, and

"Whereas there will be some expenses, attorney's fees and incidental expenditures for the purpose of completing and ratifying and finally settling the proposed separation,

"Now therefore, in consideration of the premises and in consideration of the covenants hereinafter more specifically set out, the said first party and the said second party do, and each of them does renounce any and all marital rights which each owes to the other, of any kind or nature, whether legal, moral or equitable, and each renounces, quit claims, and conveys any right or title to any of the estate now owned or possessed by the other or that may be hereafter acquired in any way by the other; and the said second party hereby acknowledges receipt of three hundred (\$300) dollars, from said first party, which said first party advances for the purpose of payment of attorney's fees, expenses and other incidental expenditures in connection with the separation hereto agreed; and the said first party likewise relinquishes and waives any right, title or interest he may have in the above mentioned furniture, to the said second party, and in consideration of the premises and covenants herein specified, the said second party specifically releases the said first party of any and all claims of alimony or support of any kind whatever, it being her desire and wish that on account of their unhappy relationship she should not feel under any financial obligation to said first party or allow financial considerations to enter into her determination to sever the said marital relationship.

"Each party to this agreement herewith solemnly and specifically avers that the foregoing agreement has been entered into without undue influence or fraud or coercion or misrepresentation or from any cause except as herein specified.

"In witness whereof the above parties hereto have hereunto set their hands and seals the day and year first above written.

"Signed in the presence of Blanche Maxwell.

"David S. McClelland. [Seal.]

"Lettie J. McClelland. [Seal.]"

(Italics ours.)

This agreement, at the request of the appellant, was recorded in Los Angeles county and also in Alameda county. Following the separation the appellant went to live in Berkeley. About ten years passed from the time of this separation until the death of the decedent, during which time the parties did not meet or correspond or in any way try to keep in touch with each other.

Decedent died possessed of an estate of more than \$10,000, which he had disposed of by will, naming therein his brothers and sisters as legatees. The will was filed for probate on July 18, 1916, and letters testamentary were issued on August 9, 1916. It was on September 15, 1917, more than a year after decedent's death, before appellant learned of that fact. She at once instituted proceedings to establish herself as an heir at law of the decedent entitled to inherit one-half of his estate. On October 30, 1917, she filed a petition to set aside the probate of the will and made application for a monthly family allowance of \$250. On November 17, 1917, she filed a petition under section 1864, Code of Civil Procedure, to determine heirship. On January 31, 1918, she filed an objection to the final account. The court ruled against the appellant on the petitions and the objection.

On the petition to determine heirship the court found in part as follows:

"(2) That the petitioner, Lettie J. McClelland, and the deceased, David S. McClelland, were legally and lawfully married on the 21st day of August, 1906, and were during all the time since respectively wife and husband.

"(3) * * *

"(4) That a written agreement was made, executed, and acknowledged by and between said Lettie J. McClelland and said David S. McClelland, on the 21st day of December, 1906, whereunder both parties thereto, and each of them, renounced any and all marital rights which each owed to the other, of any kind or nature, whether legal, moral, or equitable, and wherein each renounced, quitclaimed, and conveyed any right or title to any of the estate then owned or possessed by the other, or that might thereafter be acquired in any way by the other. That in said written agreement, it was further contracted that no community property had been acquired since the said marriage. That on the said 21st day of December, 1906, the said parties separated and have never since seen one another, corresponded, or had any relations of any kind whatsoever.

"And, after hearing the evidence and arguments of counsel, the court makes and renders judgment as follows, to wit:

"It is ordered, adjudged, and decreed by the court that David S. McClelland died testate on the 11th day of June, 1916, leaving surviving as his only heirs at law the persons whose names and relationships to said decedent are as follows, to wit:

"Jemima McClelland, a sister; Mrs. Elizabeth Savage, a sister; Mrs. Ann Jane Warnock, a sister; William McClelland, a brother; Mrs. Maria McCreary, a sister; Crozier McClelland, a brother; Robert George McClelland, a brother, and Lettie J. McClelland, wife.

"That said decedent left a will which has been duly admitted to probate herein, and that by the terms of said will the whole of the said estate is devised and bequeathed as follows: * * *

"That the petitioner herein, Lettie J. McClelland, is not entitled to any part of said estate and her said petition is hereby denied"

The decree of distribution entered on February 28, 1918, contains the following:

"That at said hearing of said petition, Lettie J. McClelland, the widow of deceased, appeared with counsel in opposition to the petition herein for distribution. That testimony, oral and documentary, was received, and the court finds that said Lettie J. McClelland and the deceased separated as wife and husband, and settled and adjusted all property rights between them by a contract in writing bearing date the 21st day of December, 1906, and that said Lettie J. McClelland is not entitled to participate in the distribution of this estate."

The following statement appears in the "Minute Entry" made on April 16, 1918:

"Petition to determine heirship denied on the ground that property settlement disposed of the widow to inherit."

No other mention was made of this matter by the court in its findings, orders, or decrees.

[1-3] Appellant contends, however, that—

"There can be but very little doubt that the agreement of settlement was signed by the appellant under duress and undue influence. Practically the only point on which the case was decided by the trial court was the point of laches, and the trial court held that too much time had been allowed to escape before appellant did anything in the matter. Since this is the point on which the trial court decided the case, I will confine myself to a discussion of the question of laches."

We are unable to understand the position of appellant in this matter, for the record discloses no such finding as here attributed to the trial court. Indeed, such a finding would not have been responsive to any issue in the proceedings. The petition to set aside the probate of the will, the petition to determine heirship, and the objection to the final account—the only proceedings taken by appellant in the matter—did not in any sense bring into issue the question of the validity of the agreement of settlement. This point could have been raised only in a direct proceeding attacking the validity of the instrument. And although the court, in hearing the petitions, and the objection to the final account, admitted evidence to the effect that appellant had signed the settlement agreement under duress and undue influence, it is not to be deduced from the findings that the settlement agreement was obtained by duress or undue influence and that, as contended by appellant, "the trial court held that too much time had been allowed to escape, before the appellant did anything in the matter." So far as anything appears to the contrary, the court may not have believed this testimony. We think from the finding that the appellant was not entitled to any part of the estate the court must have reached the conclusion that

the settlement agreement was valid—that it had not been obtained through duress or undue influence. Moreover, this conclusion finds direct support in the minute order entry:

"Petition to determine heirship denied on the ground that property settlement disposed of the widow to inherit."

It is further contended by appellant:

"That while a party may, by undue delay, lose his right to attack an instrument he signed under duress or undue influence, he never loses his right to defend himself against the instrument if the other party chooses to enforce the terms of said instrument."

In the absence of a specific finding that there was "duress or undue influence," this contention is without merit.

The decree is affirmed.

We concur: SHAW, J.; OLNEY, J.

MAHANA et al. v. ECHO PUB. CO. (L. A. 5231.)

(Supreme Court of California. Sept. 8, 1919.)

1. ESTOPPEL ¶110 — DEFENSE UNAVAILING ON FAILURE TO PLEAD.

In an action for libel, defendant publishing company's failure to plead an estoppel against plaintiffs, because the false information had been obtained through their agent, rendered the defense unavailable.

2. LIBEL AND SLANDER ¶121(1)—EVIDENCE OF INJURY TO BUSINESS INSUFFICIENT TO SUSTAIN VERDICT.

Verdict for \$1,500, recovered by insurance agents for libel against a publishing company, though reduced by the trial court to \$1,000, held grossly excessive; any injury to the agents' business having resulted more from the dishonesty of their local representative than from the libelous statement.

3. LIBEL AND SLANDER ¶9(9)—STATEMENT AS TO AN INSURANCE BUSINESS NOT LIBELOUS PER SE.

A statement of a publishing company in its newspaper that policy holders who had taken out policies through a firm of insurance brokers had been somewhat mystified by the receipt of cancellation notices for policies on the occasion of the disappearance of the broker's agent, when he was short in his accounts, held not libelous per se as to the brokers.

4. LIBEL AND SLANDER ¶86(4)—UNLESS ARTICLE IMPLIED DISHONESTY AND FINANCIAL IRRESPONSIBILITY, INNUENDO WOULD NOT DO SO.

Unless an article published by defendant in its newspaper was of such a nature that, in view of extrinsic facts alleged and proved, it conveyed to readers charges of dishonesty and

financial irresponsibility on the part of plaintiffs, the innuendo would not give it such sinister significance.

Department 2.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action for libel by George T. Mahana and Park A. Cooling, doing business under the firm name of Mahana & Cooling, against the Echo Publishing Company, a corporation. From a judgment for plaintiffs, defendant appeals. Reversed.

Wiley & Lambert, Kaye & Siemon, and W. W. Kaye, all of Bakersfield, for appellant.

Duke Stone, of Los Angeles, and Rowen Irwin, of Bakersfield, for respondents.

MELVIN, J. Plaintiffs, who are copartners, were awarded \$1,500 damages for an alleged libel. This verdict was reduced by the court to \$1,000. Defendant appeals from the judgment.

Mahana and Cooling were general agents for the Western Indemnity Company. The principal place of business of the copartnership was in Los Angeles. They had an agent at Bakersfield, one H. E. Weymouth. The defendant corporation publishes the Morning Echo, a newspaper of general circulation in Kern county and other counties in the state. On the morning of August 8, 1915, the following article, which is the basis of this suit, appeared in the said newspaper:

"Notices Mystify Policy Holders.

"Bakersfield policy holders of the Western Indemnity Company have been somewhat mystified during the past few days by the receipt of cancellation notices for paid policies, indicating that some kind of a financial tangle has arisen whereby they will be the losers. The cancellation notices have been sent out by Mahana & Cooling, F. E. Sherk, agent, Los Angeles.

"Col. H. E. Weymouth, who had charge of the Bakersfield office of the company, left the city several days ago, and it is reported that the insurance people have been endeavoring to locate him. It is said that premiums amounting to several hundred dollars, perhaps over \$1,000.00, have been involved in the investigation of the special agents of the insurance company.

"Colonel Weymouth, for several months in charge of the insurance department conducted by McManus & Son, real estate agents, opened an agency for himself in a location under the post office about six months ago. He was a hail-fellow-well-met and popular with the men about town."

That the part of the article following the first paragraph was substantially correct seems to be conceded by plaintiffs. Their representative had left the city a few days before the publication, and premiums amounting to several hundred dollars were involved in the investigation by special agents of the indemnity company, sent to

learn the truth about Weymouth's speculations.

The part of the article, therefore, upon which the judgment must be supported, if at all, is that charging that plaintiffs had sent out cancellation notices for paid policies. It is admitted by appellant that at the time of the publication of the article no such notices had been sent out. Plaintiffs admit that—

"In two or three instances after the publication of the article the plaintiffs did cancel policies on account of not having received the premium, and when they found that their agent had collected the premium, in every instance the policies were reinstated."

Appellant's first contention is that plaintiffs were estopped by the conduct of their agent from complaining of the publication of the supposed fact that cancellation notices had been sent out. There was testimony to the effect that one of defendant's reporters, who had a policy of insurance issued by the Western Indemnity Company, had received a notice a few days before the publication of the article in the Echo to the effect that if his premium should not be promptly paid his policy would be canceled. He showed this letter to Mr. Sinclair, a local agent, who had been representing plaintiffs after Weymouth's departure. According to the testimony of Mr. Gill, the reporter, Mr. Sinclair said:

"There's a lot more of them have had their policies canceled, and will have them canceled."

[1] Mr. Sinclair denied any recollection of such a remark, but admitted that, when Mr. Gill spoke of the cancellation of his policy, a Miss Meyer, who was present, said: "Yes one of my policies has been canceled, too." He also said that neither he nor Miss Meyer explained that her policy had not been issued by the Western Indemnity Company. Acting upon the information received from Mr. Sinclair and Miss Meyer, the reporter wrote that part of the article relating to cancellations, and appellant insists that, the false information having been obtained through the agent of respondents, or in his presence, the plaintiffs are estopped from asserting that they were injured by its publication. Respondents answer that estoppel was not pleaded, and deny that the introduction of the evidence at the trial waived such pleading, because the matter was properly introduced not to show estoppel but good faith on the part of the publisher. This position is well taken. The failure to plead estoppel makes that defense unavailable now.

[2] But the judgment must be reversed because the amount of damages is grossly excessive. If plaintiffs were injured in their business in and around Bakersfield, it is obvious that the dishonesty of their local representative must have done more to bring about that result than the mere erroneous statement that policies upon which the premiums

were paid had been canceled—a statement which would have been true if made a few days later. Therefore, the judgment, even if it have any basis in the false statement regarding the cancellation notices, is too large.

[3] When they became suspicious of Weymouth, plaintiffs sent to Bakersfield agents who interviewed many holders of policies issued by the Western Indemnity Company, so that they might learn the extent of Weymouth's embezzlements. They must have known that such a course would probably result in the publication of the story of his dishonesty. They must have been aware that such publication would result in temporary diminution of their local business; but they must have known, also, that the printing of the facts about Weymouth's crimes would not be libelous. The offense was one committed, not only against his employers, but against the people of the state; hence the publication was a matter of interest to every citizen. The false statement that policy holders had been "somewhat mystified" by the receipt of "cancellation notices for paid for policies" was not libelous per se, and the elaborate innuendo of the complaint does not make it a libel. An insurance company that has not received the premiums due on a policy may usually give notice that unless the amount due is promptly remitted the policy will be annulled, and there was nothing to show that the notices indicated by the article would be different from those ordinarily sent to delinquent policy holders. There was nothing in the published article which would convey to the reader the idea that plaintiffs intended to profit by the rascality of Weymouth by the actual cancellation of policies for which the holders had paid the premiums to him, unless such implication is to be found in the words "indicating that some kind of a financial tangle has arisen whereby they will be the losers." But these words do not necessarily imply either sinister motives of the agents or that the loss would be of the amount paid on the policies. A policy holder would be to some extent a loser, if compelled to go to the trouble and expense of proving that as matter of fact he had paid a premium which had been embezzled by the agent of the insuring company. A cancellation notice coming to a man who owed nothing to the insurance carrier would naturally mystify him, and would indicate that some kind of a financial tangle had arisen. The words are not libelous per se, and there is nothing in the record to indicate that by the printing of the article defendant conveyed to the public the idea that Western Indemnity Company and plaintiffs "were in bad financial condition, and were not responsible under their policies, and were dishonest in their dealings with policy holders, and in general were unreliable."

[4] Unless the article was of such a nature

that in view of extrinsic facts alleged and proved it conveyed to the readers of the newspaper charges of dishonesty and financial irresponsibility of plaintiffs, of course the innuendo will not give it that sinister significance. *Mellen v. Times-Mirror Co.*, 167 Cal. 587, 140 Pac. 277, Ann. Cas. 1915C, 766. We find nothing in the record which shows that the statements in the article were understood in any sense beyond their literal import.

We are of the opinion that the portion of the publication which was false is not libelous, and has no tendency to hold plaintiffs up to shame or to injure them in their business. In this connection it is to be noted that the insurance company is not a plaintiff. If any losses were to fall upon policy holders, the repudiation of liability would necessarily be that of the insurer. The insinuation that those receiving cancellation notices might be "losers" is, therefore, one which in the most serious aspect would be injurious to the insurer rather than to the agents.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.

POST v. CITY AND COUNTY BANK et al. (L. A. 4884.)

(Supreme Court of California. Sept. 8, 1919.
Rehearing Denied Oct. 6, 1919.)

1. PRINCIPAL AND AGENT ⇨106—AUTHORITY TO PAY NOTE NOT OSTENSIBLE AUTHORITY TO RECEIVE COLLATERAL.

Where stockholder, upon request of president of corporation, gave bank note to secure loan to corporation, the president was not stockholder's ostensible agent to receive the collateral upon payment of note, though president had theretofore made partial payment on note and secured extension thereof, since bank should have assumed that president, in making such payment, acted for himself and corporation and not for stockholder, and since authority to make partial payment, even if it did exist, did not, under Civ. Code, §§ 2300, 2317, create ostensible authority to receive the collateral.

2. APPEAL AND ERROR ⇨931(1)—CONFLICTS IN EVIDENCE RESOLVED IN FAVOR OF FINDINGS.

In determining whether there is evidence to support findings, Supreme Court will resolve all conflicts in the evidence in favor of findings.

3. PRINCIPAL AND AGENT ⇨106—AUTHORITY TO PAY NOTE NOT OSTENSIBLE AUTHORITY TO RECEIVE COLLATERAL.

That one has been given authority to make payment on note does not, under Civ. Code, §§ 2300, 2317, make him the maker's ostensible agent to receive security deposited with payee.

4. PRINCIPAL AND AGENT \Leftrightarrow 99—PRESUMPTION OF AUTHORITY MUST BE BASED ON SIMILAR ACTS.

When authority is deduced from recognition of certain acts, it must be limited to the presumption of other acts of the same general kind, and cannot be extended to acts of a wholly different nature.

5. PRINCIPAL AND AGENT \Leftrightarrow 106 — PRINCIPAL LIABLE FOR WANT OF DUE CARE OF AGENT.

Where stockholder's note, given bank to secure loan to corporation, provided that the collateral should be returned to stockholder, bank, in delivering collateral to president of the corporation upon president's payment of note without a written order from stockholder, or communicating with stockholder before so doing, failed to exercise ordinary care within Civ. Code, § 2334, making principal bound by acts of agent under ostensible authority where person without want of ordinary care has incurred a liability, or parted with value upon faith thereof.

6. PRINCIPAL AND AGENT \Leftrightarrow 106—PAYEE ON PAYMENT BY AGENT OF MAKER'S NOTE LIABLE FOR DELIVERING COLLATERAL TO AGENT.

Where one who had previously made partial payment on note purported to be maker's agent, and in paying up note claimed to have authority to receive the collateral, payee, in reposing confidence in purported agent and in delivering collateral without ascertaining whether he in fact had authority, is liable for loss upon purported agent's conversion of collateral, under Civ. Code, § 3543.

Department 1.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by C. H. Post against the City and County Bank, Bank of Italy, Irving S. Metzler, J. B. Hedrick, and A. M. Allison. Judgment for plaintiff against last two named defendants, and for other defendants against plaintiff for costs, and from judgment and from order denying motion for new trial plaintiff appeals. Reversed, and new trial ordered.

John R. Weber and C. C. Mishler, both of Los Angeles (Julius V. Patrosso and J. F. Keogh, both of Los Angeles, of counsel), for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondents.

LAWLOR, J. This is an action for damages for the conversion of two trust deed promissory notes of the United Oil Company, Nos. 706 and 707, owned by the plaintiff. He recovered judgment against defendants, J. B. Hedrick and A. M. Allison for the sum of \$1,700. The defendants City and County Bank, Bank of Italy, and Irving S. Metzler, vice president and stockholder of the former bank, were given judgment against plaintiff

for their costs. A motion for a new trial on behalf of plaintiff was interposed and denied. The appeal is from the judgment and order in favor of the defendant banks only.

Plaintiff was a stockholder in the Panama Oil Company, and on March 13, 1913, while in the office of that company, the president, J. B. Hedrick, asked plaintiff to lend the Panama Oil Company \$1,000, offering the note of the company, indorsed by himself, for the amount. Post stated that he did not have the money to lend, whereupon Hedrick informed him that if he would execute and deliver a note for \$1,000 to the City and County Bank, and deposit as collateral for the amount the two said trust deed promissory notes of the United Oil Company, the bank would make the loan. Post finally assented to the proposition. Accordingly, on March 13, 1913, Post executed and delivered to the bank his note for \$1,000, due 30 days from date, and delivered the two said promissory notes to the bank as collateral security, the note containing the provision that on the payment thereof the security was to be returned to Post. The bank was instructed by Post to place the \$1,000 to the credit of the Panama Oil Company. On the same day Post was given a note for \$1,000 for the same period by the Panama Oil Company, indorsed by Hedrick, personally. Prior to this time, Hedrick had attempted to borrow \$1,000 from the same bank, on behalf of the Panama Oil Company, but it had refused to lend the money without security, stating that if he could get collateral the loan would be made. The court stated in an opinion, which appears in the transcript, that Post borrowed the \$1,000 at the instigation of Hedrick, and that there had been a close business intimacy between them for a considerable period prior to March 13, 1913.

There is a conflict in the evidence as to who accompanied Post to the bank to negotiate the loan. Post, Antonia C. Fritsch, stenographer, and C. F. Spillman, bookkeeper, of the Panama Oil Company, all testified that Spillman accompanied Post to the bank, while Hedrick and Irving S. Metzler testified that Hedrick accompanied Post. On this question of fact the court made no finding. Post, on being notified in writing by the bank when his note would fall due, went to the office of the Panama Oil Company, and demanded of Hedrick payment on the note which the company had executed and delivered to him. He was informed by Hedrick that the company could not at that time pay the note, but that it would pay the accrued interest.

Some time in April, 1913, the Panama Oil Company levied an assessment on its capital stock of $1\frac{1}{2}$ cents per share. It was agreed

that the assessment on Post's 20,000 shares, amounting to \$300, should be credited on the note which he held against the company. The court found that prior to February 11, 1915, the Panama Oil Company paid Post \$400 upon its promissory note to him for \$1,000. Post was again notified in writing by the bank on June 6, 1913, that his note must be paid. He at once made demand on Hedrick that the Panama Oil Company's note be paid. At this time it was arranged between Post and Hedrick that \$300 be raised as part payment on the note so as to secure an extension thereof. The partial payment was accordingly made by Hedrick. There is a conflict in the evidence as to how Hedrick came to make the payment, Hedrick testifying that he was directed to do so by Post, and the latter's version being that "it was by Mr. Hedrick's request that caused me to allow Mr. Hedrick to take my money to the bank." The court found that Hedrick was authorized by Post to make the payment, which was made up of Post's check for \$140, a check of the Panama Oil Company for \$100, and two interest coupons, amounting to \$60, taken from the collateral at the bank. Hedrick returned to Post a receipt for \$240, which contained the statement that the time of the note had been extended to June 20, 1913. Later, another extension was granted to Post until September 13th, following. Post testified that there were six or eight extensions in all.

On September 6, 1913, before the expiration of the last extension on the note, Hedrick, accompanied by A. I. Allison, a stockholder in the two oil companies who was known at the bank, went to the bank, and Allison, at the direction of Hedrick, paid the balance of \$700 due upon the Post note. Upon the further direction of Hedrick the bank delivered the collateral to Allison. There is a sharp conflict in the testimony of Post and Hedrick as to whether the former knew in advance that this was to be done, but the court found that the \$700 was paid and the collateral surrendered to Allison without the knowledge or consent of Post. The court found that neither Hedrick nor Allison ever had any authority from Post to make the payment or receive the security. Metzler represented the bank in this transaction. He testified that Hedrick and Allison came into the bank and Hedrick said:

"Mr. Post has authorized you to deliver—Mr. Post has authorized Mr. Allison to pay his note, and you are to deliver the collateral notes to Mr. Allison. * * * Mr. Post does not want the collateral delivered to me because he has more confidence in the financial responsibility of Mr. Allison."

Upon this representation being made Allison gave his check to the bank for \$2,527, \$700 being for the Post note and the balance on account of other business he had with

the bank. Metzler testified further that on this occasion he requested Hedrick to get an order from Post authorizing the bank to surrender the collateral; but that he was satisfied to deliver it without written authorization because Hedrick had been handling the matter for Post. According to Hedrick's testimony Post first learned of the liquidation of the note and the surrender of the security and made demand on Hedrick and Allison for them on September 9, 1913, but Post and Metzler testified and the court found that Post went to the bank on January 10, 1914, and informed Metzler that he had come to take up the note. Metzler replied that the balance on the note had been paid by a check from Allison, and that the collateral had been surrendered to him at the direction of Hedrick. Post answered that he had given no authority to Hedrick or Allison to pay the note and receive the security. Metzler said that he would get in touch with Hedrick at once. Later Post made a formal tender to the bank of the balance of \$700 due on the note, and demanded his collateral. On September 11, 1913, the bank was consolidated with the Bank of Italy, and upon the refusal of the latter bank and the other defendants to return the collateral to Post they were made parties defendant to this action.

The court found that Hedrick, "for and under the instructions of and as the agent and representative of plaintiff," was authorized on June 6, 1913, to pay the defendant City and County Bank, to apply on plaintiff's note, the sum of \$300; that on September 6, 1913, J. B. Hedrick and A. M. Allison went to the City and County Bank, and J. B. Hedrick, acting as the ostensible agent of plaintiff, caused A. M. Allison to draw his check for the sum of \$700 and deliver it to the said bank, and directed the said bank to deliver to A. M. Allison the said trust deed promissory notes, and the said bank thereupon so delivered said notes.

Thus, according to the findings, Hedrick, in making the partial payment of \$300 on the note on June 6, 1913, was the actual agent of Post, and in causing Allison to draw his check for \$700 on September 6, 1913, and in directing the bank to deliver over to Allison the collateral, he was the ostensible agent of Post. There are no findings on the evidence of extensions secured from the bank by Hedrick, the number of extensions not being definitely shown by the record, nor of the circumstances attending the negotiations for and the execution and delivery of the note by Post.

Appellant urges four grounds for a reversal of the judgment: (1) That the evidence shows that Hedrick was not the agent, actual or ostensible, of the appellant, and thus not authorized to receive appellant's collateral, and that appellant is not estopped

to deny the authority of Hedrick to receive said securities from the bank; (2) that, considering Hedrick at one time possessed authority to deal with the bank in regard to the note, the bank had notice that said authority had ceased, and that neither Hedrick nor Allison were authorized to receive said securities; (3) conceding Hedrick to have been the agent of plaintiff for the purpose of obtaining and drawing the securities from the bank, Allison was not the agent for that or any other purpose, and Hedrick had no power, actual or implied, to delegate his authority to Allison or to any one else; (4) that in view of the undisputed evidence, the defendant City and County Bank, as pledgee, did not exercise reasonable care in delivering plaintiff's securities to Allison.

[1, 2] We are of the opinion that Hedrick was not the ostensible agent of Post for the purpose of directing the bank to give the collateral to Allison. As we have seen, there are only two findings of fact from which such authority could have been inferred, namely, the finding that on June 6, 1913, plaintiff authorized defendant Hedrick to make the \$300 part payment on the note, and the further finding that on September 6, 1913, Hedrick, "acting as the ostensible agent of plaintiff, directed the City and County Bank to deliver to said A. M. Allison the said trust deed and promissory notes," and that thereupon the bank delivered to Allison the said notes. However, we will consider all of the evidence contained in the record having any tendency whatever to support the finding of ostensible agency, resolving all conflicts in the evidence in favor of the finding. It appears then that Hedrick accompanied Post to the bank and introduced him there at the time he secured the loan, which loan was placed to the credit of the Panama Oil Company at the direction of Post. It also appears that prior to this Hedrick had applied to the bank for a loan of \$1,000 and had been refused because he had no collateral to offer, but was told that he could have the loan if he would furnish security. It also appears that at this time the Post securities were mentioned, and that Metzler told Hedrick that if he could induce Post to sign a note and put up the two \$1,000 notes of the United Oil Company as collateral the bank would make the loan. It also appears that the bank sent notice to Post when the note was due, and later sent other urgent notices to him to pay the note, and that in response to such notices Hedrick applied to the bank for extensions, which were granted. It also appears that Hedrick paid \$300 to the bank on June 6, 1913. From the foregoing we think it must be held that at the time Post applied for the loan and directed that it be placed to the credit of the Panama Oil Company, whether Hedrick was present or not, the bank knew that Post was ac-

commodating the company and Hedrick. Hence, when Hedrick made the partial payment and secured the extensions the bank should have reasonably assumed that he was acting in behalf of himself and the company rather than as the representative of Post. So it seems to us that the only reasonable deduction that could have been made from these facts was that Hedrick was doing what he did, not because Post had made him his agent, but because he had induced Post to lend his credit to the company. But even if this be not a proper deduction, and the finding of the court that Hedrick was the agent of Post on June 6, 1913, is to be accepted as conclusive, yet we are convinced that the finding of ostensible agency in Hedrick to secure possession of the collateral cannot be supported upon any theory.

The Civil Code provides:

"Sec. 2300. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

"Sec. 2317. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

[3] Hedrick in directing that the bank deliver the security to Allison acted entirely outside of the scope of authority which the bank was justified in assuming that he possessed. The law on this point is stated in 2 Corpus Juris, page 464, as follows:

"The person sought to be bound must, by his words or conduct, have represented that the person assuming to act for him had authority to do so. Accordingly, an estoppel does not arise from the mere fact that the agent has acted for the principal on one or more previous occasions, but not under appearance of a general authority so to act, nor does the rule in question apply to acts of the agent outside of the scope of authority which the principal has caused him to seem to possess."

[4] The other acts of Hedrick, even if acquiesced in by Post, were not of the same general nature as gaining possession of the collateral; hence Hedrick cannot be held to be the ostensible agent of Post for that purpose. As is said in Mechem on Agency (2d Ed.) vol. 1:

"It must, moreover, be kept in mind that when authority is deduced from recognition of certain acts, it must be limited to the presumption of other acts of the same general kind, and cannot be extended to acts of a wholly different nature."

It is also declared in Story on Agency (8th Ed.) § 87, p. 110:

"If the agency arises by implication by numerous acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of the like nature."

See, also, *Robinson v. Nevada Bank*, 81 Cal. 106, 22 Pac. 478; *Consolidated Bank v. Steamship Co.*, 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85; *Mitrovich v. Fresno, etc., Co.*, 123 Cal. 383, 55 Pac. 1064.

This act of Hedrick cannot be regarded as of the same general kind or nature as his other dealings with the bank in relation to the note. In other words, making a partial payment, securing extensions, and even causing the final payment to be made are very different transactions from that of directing the bank to surrender the security. Upon no conceivable hypothesis can a logical relation be established between these acts and the act of Hedrick in directing the surrender of the collateral to Allison.

[5] It is insisted on behalf of Post that when Hedrick directed the bank to deliver the collateral to Allison because Post had more confidence in the financial responsibility of Allison than he had in that of Hedrick, any authority theretofore vested in the latter was thereby terminated. It is further contended that this constituted an attempt to delegate delegated authority. But without regard to these contentions the finding of the court that the bank was justified in giving the security to Allison cannot be upheld. Section 2334 of the Civil Code reads:

"A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value upon the faith thereof."

The good faith of the bank is not to be questioned, but there can be no escape from the conclusion that it did not exercise ordinary care in the premises. The truth is the bank was victimized by Hedrick and Allison, not because of the conduct of Post, but because of the negligence of the bank through Metzler. As already stated, the court found that what was done on September 6th was without the knowledge or consent of Post. The note contained the provision that the collateral was to be returned to him. This, in itself, it seems to us, imposed upon the bank, in the exercise of ordinary care, the duty of securing a written order from Post, or of communicating with him before delivering the security. In addition to this, it is to be borne in mind that the bank had refused to make the loan to Hedrick. A situation was thus presented to the bank which called for prudent and well-considered action, and consequently it was a further act of negligence on the part of the bank to indorse the collateral in blank instead of to the order of Post.

[6] But it is also urged that as Post had employed Hedrick as his agent, under the

rule stated in section 3543 of the Civil Code, Post should be the sufferer. That section reads:

"Where one of two innocent persons must suffer by the act of the third, he, by whose negligence it happened, must be the sufferer."

It is said in *Mechem on Agency* (2d Ed.) vol. 1, § 749, p. 531, that "he who reposed confidence in the wrongdoer must bear the loss." The bank reposed confidence in Hedrick, not, in our opinion, because of his previous dealings with the bank in relation to the note, but rather for the reason that Allison figured in the transaction. That was the genius of Hedrick's scheme. It is evident that Allison had financial responsibility, and in this connection it is to be remembered that he paid to the bank at the same time some \$1,800 on account of other business he had with it. We think it altogether unlikely that the bank would have trusted the security to Hedrick. If it had been willing to do so, the security would have been indorsed to Post. In other words, the bank reposed confidence in Hedrick's representations as to the collateral, principally, or entirely, because it was to be given to Allison, and, of course, Post is not to be charged with Allison's connection with the fraudulent transaction. Because Metzler failed to do any one of three things the bank was negligent in surrendering the collateral—Hedrick's representations should have been verified, or if this was not done a written order should have been insisted upon, or if neither of these things was done the security should have been indorsed to Post. Under no conceivable theory can it be maintained that the bank through Metzler exercised ordinary care in parting with the collateral. It is plain that when Metzler first learned that the security had been obtained through fraud he realized that the bank was at fault, for he said to Post, according to the latter's version, which is not denied by Metzler:

"Well, I will get busy. * * * Mr. Post, we will get right after this and see that it is fixed up."

Post replied:

"All right, Mr. Metzler, I will depend upon you to do that."

For the foregoing reasons, we think the evidence does not justify the finding of the trial court that Hedrick was the ostensible agent of plaintiff for the purpose of withdrawing the security. The judgment and order are reversed, and a new trial ordered as to the defendant banks.

We concur: OLNEY, J.; SHAW, J.

HOUSE v. PIERCY. (S. F. 8751.)

(Supreme Court of California. Sept. 11, 1919.
Rehearing Denied Oct. 9, 1919.)

1. PLEADING ⇨129(1) — ALLEGATIONS IN COMPLAINT ADMITTED BY FAILURE TO DENY.

Allegation of complaint is admitted by defendant's failure to deny it in the answer.

2. VENDOR AND PURCHASER ⇨3(1)—MEASURE OF DAMAGES ON BREACH OF CONTRACT TO SELL LANDS AND DIVIDE PROCEEDS DETERMINED.

Contract whereby one party agreed to advance to other party who was owner of interest in land certain sum of money wherewith to buy other interests and discharge incumbrances, and second party agreed to repay advancement after selling property and divide remainder with first party, was not one for the conveyance of an estate in real property to which the special measure of damages for breach prescribed by Civ. Code, § 3306, would be applicable; but section 3300, as to damages from breach of contract, would apply.

3. CONTRACTS ⇨324(1)—ON BREACH PARTY MAY SUE FOR MONEY PAID OR FOR DAMAGES.

Upon refusal of a party to perform a contract, the other party, who has paid money thereunder, may either treat contract as rescinded and sue to recover the money, or may elect not to acquiesce in rescission, and sue for damages for the breach, but cannot do both.

4. CONTRACTS ⇨272 — PARTY ON BREACH RECOVERING MONEY ADVANCED CANNOT RECOVER DAMAGES.

Plaintiff, suing in one count for money advanced under a contract and in another count for damages for breach of contract, by accepting amount advanced with interest in full satisfaction of demand based on cause of action of first count exercised his right of rescission, and terminated the contract, and cannot thereafter recover on second count for breach thereof.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. E. House against Andrew J. Piercy. Judgment for defendant, and plaintiff appeals. Affirmed.

R. C. McComish, of San Jose, for appellant.

Perry Evans, of San Francisco, for respondent.

ANGELLOTTI, C. J. [1] In February, 1917, plaintiff's assignor, Will M. Beggs, and defendant, Andrew J. Piercy, entered into a written contract. This contract substantially provided that Beggs would advance to Piercy \$25,000 for the purpose of buying the interests of the owners other than himself of a tract of land in Santa Clara county, known as the David J. Piercy ranch; that

Piercy would use this sum for the purchase of such interests, and would purchase such interests and discharge all liens and incumbrances thereon, and "hold the same," together with his own interest therein, "for the joint benefit of himself and Will M. Beggs, and that Will M. Beggs and defendant were to have equal interests in and to the whole of said property." The said sum of \$25,000 was to be repaid to Beggs "out of the first proceeds of any sale of said property, or any portion thereof, and the remainder was to belong to defendant and Will M. Beggs in equal shares." This was substantially the contract as alleged in the complaint, and admitted by failure to deny in the answer. The contract itself was not introduced in evidence. Beggs advanced to defendant on account of the \$25,000 the sum of \$1,070, and was at all times "ready, willing, and able to carry out all his part of the contract." Within two months of the entering into the contract defendant notified Beggs in writing that he refused and would refuse to perform his part of the contract, claiming that he was sick at the time he signed, and did not understand the terms. Beggs immediately assigned any right of action he had against Piercy to plaintiff, and this action was commenced April 11, 1917.

The complaint was in two counts. The first was for the sum of \$1,070, alleged to have been received by defendant from Beggs "to and for the use of" Beggs, the return of which had been demanded by Beggs, and which still remained unpaid. The second count stated a cause of action for damages for breach of the contract, specifically alleging that the contract was entered into "as a part of the same transaction, wherein and from which defendant received the money mentioned in the first cause of action herein," and among other things alleged the advancement of said \$1,070; that the real property, free and clear of incumbrances, was at all times of the value of \$40,000, and that plaintiff and Beggs had been damaged by defendant's failure to perform in the sum of \$7,500, for which amount judgment was claimed. The answer, filed October 28, 1917, by reason of failure to deny, admitted the allegations of the first count except the allegation of assignment, and all the allegations of the second count except those as to the value of the property, the damage suffered, and the assignment, all of which were effectively denied.

During the trial, which occurred in February, 1918, the court allowed defendant to file a supplemental answer, alleging the payment by defendant to plaintiff on November 26, 1917, of the \$1,070 mentioned in the complaint, \$55.25 interest on said sum from the time it was advanced by Beggs to defendant,

and \$20.50 as the amount claimed to have been expended by the plaintiff as his costs in the action. It was expressly stated by counsel for plaintiff that he had no objection to the filing of his answer in so far as it went only to the first cause of action. He did object to a further allegation contained therein to the effect that the amount was received by plaintiff "in satisfaction of all indebtedness of the defendant to the plaintiff," but there was no finding as to this, and our view of the case is such that the allegation may be entirely disregarded. At the opening of the trial plaintiff's counsel admitted the satisfaction of the first cause of action, as follows:

"There are two causes of action, the first of which, by reason of the payment of the amount involved, has been settled, and we are not concerned with it here."

Upon the trial it was admitted by counsel for plaintiff that the \$1,070 referred to in the second count was the same \$1,070 referred to in the first count. Upon the trial proof of the payment was made as alleged.

The findings are in accord with the allegations of the second cause of action of the complaint, except that there is no finding as to the value of the property, and, further, damaged in any sum whatever by the other, that neither plaintiff nor Beggs had form his part of the contract. The court failure and refusal of defendant to per-further found that the defendant on November 26, 1917, made the payment to plaintiff alleged in the supplemental answer. Upon these findings, judgment was given for defendant.

We have an appeal by plaintiff from this judgment.

Plaintiff claims that he was entitled to a judgment for the amount of profit he would have realized if the agreement had been performed, which he says is one-half of the difference between the \$25,000 he was to pay and the actual value of the property, alleged to be \$40,000. The failure of the court to find upon the issue of value of the property he assigns as prejudicial error. Defendant's position appears to be that the contract here was one for the conveyance of an estate in real property within the meaning of section 3306, Civil Code, and that the special measure of damage prescribed by that section is applicable here. That section declares:

"The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

[2] Defendant says that bad faith was neither alleged nor proven here, and that, consequently, the value of the land is an immaterial matter, and the lack of finding without prejudice. Consideration of the contract as alleged forces us to the conclusion that the agreement was not one for the conveyance of real property to Beggs. The reasonable construction is that there was not to be any conveyance to Beggs, but that Piercy, holding all of the same for the joint benefit of both, each having an equal beneficial interest therein, the same was to be sold, Beggs was to be repaid \$25,000 out of the first proceeds, and the remainder of the proceeds was to be divided equally between the parties. Section 3306, Civil Code, we think, has no application. If this be so, section 3300, Civil Code, prescribes the measure of damage applicable, which would in his action for damages for breach of contract entitle plaintiff to the profit he would have realized.

[3, 4] Notwithstanding all this, it is entirely clear, in view of the record, that plaintiff was not entitled to recover. The record demonstrates that the \$1,070, referred to in the statement of the second cause of action as advanced by Beggs to defendant on the contract is the same \$1,070 sought to be recovered as money had and received by the first cause of action. The two causes of action rest upon different and inconsistent theories: The first upon the theory that the contract between the parties is terminated, the plaintiff electing upon defendant's repudiation to treat the contract as rescinded and to bring action for the money he has advanced as being money for which he has received no consideration; the second, upon the theory that the contract is still in force, the plaintiff electing not to acquiesce in a rescission and to maintain an action on the contract for damages for the breach. It is thoroughly settled in this state that a party to a contract may pursue either of these courses, but that he may not recover on both. This whole matter has been so recently discussed by this court in the opinions filed in *Lemle v. Barry*, Sac. No. 2751, 183 Pac. 150, as to render extended discussion unnecessary here. See, in addition to cases cited in these opinions, *Walsh v. Standart*, 174 Cal. 810, 164 Pac. 795; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 64, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; *Alderson v. Houston*, 154 Cal. 10, 96 Pac. 884; *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 677, 681, 34 Pac. 497. In the case at bar the plaintiff stated these two inconsistent causes of action in one complaint, and, of course, there was nothing in the nature of an election of remedies apparent from the complaint. But when, some time prior to the trial, he accepted full satisfaction of the demand based on the first cause of action, he effectually and finally exercised his right of

rescission and terminated the contract for all purposes. The situation was not materially different from the situation that would have existed had he brought two separate actions, instead of stating the two causes of action in one complaint and had carried the one based on the rescission theory to judgment. As said by Mr. Justice Shaw in his concurring opinion in *Lemle v. Barry*, supra:

"But if the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by a breach of its covenants."

The whole basis of the action, in so far as it was one on the contract for damages for the breach, was destroyed by the enforcement of the claim based on the first cause of action, and thenceforth there could be no recovery on the contract. Unlike the case of *Lemle v. Barry*, supra, the record here does fully show the facts material to this question. Indeed, all that is necessary is shown by the pleadings and the findings of the trial court. In view of the condition of the pleadings and the findings as to the payment, the judgment for defendant was the only judgment that might properly be given, even though perchance it may have been given upon some other theory than the one we have discussed.

The judgment is affirmed.

We concur: OLNEY, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

ANAHEIM SUGAR CO. v. ORANGE COUNTY et al. (L. A. 4594.)

(Supreme Court of California. Sept. 3, 1919.)

1. HIGHWAYS \S 121—UNDER STATUTE, TAX FOR ROAD IMPROVEMENT FOR PERMANENT ROAD DIVISIONS GENERAL TAX.

Intent to make the tax for a road improvement provided for in Pol. Code, §§ 2745-2773, as to permanent road divisions, a general tax, held clear; the burden being imposed on all property, real and personal, in the district, according to its value, whereas special assessments can be levied only on the specific property benefited, and on the basis of special benefit.

2. HIGHWAYS \S 121—LEGISLATIVE INTENT THAT TAX FOR ROAD IMPROVEMENT SHALL BE GENERAL TAX CONTROLS.

The legislative intent that the tax provided for in Pol. Code, §§ 2745-2773, as to permanent road divisions, on the property in such a division, for highway improvements therein, shall be a general tax, rather than a special assessment, controls.

3. CONSTITUTIONAL LAW \S 283—HIGHWAYS \S 122—GENERAL TAX FOR ROAD IMPROVEMENTS NOT TAKING OF PROPERTY WITHOUT DUE PROCESS.

The tax under Pol. Code, §§ 2745-2773, as to permanent road divisions, on the property in a division, for highway improvements therein, being a general tax, does not amount to a taking of property without due process, because not in proportion to benefits.

4. HIGHWAYS \S 90—COUNTY OFFICIALS, FOR LEVYING TAX FOR HIGHWAY IMPROVEMENTS, ACT IN THEIR CAPACITIES AS SUCH.

In levying, collecting, and holding a tax for highway improvement under Pol. Code, §§ 2745-2773, as to permanent road divisions, county officials act in their capacities as such, and not as ex officio officers of a corporate entity separate from the county; there being no provision that road divisions shall have corporate existence, and no necessity for implying such existence, the whole tenor of the act indicating that a road division was regarded merely as a territorial subdivision of the county for purpose of a county tax for road improvements in the district.

5. HIGHWAYS \S 128—COUNTY ONLY PROPER DEFENDANT TO RECOVER HIGHWAY TAX PAID UNDER PROTEST.

The tax under Pol. Code, §§ 2745-2773, as to permanent road divisions, being essentially a county tax for a special purpose, the county is the only proper defendant to action to recover such a tax paid under protest.

6. COUNTIES \S 57 — ACTION OF COUNTY BOARD COLLATERALLY ATTACKED ONLY FOR EXCESS OF JURISDICTION.

Action of a county board of a judicial or quasi judicial nature may be collaterally attacked only on the ground of excess of jurisdiction.

7. HIGHWAYS \S 90—PUBLICATION OF LAND-OWNERS' PETITION FOR ROAD DIVISION NECESSARY TO ACTION BY COUNTY BOARD.

Under Pol. Code, §§ 2745-2773, as to permanent road divisions, presentation and publication of a sufficient petition prepared by land-owners in the proposed division, giving its boundaries, so that it may be determined therefrom what lands are included, is indispensable to hearing and action thereon by the county board of supervisors.

8. HIGHWAYS \S 90—IN PETITION FOR ROAD DIVISION, WORDS "EAST" AND "WEST" MEAN DUE EAST AND DUE WEST.

In the absence of other words qualifying their meaning, the words "east" and "west," in a petition under Pol. Code, §§ 2745-2773, for formation of a permanent road division, describing boundaries by courses and distances, mean due east and due west.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, East; West.]

9. HIGHWAYS \S 90 —MAP ATTACHED TO PETITION FOR ROAD DIVISION CONTROLS AS TO BOUNDARIES.

The description by courses and distances in a petition under Pol. Code, §§ 2745-2773, of the

boundaries of a proposed permanent road division, being followed by statement that the boundaries are more particularly shown by an attached map, to which reference is hereby made, and such map deviating materially from the description by courses and distances, the map under Code Civ. Proc. § 2077, controls, so that, neither it nor the courses or distances indicated therein being published with the petition, publication was insufficient to give the county board of supervisors jurisdiction.

10. HIGHWAYS ⇨90—PUBLICATION OF PETITION FOR ROAD DIVISION INSUFFICIENT.

There was not the necessary publication of the petition for establishment of a permanent road division, under Pol. Code, §§ 2745-2773, to give the board of county supervisors jurisdiction to act thereon, where the attached map containing the controlling showing of boundaries was not published, and thereafter there was published merely a notice that a petition, with incorrect statement of boundaries, had been presented, and that description in the notice was correct.

11. HIGHWAYS ⇨90—TAX INVALID WHERE DESCRIPTION IN SUPERVISORS' RECORD VARIES FROM THEIR FINAL ORDER.

The record of the board of county supervisors on the final hearing for establishment of a road division, required by Pol. Code, § 4039, to be made, having contained a description of an altogether different parcel of land from that included in the division by the board's final order, such error was fatal to the tax voted by the electors; they having a right to rely on the record, and not being bound to corroborate it by examination of the board's files.

12. HIGHWAYS ⇨127(1)—ON ELECTION ON SPECIAL TAX FOR IMPROVEMENTS, PRECINCTS NEED NOT BE ESTABLISHED NINETY DAYS PRIOR THERETO.

Pol. Code, § 2756, providing that elections to vote on a special tax for highway improvements in a road division shall be held in all respects as nearly as practicable in conformity with the general election laws, held not to require that election precincts be established 90 days before the election, as required by section 4041, subd. 3, in case of a general election.

13. HIGHWAYS ⇨127(1) — NOTICE FOR SPECIAL TAX ELECTION FOR IMPROVEMENTS SUFFICIENT.

It appearing from the notice of election, stating purpose of election to be to determine whether a special tax should be levied to be raised in one, two, and three successive years, that the election was to be held under the Road Division Act, omission to state what proportion was to be raised in any given year was immaterial; Pol. Code, § 2754, providing the proportion to be raised in each year.

14. HIGHWAYS ⇨127(1)—FAILURE TO KEEP POLLS OPEN STATUTORY TIME MUST BE SHOWN HARMLESS.

The polls for a special tax election for a road division, which Pol. Code, § 2756, requires to be held in all respects as nearly as practicable in conformity with the general election, having been kept open only from 8 a. m. to 4 p. m.,

while the requirements of section 1160, as to general elections, is from 6 a. m. to 7 p. m., the deviation is great, requiring one seeking to uphold the election to show affirmatively that the result was not affected thereby.

15. HIGHWAYS ⇨128—GENERAL SCHEME FOR RECOVERY OF TAXES PAID UNDER PROTEST APPLIES TO SPECIAL HIGHWAY TAX.

Pol. Code, § 2759, providing that the special tax for improvement of highways in a road division shall be computed and collected in the same manner as state and county taxes, incorporates into the Road Division Act the provisions of section 3819, part of the general scheme for collection of taxes, for payment under protest and recovery of an illegal tax.

In Bank.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Anaheim Sugar Company against the County of Orange and its Treasurer. From an adverse judgment, plaintiff appeals. Reversed and remanded, with instructions.

Allen & Weyl, Gray, Barker & Bowen, and Donald Barker, all of Los Angeles, for appellant.

L. A. West, of Santa Ana, W. F. Menton, Walter Eden, A. E. Koepsel, and West, Koepsel & Eden, all of Santa Ana, for respondents.

LENNON, J. This action was brought by the plaintiff to recover money paid by it under protest to the tax collector of Orange county. The money was paid on a levy of taxes for the improvement of highways in the so-called Anaheim and Fullerton road division in that county. The complaint attacked the validity of the formation of the road division and of the proceedings for the levy of the tax. A general demurrer to the complaint was sustained by the trial court. The plaintiff having failed to amend, the court entered a judgment of dismissal in favor of the defendants. This appeal has been taken from that judgment.

The question of the sufficiency of the plaintiff's complaint to state a cause of action presents several problems for our consideration, the first of which is that of the constitutionality of the statute which authorizes the formation of road divisions. Pol. Code, §§ 2745-2773. If the statutory provisions are unconstitutional, the action of the county tax collector in demanding the money collected for the tax in question was wholly unwarranted, and it would follow that, if payment were properly protested under that section, the money so collected could be recovered pursuant to the provisions of section 3819 of the Political Code, which, as elsewhere stated in this opinion, was in effect incorporated into the Road Division Act by section 2759 of the Political Code.

Sections 2745-2773 of the Political Code provide, in effect, that the resident landowners of any portion of a county not already a part of a road division may petition the board of supervisors of the county to form thereof a permanent road division. Provision is made for a hearing upon due notice before the final action of the board, which may, in its discretion and upon a hearing after due notice, change the boundaries of the proposed division, either by exclusion or inclusion. At or after the formation of the division, 10 or more resident landowners may petition the board of supervisors for the construction of road improvements. The board must then have plans made, estimate the cost of the improvement, and set aside a certain amount of the money of the road districts in which the division may be situated to apply towards meeting the expense. It may in its discretion set aside other public moneys for the purpose. A special election to authorize the levy of taxes is then to be held on due notice, and if, at this election, a majority of the electors signify their approval of such levy, a tax is to be levied on all the property in the division. Such tax is to be computed and collected in the same manner as state and county taxes, and paid into the county treasury for the use of the division.

[1-3] The plaintiff does not indeed deny that the tax so provided for is for a public purpose. It does, however, most earnestly insist that the statute authorizes a taking of property without due process of law, because the tax is made to fall unequally upon those holding property in the taxing division by reason of the fact that no provision is made that the burden of taxation shall be in proportion to the benefits derived from the road improvement for which the tax is to be levied. It is conceded that it is not essential to the validity of a general tax that the burden be in proportion to the benefit derived. The contention of the plaintiff rests, therefore, upon the assumption that the tax provided for in the statute in question is a special assessment as distinguished from a general tax.

The legislative intent to make the tax here in question a general tax is unescapably clear. Special assessments can be levied only on the specific property benefited, and not on all the property in the district. *Louisiana, etc., Co. v. Madere*, 124 La. 635, 50 South. 609. The basis of the imposition of a special assessment is the benefit inuring to the property assessed. *Doyle v. Austin*, 47 Cal. 353. Where, as here, therefore, the burden is imposed upon *all* of the property in the district, real and personal, according to its value and not upon the basis of special benefit, it is clear that the Legislature regarded the burden as a general tax, and not as a special assessment. This is so, even though the tax be imposed for the purpose of constructing

a public improvement which may confer greater benefits on one class of persons or property than on another. *Williams v. Corcoran*, 46 Cal. 553.

This being so, the question now presented for decision is the extent to which the legislative intent is controlling in the matter of determining whether a given tax is in fact a general tax or a special assessment. The plaintiff contends that, where the Legislature provides for the creation of a small subdivision within a county for the sole purpose of providing means for making highway improvements therein which will be largely beneficial to the property owners in such subdivision, a tax levied therein must be held to be a special assessment, even in the face of a contrary intent expressed by the Legislature. We do not so understand the law. It is well settled that it is purely a question for the Legislature to determine what shall be the territorial subdivisions of a state for taxing purposes, and that it is not within the province of the courts to hold that a tax amounts to a taking without due process of law, solely on the ground that the property or person taxed is in a position where a proportionately small or even minute amount of benefit may be received. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Thomas v. Gay*, 169 U. S. 264, 278, 18 Sup. Ct. 340, 42 L. Ed. 740; *Williams v. Eggleston*, 170 U. S. 304, 309 to 311, 18 Sup. Ct. 617, 42 L. Ed. 1047. We have no doubt that it was competent for the Legislature to create, or rather to provide for the creation, upon petition and after due hearing by the county supervisors of taxing districts for the construction of highway improvements and at the same time provide that the tax should be general, if it appeared that some benefit would accrue to the property taxed. *Lent v. Tillson*, 72 Cal. 404, 428, 14 Pac. 71; *In re Madera Irrigation District*, 92 Cal. 296, 326, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Bliss v. Hamilton*, 171 Cal. 123, 133, 152 Pac. 303. It follows, from the rules established by the cases cited, that the intent of the Legislature that a tax shall be a general tax is controlling, where it appears upon an analysis of the facts of the particular case that the tax is in fact for a public purpose and calculated to benefit the members of the taxing district in common with the public, and not merely as individual property owners. There being no question but that the tax provided for in the statute here in question is for a public purpose in the sense noted, it follows that the legislation in controversy is not in conflict with the provisions of the Constitution of this state, or of the United States, prohibiting the taking of private property without due process of law.

[4, 5] While the order sustaining the demurrer is general, nevertheless, it appears, therefrom that the ruling of the lower court

rested, in part upon the assumption that in levying and collecting the tax and in holding the moneys so collected the county officials were acting, not in their respective capacities as county officers, but as ex officio officers of a corporate entity separate from the county, that is to say the Anaheim and Fullerton road division. This was error. The road divisions formed pursuant to the provisions of the Political Code have no corporate existence, de jure or de facto. It is not expressly provided in the Code that road divisions shall have corporate existence. The contention of the county in this behalf must therefore rest upon the theory that the road division is a corporation by implication. The doctrine of the creation of corporations by implication has been developed to save and make effective legislative acts which purport to confer powers which can only be exercised by a corporation upon bodies to which the Legislature has neglected to specifically grant corporate existence. The doctrine is thus a remedial doctrine, in that it is invoked to give effect and force to statutory provisions which would otherwise fail of accomplishing their purpose. Such being the nature of the doctrine, it should not be extended beyond those cases where that necessity appears to which the doctrine owes its origin and existence. If, therefore, in any given case, it appears that no express grant of corporate existence has been made, it should not be held that there is a grant of such existence by implication, in the absence of a clear and affirmative showing that the legislative intent cannot otherwise be fully and fairly accomplished. *Stebbins v. Jennings*, 10 Pick. (Mass.) 172, 188; *Walsh v. New York & Brooklyn Bridge*, 96 N. Y. 427; 1 *Dillon on Municipal Corporations* (5th Ed.) p. 121.

An analysis of the Code provisions relating to the forming of road divisions reveals the fact that not only is there no provision for the exercise of any of the well-recognized corporate facilities by the division, but there is no requirement that the division as such shall do any corporate act of any sort. Section 2745 of the Political Code does indeed provide that a road division, once formed, shall have "the powers" enumerated in the act. But no powers are enumerated or conferred therein, either expressly or by necessary implication. The first action contemplated by the statute after the formation of the division is the presenting of the petition for road construction. This is to be done by individual landowners resident in the division. Pol. Code, § 2751. All subsequent acts are to be done by the county officials, nor is there anything in the statute to indicate that in performing the several acts directed they are not to be considered as acting in their respective official capacities. Pol. Code, § 2752 et seq. Indeed, the supervisors

are directed to set apart money from the general funds of the county to apply toward defraying the expenses of construction. Pol. Code, § 2753. This is obviously an act which could not be performed by them as officers of the road division, as a separate legal entity, but could be performed only in their official capacity as supervisors. It is true that the money collected by means of the tax provided for in the statute is to be paid into the county treasury "for the use" of the division. Pol. Code, § 2759. This, however, is nothing more than a provision that the money so paid shall constitute a special fund for a special purpose. The existence of such a fund does not necessarily imply the existence of a corporate entity, separate and distinct from the county as beneficiary, nor does it necessarily imply that the county officers in dealing with the fund are not acting in their official capacities as county officers. *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150. It is true that bonds are, under some circumstances, to be issued to finance the construction work; but they are to bear the signature of the county clerk and of the chairman of the board of supervisors, and there is nothing to indicate that in so signing they are not acting in their official capacities as county officers. Pol. Code, § 2765. It is also true that the bonds are to be payable only out of the funds of the division. Pol. Code, § 2763. This fact, however, does not affect the question we are discussing. *Hellman v. Shoulters*, 114 Cal. 136, 145, 44 Pac. 915, 45 Pac. 1057. It is also significant that the expenses not only of the formation of the division, but also of all the elections provided for in the statute are to be paid out of the general funds of the county. Pol. Code, § 2772. The purpose of the statute is to provide an alternative method for road construction. Pol. Code, § 2773. The act is no doubt to be construed liberally to enable the accomplishment of that purpose, but in order to accomplish the end named we fail to see why it is necessary to imply the existence of a corporate entity not specifically granted corporate powers by the statute.

The cases cited on this point on behalf of the defendant have no application to the case at bar. For the most part they are cases involving a consideration of the corporate capacity of school districts. There is no doubt but that a school district is a corporate entity separate and distinct from the county. The county officers, as such, have no control over the funds of the school district. The power to make contracts payable out of the funds of the district is vested exclusively in the school board. The business of the district is managed independently of the board of supervisors by its own executive and administrative officials. Finally, school districts may sue and be sued separately. None of these undoubted attributes of corporate or-

ganization are granted to the road division by the statute here in controversy, either by express words or by implication.

There is nothing in this conclusion inconsistent with the decision in *Dean v. Davis*, 51 Cal. 406. The court was there construing chapter 293 of the Statutes of 1867-68, which provided for the formation of levee districts. The electors of the district were authorized by that statute to elect an assessor and tax collector. These officials were not to be in any sense officers of the county. They were solely the officers of the district, and if it were held that the district had no corporate existence separate from the county, the whole purpose of the act would fail of accomplishment. Again, it was provided that the county surveyor was to perform certain services, not in his official capacity as a county officer but, as expressly stated in the act, as *ex officio* engineer of the district. In fact, the whole tenor of the act indicated the intent of the Legislature that the levee districts should have a separate corporate existence. On the other hand, the whole tenor of the statute here in controversy indicates that the Legislature regarded the road division provided for therein as nothing more than a territorial subdivision of the county for the purpose of taxation for road improvements similar to improvement areas within municipalities such as those discussed in *Gill v. City of Oakland*, *supra*, and in *Pasadena, etc., Co. v. Leland*, 175 Cal. 511, 166 Pac. 341. It follows that the tax here in question was, if valid, essentially a county tax for a special purpose, and that, therefore, the county is the only proper party to an action such as that brought by the plaintiff herein.

[8, 7] It is insisted on behalf of the defendant that the action of the board of supervisors of Orange county in forming the road division cannot be attacked collaterally, as is attempted here. In support of this contention defendant cites 11 Cyc. 405. The rule there stated, however, and the rule which we believe is unquestioned, is that the action of a county board of a judicial or quasi judicial nature is subject to collateral attack only on the ground of excess of jurisdiction. It is clear that when the board acts without jurisdiction its action may be collaterally attacked. *Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264. It may be conceded that the determination of a board of supervisors on a petition for the formation of a road division is of a judicial or quasi judicial nature. *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780. The attack here made, however, is directed against the jurisdiction of the board of supervisors. It is contended on behalf of appellant that, by reason of alleged defects in the description of the boundaries of the proposed division as set forth in the petition as originally filed

and published by the persons interested in the formation of the division, the board of supervisors never gained jurisdiction to proceed in the matter, and that therefore the complaint states a good cause of action. This contention must be sustained. Upon a careful analysis of the statute, we are convinced that the presentation and publication of a sufficient petition prepared by landowners resident within the proposed division was contemplated by the Legislature as an indispensable prerequisite to any action taken by the board of supervisors. The hearing prescribed by the statute would be no more than an idle ceremony, if definite boundaries of the proposed division were not to be so published prior to the hearing as to enable all landowners within such division to ascertain whether or not their property was included within the proposed boundaries. The statute, on the one hand, expressly makes it the duty of the majority of the landowners residing within the proposed division to prepare a petition containing the boundaries of the division, while, on the other hand, it does not authorize the board of supervisors to perform a single act until after the presentation and publication of the petition. It follows that if the petition, as originally presented and published, was vitally defective in its description of the boundaries of the proposed division, the board of supervisors was without jurisdiction to consider the merits of the petition.

[8, 9] Confining our attention, therefore, to the petition as alleged to have been originally published, we are constrained to hold that the description contained therein was such as to render the petition vitally defective. The description set forth by courses and distances in the petition assumed to fix the eastern and western boundaries of the proposed division as lines respectively one-quarter of a mile east and one-quarter of a mile west of the middle line of a certain highway and parallel to such middle line. Appellant contends that this description is ambiguous for the reason that the highway in question does not form a straight line between the proposed northern and southern boundaries of the division, but runs for a portion of the distance from north to south and for a portion of the distance from northwest to southeast, and that it is impossible to tell whether the lines were drawn parallel to the line of center measuring at right angles to such line of center and in an easterly and westerly direction, or whether they were to be drawn parallel to the line of center measuring due east and due west. This contention cannot be sustained. In the absence of other words qualifying their meaning, the words east and west, as used in the petition must be construed as meaning due east and due west. Bosworth

v. Danzien, 25 Cal. 296; Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573; Jackson v. Reeves, 3 Caines (N. Y.) 293; Brandt v. Ogden, 1 Johns. (N. Y.) 156. Cf. Cal. Pol. Code, § 3903. The description of the boundaries of the proposed division by courses and distances is, however, followed by the statement that "the boundaries of the said division are also more particularly shown by a plat or map of said division, attached hereto, to which reference is hereby made." This map, while in general following the initial description by courses and distances, deviates materially therefrom in many important particulars. Thus, with relation to the land of the appellant, the deviation is very substantial, a much larger portion of its land being included in the proposed division as indicated in the map than would be included under the initial description by courses and distances. From the intent of the petitioners themselves as indicated by the words "more particularly shown," and also by the application of general rules of construction, it is clear that the description by courses and distances is governed and controlled by the description as set forth in the map. Code Civ. Proc. § 2077; 5 Cyc. 524, 525; Vance v. Fore, 24 Cal. 435. If, then the map, or a description by courses and distances of the boundaries as indicated therein, had been published as part of the petition, it cannot be doubted but that the board of supervisors would have had jurisdiction to proceed in the matter. It sufficiently appears from the complaint, however, that the only description published was that by the courses and distances of the initial description. The complaint therefore, in effect, alleges that the petition, as published, contained a description differing essentially from that contained in the petition as originally filed and presented. While the petition, as published, contained a clear and definite description of the boundaries of the proposed division it was a description wholly incorrect and misleading, which in no sense satisfied the statutory requirement that the petition, as published, should contain the true boundaries. The original publication was therefore wholly nugatory.

[10] Clearly, then, the complaint alleges facts which show that the board of supervisors was without jurisdiction to consider the petition at the date originally set for the hearing. It appears from the complaint, however, that on that date the board directed the county surveyor to draft a description by courses and distances, designating the boundaries delineated on the map, and ordered a publication of that description embodied in a notice to the effect that a petition for the formation of a road division had been presented, that the boundaries of the proposed division were incorrectly stated therein, that the then published description stated

the boundaries correctly and that the board would hear the petition on a certain date. This obviously was wholly insufficient as a publication or republication of the petition. The original publication having been wholly nugatory, and the petition never having been republished, it follows that the board of supervisors never acquired jurisdiction to pass upon the merits of the petition.

[11] Appellant claims that a further defect in the proceedings affecting the validity of the tax appears from the facts alleged in the complaint. In this behalf it is alleged that the minute record of the board of supervisors upon the final hearing of the petition contained a description of an altogether different parcel of land from that included within the division by the final order of the board and that this description remained upon the minutes until after the election held to authorize the levy of the tax. The making of such a record is expressly required by statute. Pol. Code, § 4039. No other record of the action of the board of supervisors in establishing a road division is provided for. Inasmuch as an election whereby property may be made subject to sale for taxes would be confiscatory, were no means provided whereby it could be definitely determined in advance of the election what property would be affected by the election, it follows that the making of a public record of the action of the board in establishing the boundaries of the division was not only expressly required by the Legislature, but was also essential to due process of law. The facts alleged in the complaint, therefore, present a situation where a record required by statute and essential to due process of law was wholly incorrect and misleading, and so remained at all times prior to the election. It is contended on behalf of respondent that, because the files contained papers setting forth the accurate description of the division as finally formed by the order of the board, the burden is upon appellant to show that the error in the record actually misled some of the electors. This contention is without merit. The electors had a right to rely upon the record. They were not bound to corroborate its statements by an examination of the files. "The law requires a record, to the end that those who may be called to act under it may have no occasion to look beyond it." *Sawyer v. Manchester, etc., R. R. Co.*, 62 N. H. 135, 13 Am. St. Rep. 541.

[12] It appears from the complaint that the order of the board establishing the Anaheim and Fullerton road division as an election precinct was made on November 18th, and that the election was held on December 27th. Since it appears that section 2756 of the Political Code provides that such elections shall be held in all respects as nearly as practicable in conformity with the general

election laws, by which it is required that election precincts be established 90 days prior to the election (Pol. Code, § 4041, subd. 3), it is contended that the election here in question was void by reason of the fact that the precinct was established less than 90 days prior to the election. The same contention was made under similar circumstances in *Irrigation District v. De Lappe*, 79 Cal. 351, 362, 21 Pac. 825, and was there held to be without merit. That decision is directly in point, and fully disposes of the contention of the plaintiff in the instant case.

[13] It appears from the complaint that the notice of election stated that the purpose of the election was to determine whether a special tax should be levied, to be raised in one, two, and three successive years; but it was not stated what proportion of the whole was to be raised in any given year. This omission was immaterial, if it appeared from the notice that the election was to be held under the Road Division Act, for the act itself provides the proportion to be raised in each year where a three-year period for raising the tax is adopted. Pol. Code, § 2754. It is contended, however, that it did not appear in the notice of election under what one of three possible road improvement acts the election was to be held. Upon an examination of the notice, which is appended to the complaint as Exhibit D, we are constrained to hold that the contention is without merit.

[14] The complaint alleged, in effect, that the election in question was void because of a failure to observe the requirement of the general election law relative to the time of opening and keeping open the polls. Pol. Code, § 1160. The defendant concedes, as indeed it must be conceded, that the Road Division Act required that the election in question should "be held in all respects as nearly as practicable in conformity with the general election law." Pol. Code, § 2758. The general election law required the polls to be open from 6 a. m. to 7 p. m. Pol. Code, § 1160. The notice of election in the present case—evidently inadvertently prepared pursuant to subdivision 3 of section 2761 of the Political Code—as set forth in Exhibit D of the complaint, shows that the supervisors ordered the polls to be kept open from 8 a. m. to 4 p. m., and it appears from the allegations of the complaint that they were so kept open, and not otherwise. The contention made upon behalf of the defendant in support of the validity of the election is that, notwithstanding the departure from the requirement of the general law, the keeping of the polls open for eight hours in the middle of the day was a substantial compliance with the law. This contention cannot be maintained, for the reasons stated in the case of *People v. Town of Larkspur*, 18 Cal. App. 169, 177, 118 Pac. 702, 706, where it is said:

"We think the principles enunciated in the well-considered case of *Kenworthy v. Mast*, 141 Cal. 268, 74 Pac. 841, are decisive of the question. The general rule laid down in *McCrary on Elections*, § 165, is quoted approvingly, namely, that where there is no statutory provision expressly declaring that a failure, in the respect now being considered, shall render the election void, it will be regarded as directory only, and that, unless the deviation from the legal hours has affected the result, it will be disregarded, but that if such deviation is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not."

Obviously the deviation pleaded in the present case was great and consequently, applying the rule above quoted, the complaint, in that particular, stated a cause of action.

[15] It is finally urged, however, on behalf of the defendant, that, even if the complaint does state a cause of action in the particulars stated, it affirmatively appears that the tax was paid before it became delinquent, and that there was no threat shown, and no power existent on the part of the tax collector to enforce the collection at that time, wherefore the payment must be considered as having been made voluntarily. The complaint alleges that the payment of the tax was protested under the provisions of section 3819 of the Political Code. If the tax provided for in the Road Division Act may be so protested, the payment cannot be considered voluntary. We are of the opinion that the tax may be so protested. It is true that it is nowhere expressly provided in the act that the provisions of section 3819 shall be held to apply. It is, however, provided that the tax shall be computed and collected in the same manner as state and county taxes. Pol. Code, § 2759. The provisions of section 3819 for the payment of void taxes under protest are a part of the general scheme for the collection of taxes. It follows that section 2759 of the Political Code amounts to an incorporation of these provisions into the Road Division Act, so that an action can be maintained against the county to recover illegal taxes assumed to have been collected pursuant to the act and protested under the provisions of section 3819. *Hellman v. City of Los Angeles*, 147 Cal. 654, 82 Pac. 313.

The judgment is reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer, with leave to the defendant to answer within a specified time.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; MELVIN, J.; LAW-LOR, J.; OLNEY, J.

WATTERSON v. OWENS RIVER CANAL CO. (Civ. 2733.)

(District Court of Appeal, Second District, Division 1, California. July 24, 1919. Rehearing Denied by Supreme Court Sept. 22, 1919.)

1. PLEADING §236(4) — REFUSAL OF AMENDMENT TO COMPLAINT FOR DELAY NOT ABUSE OF DISCRETION.

In an action against a canal company for the cost of completing its canal brought by the surety for the contractor on an express contract, the trial court's refusal to allow a proposed amended complaint declaring on an implied contract was not an abuse of discretion, where the case was pending 10 months before trial, and the lower court's decision was not made for more than a year thereafter, and 5 months passed after remand of the case by the appellate court before plaintiff asked leave to amend.

2. CANALS §15—EVIDENCE INSUFFICIENT TO SHOW NEW CONTRACT BY SURETY OF DEFAULTING CONTRACTOR WITH CANAL COMPANY.

In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, evidence held insufficient to show the existence or making of another contract between plaintiff and the canal company, as alleged in plaintiff's complaint, and on which his cause of action was based.

3. CANALS §15 — MONEY EXPENDED BY SURETY OF DEFAULTING CONTRACTOR UNDER ORIGINAL CONTRACT.

In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, evidence held to show that any money expended by plaintiff or work performed by him was furnished and performed as part of the canal company's original contract with the contractor for construction of the canal.

4. EVIDENCE §317(4)—HEARSAY EVIDENCE PROPERLY STRICKEN.

In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, testimony that the witnesses had heard a director of the canal company say that he had seen a third person interested in companies having business relations with the canal company, and that such person had stated he was glad plaintiff had gone on with the work, etc., held properly stricken as hearsay.

5. APPEAL AND ERROR §1050(1)—STRIKING EVIDENCE WAS HARMLESS WHERE SIMILAR TESTIMONY WAS ADMITTED.

The improper striking of testimony as hearsay was harmless to the party aggrieved, where a letter embodying the same matter was in evidence.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by T. G. Watterson against the Owens River Canal Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Richard S. Miner and P. W. Forbes, of Independence, for appellant.

L. C. Hall, of Bishop, for respondent.

CONREY, P. J. After the first trial of this action, wherein a judgment had been rendered in favor of the plaintiff, that judgment was reversed by this court. 25 Cal. App. 247, 143 Pac. 90. On the second trial the court granted defendant's motion for a nonsuit, and judgment was entered in favor of the defendant. From this judgment the plaintiff now appeals.

The complaint upon which the case was first tried was framed to state a cause of action for the foreclosure of a lien claimed by the plaintiff on real property, known as the Owens River Canal, for labor and materials furnished by the plaintiff of the alleged reasonable value of \$20,189.54, which said amount was also alleged to be the whole amount of the contract price. It was alleged that on or about the 16th day of February, 1909, plaintiff and defendant entered into an agreement under which the plaintiff was to perform labor and furnish materials to be used in the construction, alteration, addition to, and repair of said Owens River Canal. The complaint described the labor and materials furnished, and alleged that the contract had been fully performed by the plaintiff, and the same was completed and said work finished and said materials furnished and used on the 16th day of April, 1909, and that on the same date the construction, alteration, addition to, and repair of the canal was finished. It was further alleged that said labor and materials were furnished and used in said work on said canal at the personal instance and request of the defendant Owens River Canal Company; that no part of the contract price for said work and labor furnished had been paid; and that the whole of the sum stated was still due, owing and unpaid to plaintiff. Other allegations were made showing the due filing and recording of a notice of claim of lien.

The answer of the defendant to that complaint contained denials covering the principal allegations of the complaint. The answer contained a further affirmative defense, showing that the original contract for the work in question was a written contract, dated November 30, 1908, made with one P. N. Snyder, under which the contract price was to be \$19,000; that at the time of the execution of that contract the plaintiff Watterson executed to the defendant an undertaking in the sum of \$5,000, conditioned upon due performance of the contract by the contrac-

tor. Without making here a long statement of the case, suffice it to say that the defendant claims that when, on the 16th day of February, 1909, the plaintiff took charge of the work which he afterwards conducted to completion, he did so on behalf of Snyder for the purpose of preventing default on the contract and to save and keep himself harmless from the penalties provided in his bond; and that no contract relation whatever, except by reason of said bond, existed between the defendant and the plaintiff.

It was established at the former trial, and likewise at the later trial, that no written contract has ever been made between the plaintiff and the defendant, that the Snyder contract was not recorded before the commencement of the work, and that the defendant has paid the full amount of the contract price named in the Snyder contract.

Upon the evidence shown by the record before us on the former appeal we held that the plaintiff could not successfully maintain that changes were made in the work outside of the terms of the written contract or without the consent of Watterson, and that he had not been thereby released from his liability on the bond. We further held that when Snyder told Watterson to go ahead and finish the work of the contract and Watterson consented and proceeded in accordance with that request, he was in the situation of a surety on a contractor's bond who undertakes to finish the contract work for his principal; therefore that he was not a person acting "at the personal instance of the owner," as described in section 1183 of the Code of Civil Procedure, or entitled to any lien for the value of anything furnished or done by him. The court further said in the opinion rendered:

"His right of recovery, if any, for the value of the labor and materials furnished by him, was merely the right to recover a personal judgment therefor, under like limitations as were binding upon Snyder. As Mr. Watterson succeeded and in that way represented the contractor, it follows that Watterson would be limited in his recovery (as in like circumstances the contractor would have been) by the contract price named in the written contract, after adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowance of the proper credits for payments made by the owner. *Laidlaw v. Marye*, 133 Cal. 170, 176, 65 Pac. 391; *Condon v. Donohue*, 160 Cal. 749, 754, 118 Pac. 113. In the trial of this action, however, this plaintiff not only attempted to assert a lien, but has obtained a decree affirming his claim without regard to the limitations above noted. With respect to the cause of action stated in plaintiff's complaint, his right to recover herein and to enforce the lien claimed by him depends primarily upon the allegation and finding that on or about the 16th day of February, 1909, plaintiff and defendant entered into an agreement, under which plaintiff was to furnish certain labor and

materials, for the purposes named. There is no evidence of any such agreement, unless the fact could be derived from the circumstances to which we have referred. As these circumstances do not support the claim as to the alleged contract, the appeals must be sustained as to him."

The remittitur on the former appeal was filed with the clerk of the superior court on the 1st day of October, 1914. On March 18, 1915, pursuant to notice given, a motion was made by the plaintiff to file an amended complaint. The first ground of appeal argued by appellant is that the court erred in denying that motion. So far as necessary for consideration at this time, the differences between the former complaint and the proposed amended complaint are as follows: Paragraph 8 of the former complaint alleged that on or about the 16th day of February, 1909, plaintiff and defendant entered into an agreement and contract under and by which the plaintiff was to perform, furnish, and bestow certain labor in and upon the construction, alteration, addition to, and repair of said Owens River Canal, and to furnish certain materials, etc. The proposed amended complaint, in the corresponding paragraph thereof, alleges that between the 15th day of February, 1909, and the 17th day of April, 1909, at the special instance and request of the defendant, plaintiff, by and with the aid and means of a large force of men, etc., performed work and labor amounting to a stated number of days in and upon the construction, alteration, etc., of said canal. The former complaint alleged that in pursuance of said agreement and contract the plaintiff performed labor in connection with said work for a stated number of days at stated prices per day, amounting to a stated total sum; that he also furnished materials amounting to a stated sum of money in the prosecution of said work; that said contract has been fully performed on the part of the plaintiff, and the same was completed and the work finished on the 16th day of April, 1909, and the construction, alteration, etc., of the canal was finished on the 16th day of April, 1909. Paragraph 6 of the former complaint stated that the labor and materials so furnished were of a stated reasonable value, the total thereof amounting to the sum of \$20,189.54. Paragraph 7 stated that the said labor furnished, performed, and bestowed as aforesaid, and the materials furnished and used in said work, were performed and furnished at the personal instance and request of the defendant, but it was not alleged that the defendant agreed to pay the "reasonable value" thereof. The proposed amended complaint omits the direct allegation that the parties on the 16th day of February, 1909, entered into a contract, and that the amount of the contract price therefor was a stated

and fixed sum of money. It merely states, as above shown, that between said periods the work was done at the special instance and request of the defendant; that in consideration of the same the defendant undertook, promised, and agreed to pay plaintiff whatever said work and labor was reasonably worth, and that the work and labor so furnished was of the reasonable value of \$21,136.10. In like form the proposed amended complaint states a cause of action for the sum of \$312.85, the reasonable value of powder, fuse, and caps furnished in the doing of said work. For a third cause of action the proposed amended complaint alleges that between the said dates, at the special instance and request of the defendant, the plaintiff paid, laid out, and expended for the use and benefit and advantage of the defendant upon said canal in said work the sum of \$18,490.73, and also for powder, fuse, and caps in the sum of \$312.85; that in consideration thereof the defendant undertook, promised, and agreed to repay to the plaintiff the full amount thereof, and to pay plaintiff the sum of \$18,490.73; that being the full amount so due as aforesaid, advanced and paid out by plaintiff for the use of defendant. The former complaint alleged that—

"On the 16th day of February, 1909, a large portion of the said construction, alteration, addition to, and repair of said Owens River Canal had been done and made, by another person, under a pre-existing and invalid contract."

This allegation was omitted from the proposed amended complaint.

The motion as presented to the court on March 13, 1915, was made upon the papers, files, and records of the court, including the decision of the District Court of Appeal on the former appeal and the remittitur thereon. Plaintiff now claims, and the motion was made upon the ground, that the said proposed amended complaint is necessary and proper in order to rightfully and regularly present and prosecute his cause of action herein, and in order to have the complaint conform to the decision of the Court of Appeal and in accordance with the remittitur thereon, and upon the further ground that the proposed amendment is and will be in furtherance of justice. The motion so presented was denied.

On the 24th day of April, 1915, pursuant to notice duly given, the plaintiff moved to amend said former complaint by striking out certain portions thereof, and also moved for a jury trial of the case. This motion was granted, and a jury trial was allowed. The amendment consists in striking out those portions of the former complaint which set forth the filing of a notice of claim of lien and the payment of the necessary charge and expense for preparing and recording the

same, and the prayer that said several sums claimed by the plaintiff be adjudged and decreed to be a lien upon and against the property described in the complaint. It was upon the complaint as thus amended that the action was tried a second time. It should also be noted that the proposed amended complaint which the court did not permit to be filed did not contain any reference to plaintiff's claim of lien, and prayed only for a money judgment.

[1] 1. The court did not commit any error or abuse of discretion in refusing to allow the filing of the proposed amended complaint. As stated by counsel for appellant, the substance of his application was for leave to change his complaint from one upon an express contract to one upon an implied contract. So far as appeared to the court upon the record before it, and so far as now appears, the plaintiff has known from the beginning of this litigation all of the facts necessary to enable him to properly state his cause of action. With that knowledge, in filing his original complaint, verified by his oath, he alleged that on or about the 16th day of February, 1909, plaintiff and defendant entered into a contract on which he based his claim in the action. Ten months intervened between the filing of that complaint and the commencement of the first trial. An additional period of more than one year expired before the decision was made by the lower court following upon that trial. About 5 months passed after the case was sent back to the court below before this application now under review was made. We recognize the rule which recommends liberality in the allowance of amendments to pleadings; nevertheless, within reasonable limits, the granting or denial of applications to amend remains within the discretion of the trial court. In exercising that discretion the court should take into consideration, not only the rights of the party seeking to amend, but also the rights of his opponents. It is not in every instance that the court is imperatively required to permit a plaintiff to substantially change the allegations of his complaint. That the plaintiff was not really entitled to thus change the statement of his cause of action, became apparent subsequently at the trial, as will be seen when we consider his own acts as shown by his testimony.

[2, 3] 2. On closing of the case as presented by the plaintiff's evidence defendant on various grounds moved for an order of nonsuit. This motion was granted, and judgment entered for the defendant. Appellant contends that the court erred in granting this motion. The grounds of the motion included among others, the following: (2) That the evidence introduced by plaintiff in support of his alleged cause of action wholly fails to prove the existence or making of any contract

by and between the plaintiff and this defendant, as alleged in plaintiff's complaint and upon which his cause of action is based. (4) On the ground that the evidence shows that any money, if any was expended by T. G. Watterson, or if any work was performed in the construction of said canal, the same was furnished and performed by him as a part of the contract of November 30, 1908, in evidence.

The granting of the motion is supported by both of the reasons stated. In our decision on the former appeal we made a statement of facts with respect to the Snyder contract and specifications and the undertaking given by Watterson in connection therewith and the consideration named in the contract and the failure to record the contract before commencement of the work and the circumstances which led to the substitution of Watterson for Snyder as the person in actual charge of the work of construction and the absence of any formal contract, either written or unwritten, between the plaintiff Watterson and the defendant by virtue of which Watterson undertook to complete the work. All of these facts appear on the record of the second trial to the same effect as before, and therefore we refer to our former statement of facts on these matters without repeating the statement here.

[4, 5] Appellant claims that on the second trial he has produced additional evidence tending to support his allegation that at the time when he took charge of the work, to wit, on or about the 16th day of February, 1909, an agreement for said work was entered into between himself and the defendant. We have examined this additional evidence, and are not able to agree that it strengthens the plaintiff's case. This evidence as discussed in the briefs of counsel for appellant refers especially to certain negotiations to which one Chappelle was a party. Chappelle was not a stockholder of the defendant corporation. He was interested in certain other corporations which had business relations with defendant corporation, and in that way he was interested in the successful completion of this canal work. For that reason he advanced some of the money paid by the defendant on account of the contract. On the 16th day of February, 1909, while the plaintiff was negotiating with Mr. Hall, a director of the defendant corporation, and with another director and with the corporation's engineer of the work, a request was made for an advancement on the Snyder contract, of some money necessary to enable the plaintiff to go on with the work; such money being not yet due. They found it necessary to consult with Mr. Chappelle, or report to him, concerning the situation. The plaintiff and Mr. Hall jointly prepared a telegram to Mr.

Chappelle, which telegram was rewritten by the plaintiff, and by him was sent to Chappelle at Pasadena, Cal. This telegram was signed by Teel, president of the corporation, and Kevil, the engineer. It read as follows:

"Snyder requires more money present needs. Watterson assumes charge and responsibility under same. We recommend advance of two thousand dollars on account. Wire answer."

On the next day Mr. Hall notified plaintiff that he would pay plaintiff the \$2,000 which had been O. K'd by Mr. Chappelle. On the same day the plaintiff received this money, and he immediately proceeded with the work. The plaintiff, in his testimony, admitted that he never, before the time when he completed the work, asked or demanded of the defendant any money on work done under his supervision separate from the Collins and Snyder account, and that he never kept any account of the work under his supervision separate from the account that embraced the work from the beginning under the Snyder contract; that he never gave any notice to any officer of the corporation or to the corporation that he claimed to be working under a contract of his own, or that he was not completing it as Snyder's bondsman; that the defendant did not, nor did any of its officers, agree to pay him anything upon any basis separate or apart from the obligation under their contract with Snyder, "other than the understanding that when the job was completed I was to be paid for the extra work." But the Snyder contract and specifications themselves provided for payments for extra work. This "additional evidence" upon which appellant relies consisted principally of the testimony of certain witnesses to the effect that they had heard Director Smith of the defendant company say that he had seen Mr. Chappelle, and that Chappelle stated he was glad that Mr. Watterson had gone on with the work, and that when it was completed there would be no question of a right settlement. This really added nothing favorable to the plaintiff's contention herein. Complaint is now made that some of this testimony was stricken out by the court as hearsay. We think there was no error in this; but, even if it had been error, no harm was done, because there is in evidence a letter written by Chappelle to the plaintiff on February 24, 1909, in which Chappelle said that he was glad that Watterson had taken charge and would see the work finished, and that when it was completed he would feel like doing whatever was right and fair in making the final settlement. None of this evidence tends to show that these parties thought they were making a separate contract with Watterson. Watterson's receipt for the \$2,000 paid to him on February 17, 1909, as well as the other receipts given by

him, all referred to the payments mentioned therein as payments on account of the Snyder contract. The evidence drives straight to the conclusion that plaintiff's efforts to establish a separate new contract of defendant with himself is an attempt to avoid the limitations of the contract price as fixed by the Snyder contract. Unfortunately for the plaintiff, the facts do not support his theory of the case.

The evidence shows that the payments made by the defendant (including certain counterclaims to which it is admitted that defendant is entitled on account of payments made to subcontractors, etc., in order to relieve the canal property from liens) exceeded the sum of \$19,000, the price named in the Snyder contract. That price was subject to increase or decrease if changes in the work were made, increasing or decreasing the cost of the work as provided by the specifications. But the plaintiff, in order to establish any increase in the contract price above the stated price of \$19,000, must have subjected his action to that contract as the measure and test of his right to recover. This necessity he refused to recognize. In the complaint on which the case was tried, and also in the complaint which the court refused to permit him to file, plaintiff has persistently ignored the price fixed by the Snyder contract, which limits any right which he may have had to recover any judgment against the defendant, and has insisted upon a separate contract between himself and the defendant, the existence of which he has failed to prove. The plaintiff elected to stand or fall upon the proposition stated in his counsel's reply brief:

"Plaintiff has contended from the beginning, and still contends, that he never assumed to take up the work upon the canal under Snyder."

There are many exceptions noted, to rulings upon evidence. We have examined all of them. The rulings were free from any error which can be said to have prejudiced the plaintiff in his right to a full and fair presentation of his case.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

COOK v. REID, Auditor Riverside County.
(Civ. 2557.)

(District Court of Appeal, Second District, Division 1, California. January 23, 1919.)

1. MANDAMUS \Leftrightarrow 102(1)—WILL NOT LIE TO COMPEL ALLOWANCE OF CLAIM BY COUNTY AUDITOR.

In view of Pol. Code, § 1543, as amended by Amendments to the Codes 1880, p. 31, St. 1905,

p. 528, St. 1915, p. 746, and section 1700, a county auditor's duty, in relation to the allowance of an order for payment from the school fund of a district, signed by two trustees, is discretionary, and not merely ministerial, so that mandamus will not lie to compel him to draw warrant for payment unless an abuse of discretion is shown, the term "allow," as used in section 1543, as applied to a demand implying the right to examine the claim and in proper case to disallow.

[Ed. Note.—For other definitions, see Words and Phases, First and Second Series, Allow.]

2. MANDAMUS \Leftrightarrow 168(2)—BURDEN ON PETITIONER TO SHOW DISCRETION OF PUBLIC OFFICER ABUSED.

Where the official duty involved was discretionary, the burden is on petitioner for mandamus against the officer to prove that his refusal to act was unjustifiable.

Appeal from Superior Court, Riverside County; W. H. Thomas, Judge.

Petition for writ of mandate by W. H. Cook against Charles O. Reid, as auditor of the County of Riverside, State of California. From judgment denying the petition, petitioner appeals. Affirmed.

L. M. Chapman, of Los Angeles, and Adair & Winder, of Riverside, for appellant.

Sarau & Thompson, of Riverside, for respondent.

CONREY, P. J. The court below, having first sustained defendant's demurrer to the petition herein without leave to amend, entered judgment denying the plaintiff's petition for a writ of mandate. Plaintiff appeals from the judgment.

The facts set forth in the several counts of the petition are all alike, except that each cause of action is based upon a different demand. For the sake of brevity, we will discuss the case upon the first count alone as if it were all of the complaint.

In substance, the allegations are as follows: The plaintiff is, and at all times named in the complaint he was the owner and holder of a certain order and requisition of the Rannell's school district, county of Riverside, dated May 11, 1916, payable to W. H. Cook or order, for the sum of \$75 from the school fund of said district, and signed by two trustees of said district, on that date. On June 30, 1916, the plaintiff presented said order to the superintendent of schools of the county of Riverside, who thereupon duly examined and approved the same in writing by indorsing upon said order, "Examined and approved, numbered as above, June 30, 1916," and affixed his signature thereto as county superintendent of schools and thereupon drew said requisition on said auditor as such. On the 6th day of September, 1916, the plaintiff presented said requisition to the defendant as auditor of said county at

his office. Thereupon the defendant refused to allow and indorse the same and refused to draw his warrant in favor of the plaintiff for the amount stated in the order and requisition, although sufficient funds are available therefor.

The right, claimed by plaintiff depends upon certain provisions of the Political Code. Section 1543 (as amended, Stats. 1915, p. 746):

"It is the duty of the superintendent of schools of each county: * * * Third-a. On the order of the board of school trustees, * * * to draw his requisition upon the county auditor for all necessary expenses against the school fund of any district. * * * Each requisition must specify the purpose for which it is drawn, but no requisition shall be drawn upon the order of the board of school trustees * * * against the funds of any district except the teachers' or janitors' salaries, unless such order is accompanied by an itemized bill showing the separate items, and the price of each, in payment for which the order is drawn; nor shall any requisition for teachers' or janitors' salaries be drawn unless the order shall state the monthly salary of teacher or janitor, and name the months for which such salary is due. Upon the receipt of such requisition the auditor shall draw his warrant upon the county treasurer in favor of the parties for the amount stated in such requisition. The order of the board of school trustees, * * * when signed by at least two members of the board of trustees, * * * shall be transmitted to the superintendent, who shall, in case he approve said demand, indorse upon it, 'Examined and approved,' together with the number and date when approved, and shall, in attestation thereof, affix his signature thereto, and deliver the same to the claimant, or his order, who shall transmit the same to the auditor, who shall, in case he allows said demand, indorse upon it 'Allowed,' together with the number and date when allowed, and shall, in attestation thereof, affix his signature thereto, and deliver the same to the claimant and make a proper record thereof and charge against the particular fund of the particular district against which such demand was allowed; and said demand when so approved and signed by the superintendent, and when so allowed and signed by the auditor, shall constitute the requisition on the auditor, and the warrant on the treasury within the meaning of this act."

Section 1700:

"No warrant must be drawn in favor of any teacher, unless the officer whose duty it is to draw such warrant is satisfied that the teacher has faithfully performed all the duties prescribed in section sixteen hundred and ninety-six."

Section 1543, when originally enacted in 1872, made it the duty of the superintendent of schools to draw the warrants. By amendment of section 1543, in the year 1880 (Amendments to the Codes, 1880, p. 31), it was provided that the auditor should draw the warrants. By amendment of 1905 (St. 1905, p. 528), the duty of the auditor with respect

to such demands was, for the first time, qualified, by the clause, "in case he allows said demand." That clause has been retained in the subsequent amendments of the section. Section 1700 has not been amended since the year 1874.

In the argument, counsel have referred to section 4091 of the Political Code, which reads as follows:

"The auditor must issue warrants as provided in section four thousand and seventy-six, on the treasurer, in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed, and ordered paid by the board of supervisors. The auditor must also issue warrants on the treasurer for all debts and demands against the county, when the amounts are fixed by law, or are authorized by law to be allowed by some person or tribunal other than the board of supervisors."

Under a statute substantially the same as section 4091, it has been determined that where a claim for services which, if performed, are a legal charge against the county, has been duly presented to the board of supervisors, regularly considered, allowed, and ordered paid, the auditor may not lawfully refuse to draw his warrant therefor upon the treasurer upon the ground that such services were never rendered. The duty of the auditor in such case is merely ministerial. But even there it was held that it is the privilege and duty of the auditor to refuse to draw his warrant upon the treasurer for claims which, although sanctioned and ordered paid by the board of supervisors, are void upon their face for want of jurisdiction in the board of supervisors, or showing an excess of jurisdiction or other plain and palpable violation of law. *McFarland v. McCowen*, 98 Cal. 329, 83 Pac. 113; *Walton v. McPhetridge*, 120 Cal. 440, 52 Pac. 731.

[1, 2] The provisions of section 1543 and section 1700 are in strong contrast with those of section 4091. The duty of the auditor to draw a warrant against the school funds of a district is limited to cases where "he allows said demand." When the Legislature amended section 1543 so that the duty of drawing the warrant was transferred from the superintendent of schools to the county auditor, and made the auditor one of the officers whose scrutiny the demand must pass, such amendment must be deemed to have been made with knowledge of the provisions contained in section 1700, and the two sections must be read together. The fact that the matter of allowance of the demand was referred to the auditor must be regarded as an intended safeguard to the treasury in addition to the allowance thereof by the superintendent of schools. The term "allows," as applied to a demand, implies the right to examine the claim and in a proper case to disallow the same. In other words, the duty of the auditor with respect

to this kind of a claim is discretionary and not merely ministerial. With respect to such a duty mandamus will not lie to compel the officer to draw the warrant unless an abuse of discretion has been shown. *Williams v. Bagnelle*, 138 Cal. 699, 72 Pac. 408, does not lend support to the plaintiff's argument. Section 1543, as then in force, directed the superintendent of schools to draw his requisition, on order of the board of schools trustees, and did not qualify that duty by the phrase "in case he approve said demand," or by any equivalent terms. The record in the action fully displayed the facts which, in the opinion of the court, did not justify the superintendent in his refusal to draw the requisition. *Inglin v. Hopplin*, 156 Cal. 483, 105 Pac. 582, also cited by appellant, rests upon the proposition that mandamus will lie to correct an abuse of discretion of a public officer, and will lie to enforce a particular action by him, when the law clearly establishes the petitioner's right to such action. But that case does not hold that the defendant officer must affirmatively allege and prove that his refusal to act was justifiable. In such cases, where the official duty is involved is discretionary, the burden is upon the petitioner. In the present action, petitioner's complaint does not show what service or other consideration is the foundation of his claim, and does not allege any fact from which an abuse of discretion can be inferred.

The judgment is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

COE v. CITY OF LOS ANGELES et al. (Civ. 2546.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919. Rehearing Denied by Supreme Court Sept. 25, 1919.)

1. MUNICIPAL CORPORATIONS §17, 18—CONSOLIDATION—"DE FACTO CORPORATION"—QUO WARRANTO.

Where there has been an attempt, under the Municipal Annexation Act of 1913 and amendments thereto, to annex one city to another, and where the authorities of former city have declared annexation to have been carried at an election held to decide the question, and where such city, as an incorporated city, has ceased to function, and the latter city has assumed jurisdiction over its territory and inhabitants, the latter city, as to such annexed territory, is a "de facto corporation," and any attack upon its exercise of the franchise must be by quo warranto proceedings at instance of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, De Facto Corporation.]

2. MUNICIPAL CORPORATIONS §17 — DE FACTO CORPORATION—REQUISITES.

The requisites of a de facto corporation are a charter or general law under which such a corporation as it purports to be might lawfully be organized, an attempt to organize thereunder, and actual user of the corporate franchise.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Charles Coe against the City of Los Angeles and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

Albert Lee Stephens, City Atty., Charles Burnell, Asst. City Atty., and C. D. Ballard, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiff attacks the proceedings had and taken under the provisions of the Municipal Annexation Act of 1913 (Stats. 1913, p. 577), and amendments thereto, for the annexation of certain territory, known as the city of Sawtelle, to the city of Los Angeles. To the complaint, which asks that the defendants be enjoined and restrained from further proceedings in the matter, that the election thereon be declared null and of no effect, and that the action of the city of Los Angeles, purporting to have been had pursuant to the provisions of said municipal act, be declared void and ineffectual for the purpose intended, defendants interposed a demurrer upon both general and special grounds. The demurrer was sustained, without leave to amend. Judgment of dismissal followed, from which plaintiff appeals.

[1] In our opinion, the complaint failed to state a cause of action, for want of jurisdiction. It appears therefrom that plaintiff sues as a citizen and taxpayer of the city of Sawtelle; that a petition in due form and signed by the requisite number of electors of Sawtelle was presented to its board of trustees, in pursuance of which an ordinance was regularly adopted in due form calling an election for the determination of the question, followed by the due publication of the notice thereof as required by law, which election was thereafter held in accordance with such notice; that as a result of the election so held the proposition was by the proper officers of the city of Sawtelle declared carried, and the legislative body of the city of Los Angeles, as the final step necessary to effect the consolidation, adopted an ordinance pursuant to the provisions of the "act to provide for the consolidation of municipal corporations, as amended in 1917." St. 1917, p. 30. It is further alleged that by virtue of these proceedings the defendants assert and claim that said consolidation has been completed and fully consummated, and that the city of Sawtelle as an incorporated city has ceased to

exist, and is now a part of the city of Los Angeles. In other words, the city of Sawtelle as such has ceased to function, and the city of Los Angeles, in the exercise of a franchise (People v. City of Oakland, 92 Cal. 611, 28 Pac. 807), has by virtue of the proceedings assumed jurisdiction over its territory and inhabitants as a part of the city of Los Angeles, and is now exercising governmental control and municipal functions over the same. Upon this showing the city of Los Angeles, in the assumption of political functions over the annexed territory and its inhabitants, must be deemed at least a de facto corporation, the requisites of which, as stated in Tulare Irrigation District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 581, 46 L. Ed. 773, are:

"A charter or general law under which such a corporation as it purports to be might lawfully be organized; * * * an attempt to organize thereunder; and * * * actual user of the corporate franchise."

[2] As we have seen, there is a general law pursuant to which the consolidation might be effected. There was an attempt to consolidate the two cities thereunder, the success of which, in accordance with the statutory provisions, was, notwithstanding appellant's claim of irregularities in the election held, recognized and declared by the officers primarily charged with the duty of determining the result, and, upon the asserted claim and assumption that they have fully complied with all requirements of law, the city of Sawtelle has as an incorporated city ceased its functions, which, in the exercise of the franchise, the city of Los Angeles, as to such territory and its inhabitants, has assumed governmental control as a part of said last-named city. The question involved is one of a purely political nature (People v. City of Los Angeles, 154 Cal. 220, 97 Pac. 311), and not affecting the private rights of plaintiff, in which capacity he may not challenge the asserted right to exercise jurisdiction in the matter. If such a case can be maintained by a private citizen, it may be brought at any time within the statutory limitation, and must necessarily lead to uncertainty and interminable confusion. Many cases have arisen in this state involving the validity of proceedings for the organization of protective, reclamation, and irrigation districts, wherein, upon the ground that such organizations were at least de facto corporations, it was declared that inquiry into the validity of their organization was restricted to quo warranto at the suit of the state, and not subject to attack by private individuals. Keech v. Joplin, 157 Cal. 1, 106 Pac. 222; Jaques v. Board of Supervisors, 24 Cal. App. 381, 141 Pac. 404; Reclamation District No. 765 v. McPhee, 13 Cal. App. 333, 109 Pac. 1106; Williams v. Board of Supervisors, 65 Cal. 160, 3 Pac. 667. In the case of People ex rel.

Warren v. York, 247 Ill. 591, 93 N. E. 400, it is said, quoting from the syllabus:

"The legality of proceedings by which additional territory is added to a municipality cannot be inquired into, except upon a direct proceeding by quo warranto, and not upon a bill in equity or upon objections to a tax."

Numerous cases may be cited to the same effect. Our conclusion is that, conceding, as claimed by appellant, illegal ballots were cast and counted at the election, without which the consolidation would not have been effected, nevertheless, since it appears that the city of Los Angeles, as to the annexed territory, is a de facto corporation, any attack upon its exercise of the franchise must be by quo warranto proceedings at the instance of the state.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

NOBLE v. MANATT. (Civ. 2989.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

JOINT TENANCY ↔ 10—TENANCY IN COMMON ↔ 38(13) — RELIEF OF COTENANT ON EJECTION LIMITED TO REINSTATEMENT IN COMMON POSSESSION.

Though a joint tenant or tenant in common may maintain an action of forcible entry and detainer against a cotenant who has ejected him, his right to restitution is restricted to his right of reinstatement to the common possession only.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by D. L. Noble against Samuel Manatt. From judgment for plaintiff, defendant appeals. Reversed.

Hamilton & Lindley, of San Diego, for appellant.

W. R. Andrews, of San Diego, for respondent.

SHAW, J. This is an appeal from a judgment in favor of plaintiff, rendered in an action of forcible entry and detainer. The premises, the possession of which is involved in the controversy, consist of a certain lot or tract of land and the dwelling house thereon, of all of which, in accordance with the allegations of the complaint, the court found plaintiff was on June 18th in the quiet and peaceable possession, and that on said date defendant, with force and violence, entered said premises, by breaking open the doors to said dwelling house, and threw plaintiff's goods, clothing, and provisions into the street, and, as a conclusion of law, found that plaintiff was entitled to damages in the sum of

\$81.60, which was trebled, and the restitution of possession of the whole of the premises described in the complaint.

Without regard to other alleged errors, the judgment must be reversed, for the reason that these findings are wholly without support of evidence. It appears without controversy that on March 3d defendant, as owner of the property, which was then unoccupied, together with plaintiff and J. H. Howell, moved into and took possession thereof under an agreement that they would occupy the same jointly, each contributing his own belongings and, in a way, sharing the living expenses, in accordance with which arrangement they lived until the acts of defendant complained of. That at most plaintiff's possession was a joint possession in conjunction with Howell and defendant, all having equal possession and right of egress and ingress to the house, to which defendant had a key, clearly appears. While a joint tenant or tenant in common may maintain an action of this character against a cotenant, who has ejected him, his right to restitution is restricted to his right of reinstatement to the common possession only. 19 Cyc. 1141; Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383. The effect of the findings and judgment based thereon is to oust defendant from the property in which his right to possession is at least equal to that of plaintiff, to whom the exclusive right to the possession of the property is adjudged. "All that plaintiff was entitled to, therefore, was to be let into possession with the defendant—to enjoy his moiety." Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 Pac. 45.

Our conclusion renders it unnecessary to discuss other alleged errors.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

ATCHISON, T. & S. F. RY. CO. v. SMITH et al. (Civ. 2924.)

(District Court of Appeal, Second District, Division 2, California. Aug. 5, 1919.)

1. INJUNCTION §26(1) — ALLEGED DEBTOR MAY ENJOIN 648 ACTIONS AND COMPEL SINGLE ACTION.

An alleged debtor may enjoin the prosecution of 648 separate actions and compel their litigation in a single action, all being between the same plaintiff and defendant on claims arising in the same manner, involving like or similar proof, if there is a conspiracy and combination between plaintiff and the justice of the peace to force a settlement and payment by reason of the prohibitive cost of defending them, since the remedy by change of venue would involve prepayment of costs (Code Civ. Proc. § 836), which would be greater than the total amount of

claims, and still subject defendant to multiplicity of suits and indefinite future costs in another tribunal.

2. JUSTICES OF THE PEACE §69 — CANNOT CONSOLIDATE 648 ACTIONS AND TRY THEM TOGETHER.

The justice court could not consolidate 648 actions on claims against the defendant railroad company for overcharges on freight shipments, under Const. art. 12, § 21, relating to long and short hauls, which claims had been assigned to plaintiff, and try them together.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by the Atchison, Topeka & Santa Fe Railway Company against T. E. Smith and George Flournoy, a Justice of the Peace of the Sixth Judicial Township, Kern County, Cal. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Robert Brennan, U. T. Clotfelter, M. W. Reed, and E. W. Camp, all of Los Angeles, for appellant.

E. J. Emmons and H. E. Johnstone, both of Bakersfield, for respondents.

SLOANE, J. The plaintiff filed a complaint in equity to enjoin the prosecution of a large number of suits instituted against it by the defendant, and to compel their litigation in a single action. Demurrer to the complaint was sustained, and, the plaintiff refusing to amend, judgment was given for the defendant. This appeal is by the plaintiff from the judgment refusing the equitable relief prayed for and dismissing the action. The questions on appeal, therefore, go to the sufficiency of the complaint to entitle the plaintiff to relief.

The facts set out in the complaint, and as admitted under demurrer, so far as this appeal is concerned, are in substance as follows:

The plaintiff is a railway corporation, operating its lines of railroad from Chicago, Ill., to the Pacific Coast, in the state of California, with lines extending to various towns between Los Angeles and San Francisco. At various dates between October 1, 1911, and May, 1, 1912, said railway company transported and delivered shipments of freight to numerous consignees, located in the cities of Reedley, Dinuba, Visalia, Tulare, Corcoran, Wasco, and Bakersfield, charging and collecting therefor rates fixed by its regular tariff schedules, but which rates were in excess of the amount that it would be authorized to collect under the long and short-haul clause of section 21 of article 12 of the state Constitution. The defendant T. E. Smith, under alleged assignments of their claims for such excess charges from 648 of such consignees of freight, brought 648 separate suits thereon in the justice's court of

the defendant George Flournoy, a justice of the peace of Kern county, against the railway company, the plaintiff here. These suits were for the respective amounts of each claim, as money had and received by the railroad corporation. The total amount of these claims is the aggregate sum of \$6,015. It is alleged that each of 467 of these 648 claims amounts to less than the fees which the justice of the peace was entitled to demand and collect as costs before the action thereon could be tried; 107 others are for less than \$15; and the remaining 74 are for amounts running from \$15 to \$229.92—by far the larger part being for sums between \$25 and \$30. It also appears that the minimum amount of court costs alone for the trial of these cases in the justice's court would exceed the total amount of the claims, and, if contested and witnesses subpoenaed, would amount to several thousand dollars in excess of that sum, and that, if appeals were taken, the total amount would run up to \$15,000 or \$20,000.

It is further alleged that the defendants Smith, as plaintiff, Flournoy, the justice of the peace, and Emmons, Smith's attorney, have confederated and conspired together to maintain and prosecute these numerous separate actions, instead of consolidating them, in order to force the defendant, by the multiplicity of the suits and the excessive cost of litigating them separately, to a settlement without a contest on their merits; that Smith is financially irresponsible, and that this plaintiff, defendant in each of the justice court actions, in the event of successfully defending the suits, would be unable to collect any judgment for recovery of its costs against Smith; and that Smith himself is involved in no financial outlay or risk in the matter, by reason of an agreement between him and the justice of the peace that the latter will look to a recovery against the defendant railway company to collect his fees. It is further alleged that the railway company has a good and meritorious defense to all of these claims; that the rates charged were valid and reasonable; that they were in each instance voluntarily paid by the respective consignees without compulsion, and after delivery of the various consignments had been made; and that section 21 of article 12 of the Constitution of the state of California is void, because in conflict with the commerce clause of the federal Constitution.

The complaint here asks, as permanent relief, that the defendants Smith and Flournoy, as justice of the peace, be perpetually enjoined from maintaining or prosecuting said 648 actions, or any of them, that the defendant Smith be required to set up and litigate in the present action all his claims involved in the 648 separate suits in the

justice's court, and that the rights of the plaintiff and defendant in said justice's court actions be required to be set up and determined in this action, so as to avoid a multiplicity of actions and a flagrant abuse of the legal processes of the state of California, and for general relief.

[1] Assuming the facts as pleaded to be true, as we must for the purposes of this appeal, there are two aspects of this case that ought to entitle plaintiff to relief: First, if a conspiracy and combination have been entered into between the respondents, Smith as plaintiff in the numerous suits, and the justice of the peace before whom they are pending, to force a settlement and payment of these claims by reason of the prohibitive cost of defending them, it is such an abuse of the processes of the courts as should estop the plaintiff from prosecuting them and the justice from trying them. It may be suggested that a change of venue could be obtained. This would remove the element of a disqualified court, but it would involve the prepayment of costs (Code Civ. Proc. § 836) greater in amount than the total sum of the claims, and still subject the defendant there to the same multiplicity of suits and indefinite future costs in another tribunal.

If the fraud charged here were in the origin of the cause of action itself, it could clearly be reached by injunction, under the authority of *Southern Pacific Co. v. Robinson*, 132 Cal. 408, 64 Pac. 572, 12 L. R. A. (N. S.) 497. But the claim sued on in each of the 648 cases constitutes a bona fide cause of action for which the holder is entitled to maintain suit. In *Southern Pacific Co. v. Robinson*, above cited, the defendants assiduously worked up some 3,000 or more cases against the railway company, by procuring people to buy tickets between two stations on the line of the road, and then demanding stop-over checks at an intermediate point, knowing, and in fact desiring, that the request would be denied. These claims were based upon section 490 of the Civil Code, the validity of which was disputed by the railway company. The defendants in the *Robinson* Case brought separate suits in various justice's courts upon 674 of these claims; some 500 being involved in the proceeding to enjoin. An injunction against the prosecution of these cases was sustained by the Supreme Court, on the ground that the claims were fraudulent, that the claimants were not in good faith seeking stop-over privileges, but seeking to have this privilege denied, so as to sue the railway company for the penalty and damages, and that because of the multitude of actions there was no adequate remedy at law. Mr. Justice Garoutte says in the opinion:

"We leave this branch of the case with the declaration that this action is maintainable in

a court of equity by reason of the claim of a confederacy and combination formed and existing between these appellants to create and prosecute the aforesaid 3,000 causes of action against the plaintiff, and upon the further ground that, in order to avoid a multiplicity of actions, equity will consolidate these 3,000 alleged causes of action into one action, and, thus having taken hold of the matter, will dispose of it in its entirety."

It may, however, be reasonably contended in this case that the principle involved is not different from that in the case just cited, as in each case the multiplicity of suits is resorted to as a means of extorting from the defendant a settlement which could not be had in a consolidated action without a full investigation on the merits. Whatever potential rights Smith, the defendant here, may have to recover on the 648 claims in which he has brought suit, the fact remains, under the allegations of the complaint here under consideration, that he is making use of the processes of the courts in the manner he has adopted, not to procure a judicial determination of his rights, but to prevent such a determination, and to force a settlement by piling up against the railway company of excessive and prohibitive costs.

[2] But in the second place, there is presented the question as to whether or not the nature of the numerous actions pending is not such—waiving the question of a fraudulent purpose and combination in bringing them—as to call for relief in equity by way of their consolidation. We have here 648 actions, brought by one plaintiff against one defendant, all arising out of the same general state of facts, and all dependent upon the determination of the same disputed issues of law. It is true that there are independent issues of fact which will call for separate proof on each claim, but to no greater extent than if the plaintiff were suing the defendant on an equal number of items in a store account. It may be conceded that equity will not ordinarily prevent numerous individual claimants, each having a separate cause of action against the same person, from maintaining separate actions at law, merely to prevent a multitude of suits, or to relieve from excessive costs, even where the right of recovery in each depends upon the same state of facts and the same principles of law. The result of a consolidation of such actions would be to subordinate the rights of the individual claimant to the convenience of the collective body. But here we have but one plaintiff and one defendant. By his allegation of the ownership of each of these claims the plaintiff has set up a common and collective interest in them. Presumptively only the plaintiff, Smith, is concerned in the prosecution of these claims. His interest in one

is no different from his interest in all. He stands in the same relation to them, so far as his causes of action and the methods of prosecuting them are concerned, as though he were the original consignee of all the freight shipments involved. The allegations of the complaint, as well as the inference arising from the very fact of his having brought 648 separate actions, indicate some ulterior purpose; for no man, in his senses, having that number of claims which he could properly unite in one action, if what he was after was a fair and speedy trial on the merits, would resort to a multitude of separate actions, particularly if he had to subject himself to the ordinary expense incident alone to filing suit and serving process. Obviously, if the plaintiff is not seeking to abuse the processes of the law, his own interests, as well as those of the defendant, demand a consolidation of these actions. It would require two years of constant work of the justice's court, if each of these cases should be separately tried, before they would be disposed of; whereas they could be tried in a consolidated action in a few days at most. If equity cannot meet a situation like this, its powers should be enlarged.

Even where the right of action exists in numerous claimants, if the object of bringing a multitude of actions is to harass and oppress, equity will interfere. The Supreme Court of Alabama, in the case of *Southern Steel Co. v. Hopkins*, 174 Ala. 465, 57 South. 11, 40 L. R. A. (N. S.) 464, Ann. Cas. 1914B, 692—one of the decisions cited and relied on by respondent—while sustaining the right of numerous persons damaged by a single tort to maintain separate actions, says:

"But the mere fact that the defendant has committed a tort, by which he injured one or a hundred parties, cannot give him an equity to prevent each and every one of the parties so injured from maintaining an action against him to recover damages. If there had been a combination or conspiracy between such numerous parties to vex and harass the complainant by numerous suits, then he would have an equity to enjoin their prosecution."

In most of the cases we have examined, where equity has refused to enjoin the prosecution of numerous suits for actions arising out of the same cause, it has been upon the ground that there was not a community of interest in the parties against whom the equitable relief is sought. It has not been suggested in this case why the interests involved in each of these 648 actions have not been consolidated in the one plaintiff by virtue of the assignments.

We do not have to contemplate, in this proceeding, the confusion pointed out in the Alabama case above cited, involving—

"110 separate answers, and as many pleas and demurrers in one suit, and the innumerable is-

sues of law and of fact that would be raised thereby, and the defense being conducted by 110 different attorneys, or the parties deprived of the right to have the counsel of their choice."

But, even so, equity might still take over the litigation. In *Smyth v. Ames*, 169 U. S. 466, 517, 18 Sup. Ct. 418, 422 (42 L. Ed. 819) the Supreme Court of the United States upholds the power of a court of equity to enjoin the bringing and maintaining of numerous actions to enforce the terms and penalties of an act regulating rates of transportation, which act, the petitioners claimed, was unconstitutional. After citing numerous cases upholding the doctrine contended for, the court says:

"In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground in controversy and thus avoid a multiplicity of suits that would inevitably arise under the statute. The carrier is made liable, not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine. * * * The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community."

The actions referred to were brought to enjoin the bringing of numerous suits. Can it be doubted if, as here, such suits had been actually begun, that equity would have extended its relief, by a requirement that all such be consolidated and tried in the equity proceeding? It will be observed that in the decision above cited the same issue was presented by the petitioners as in the cases before us—the determination by a court of equity of the validity of a rate schedule, in order to avoid a multitude of actions at law arising on the disputed validity of the rate.

The right of plaintiff, under circumstances such as are pleaded here, to resort to equity to prevent the prosecution of a multitude of actions finds further support in the following authorities: *Pomeroy's Eq.* (4th. Ed.) §§ 243-276; *Jordan v. Western Union Telegraph Co.*, 69 Kan. 140, 76 Pac. 396; *Third Ave. R. R. Co. v. Mayor of New York et al.*, 54 N. Y. 159; *Chicago Tel. Co. v. Illinois, etc., Association*, 106 Ill. App. 54, 72; *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224; *Milwaukee Electric Ry. Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870; *Liverpool & London, etc., Insurance Co. v. Clunie (C. C.)* 88 Fed. 160.

Especially where law and equity jurisdiction is vested in the same tribunal, as in the state of California in a matter where equitable issues are presented, the court can take over the entire controversy and try all questions of law and fact. As to the plaintiff in the actions at law being deprived of the right of trial by jury, it is within the province of a court of equity to grant a trial by jury of any disputed issue of fact where the interests of justice demand it. If the justice's court where all these actions are pending could direct their consolidation into one action and try them together—as could be done if they were pending in a superior court—there might be no need of a resort to equity. But as no such power rests in the justice's court, equity seems to afford the only adequate relief from the abuse complained of.

We are of the opinion that the complaint was sufficient to entitle plaintiff to a trial of the issues presented and that the demurrer should have been overruled. On a proper joining of issues by answer, and proof of the pendency of numerous actions in the justice's court, under the conditions alleged in the complaint, plaintiff will be entitled to an order enjoining further prosecution of said justice's court actions, and requiring the plaintiff therein to set up his claims for relief in this action, and, to a complete determination of all the rights of the parties under the issues joined.

The judgment is reversed, with directions to the trial court to proceed as above indicated.

We concur: FINLAYSON, P. J.; THOMAS, J.

PEOPLE v. CASTRO. (Cr. No. 672.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. CRIMINAL LAW §730(1)—ERROR IN LIMITATION OF ARGUMENT CURED.

Where the court trying a prosecution for murder erroneously limited defendant's two counsel to 2½ hours in their argument, in the absence of anything to show that the additional three-quarters of an hour actually allowed counsel was not ample, the error must be deemed to have been cured.

2. CRIMINAL LAW §1180(2)—SPECIFICATION OF ERRORS IN INSTRUCTIONS INSUFFICIENT FOR REVIEW.

On appeal from conviction of murder, where the sole argument that the trial court erred in refusing instructions is the claim the refusal to give each and all of the instructions found in the clerk's transcript on pages of certain numbers was prejudicial error, and withdrew full consideration of the case from the jury, the appellate court will not trouble to examine such instructions to discover wherein they are erroneous.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Bernardino Castro was convicted of murder in the second degree, and he appeals. Affirmed.

R. J. Adcock and M. G. Phillips, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Defendant was charged with the crime of murder. The trial commenced on April 14th and ended on April 17th, with a verdict convicting him of murder in the second degree.

At the close of the evidence the court, addressing counsel, asked how much time they desired in which to argue the case, to which Mr. Adcock, one of defendant's attorneys, replied that he would like 2 hours for himself, stating that they had been 3 days introducing the testimony, and Mr. Phillips, another attorney for defendant, replied that he took 2 hours at the last trial. Thereupon the court fixed 2½ hours as the time allotted to each side for argument, saying, "You can apportion it to suit yourselves." No objection other than as stated appears to have been made to the action of the court. Thereafter defendant moved for a new trial, and presented an affidavit to the effect that the action of the court in so limiting the time for argument was prejudicial to defendant in that the time was inadequate for defendant's counsel to fairly and properly review the evidence and

present argument based thereon in his behalf, on account of which many important things were necessarily omitted which otherwise could have been presented. A counter-affidavit was filed by the district attorney to the effect that when the court fixed the time allotted for argument defendant's counsel announced they would like longer time, and thereupon the district attorney gave them one-half hour of his time, which, together with an additional 15 minutes they used, thus consuming in all a period of 3 hours and 15 minutes in the argument; and, further, that there is nothing in the cause which required a longer period for the proper presentation of the defense.

[1] Under this state of the record, even were it conceded that the limitation of 2½ hours so accorded defendant for arguing the case was an abuse of discretion on the part of the court, there is nothing in the record to show that the additional three-quarters of an hour was not ample and all required by counsel for the purpose of arguing the case; hence, if the court erred in fixing the time, such error must be deemed to have been cured by the fact that additional time was granted, and, as thus extended, it is not claimed or shown that the time actually accorded counsel for argument was inadequate.

[2] Another point urged by appellant for a reversal is the ruling of the court in refusing instructions requested by defendant. The sole argument upon the point is as follows:

"We also urge the point, with emphasis, that the refusal of the court to give each and all of the instructions found in the clerk's transcript on pages 32, 33, 34, 35, 39, was prejudicial error and withdrew a full consideration of the case from the minds of the jury."

To determine whether or not there is any merit in appellant's contention would necessitate an independent examination and inquiry as to the correctness of the ruling, and this we do not feel inclined to make. *People v. Woon Tuck Wo*, 120 Cal. 297, 52 Pac. 833. A sufficient answer to the argument presented is to quote from *People v. McLean*, 135 Cal. 306, 67 Pac. 770, where it is said:

"We again repeat what we have said before, that we will not examine alleged errors presented in this way. It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion."

To like effect is *People v. Ruiz*, 179 Pac. 691.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

COLLINS v. JOHN ROBERTS CO. et al.
(Civ. 2346.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1919.)

APPEAL AND ERROR \S 434, 773(4) — **JUDGMENT AFFIRMED FOR WANT OF PROSECUTION.**

Where appellants filed no points and authorities in support of their appeal and did not appear at the calling of the calendar to make oral argument, the judgment should be affirmed.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by B. V. Collins against the John Roberts Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jones & Weller, of Los Angeles, for appellants.

Kemp, Mitchell & Silverberg, of Los Angeles, for respondent.

PER CURIAM. In this case there was an appeal taken by the defendants from the judgment. A transcript was filed in this court in April, 1917. The appellants filed no points and authorities in support of their appeal, and did not appear at the calling of the calendar to make oral argument. No cause is therefore shown why the judgment appealed from should be held erroneous.

The judgment is affirmed.

PEOPLE v. BROWN. (Cr. No. 666.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. ASSAULT AND BATTERY \S 78—**INDICTMENT FOR ASSAULT LIKELY TO PRODUCE GREAT INJURY SUFFICIENT.**

Indictment, charging that defendant committed an assault by means and force likely to produce great bodily injury, in that he willfully, unlawfully, etc., made an assault on the person of another by such means and force in that he whipped, struck, beat, bruised, and cut such other with a rawhide whip on the naked body, *held* sufficient to charge the offense denounced by Pen. Code, \S 245, in that it specified the manner of use of the whip.

2. CRIMINAL LAW \S 178—**DISMISSAL OF MISDEMEANOR CHARGE NOT A BAR TO PROSECUTION FOR FELONY.**

Under Pen. Code, \S 1387, providing dismissal of the action bars another prosecution for the same offense if a misdemeanor, but not if a felony, dismissal on motion of the district attorney of complaint in justice court, charging defendant with battery, a misdemeanor, *held* not a bar to prosecution of defendant for the felony of assault by means and force likely to produce great injury, denounced by section 245.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

H. W. Brown, Sr., was convicted of assault by means and force likely to produce great bodily injury, and he appeals. Affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Defendant by an indictment was charged with the crime of assault by means and force likely to produce great bodily injury, as provided in section 245 of the Penal Code. To this charge he entered three pleas; that of not guilty, once in jeopardy, and former acquittal. As to the two last pleas, the jury found for the people, and rendered a verdict that defendant was guilty of an assault. Judgment followed, from which this appeal is prosecuted.

[1] The charge in the indictment is that defendant committed an assault by means and force likely to produce great bodily injury, in "that the said H. W. Brown, Sr., * * * did willfully, unlawfully, feloniously, and forcibly make an assault upon the person of one Henry West Brown, Jr., by means and force likely to produce great bodily injury, in this, that he, the said H. W. Brown, Sr., did then and there whip, strike, beat, bruise, and cut the said Henry West Brown, Jr., with a rawhide whip upon the naked body of him, the said Henry West Brown, Jr., which said whipping, striking, beating, bruising, and cutting with said rawhide whip as aforesaid, upon the naked body of the said Henry West Brown, Jr., was likely to and did produce great bodily injury to and upon the said Henry West Brown, Jr." Appellant insists that the indictment is insufficient, and hence the court erred in overruling his demurrer. In support of his contention he cites the case of *People v. Perales*, 141 Cal. 581, 75 Pac. 170. In that case the charge was the commission of an assault "by means likely to produce great bodily injury, to wit, with a heavy wooden stick," the use of which language was held to be insufficient, for the reason that it was not stated how or in what manner the heavy wooden stick was used. The court there said, "The information should have specified the particular means used, which it is claimed constitute an offense within the general terms of the section," and further held "that the information shall contain a statement of the acts constituting the offense, and the particular circumstances of the offense charged, in such a manner as will enable a defendant to understand the nature of the accusation against him." In our opinion, the indictment fully complies with the rule announced in *People v. Perales*,

supra, as to the required averment in such cases; indeed, it is difficult to perceive that in the instant case language could have been selected better adapted for the purpose of acquainting defendant with the charge of which he was accused. The allegations as to the force with which the rawhide whip was used, together with the particular circumstances of the offense, clearly distinguishes this case from the charge in the Perales Case and brings it within the rule announced in that of *People v. Emmons*, 61 Cal. 487.

[2] It appears that before the indictment was returned against defendant a complaint, based upon the same assault, had been filed in the justices' court of Los Angeles township, charging him with battery. After the return of the indictment, the complaint was on motion of the district attorney, dismissed. Appellant contends that, since the charge alleged in the complaint was based upon the same acts constituting the offense for which he was indicted, the dismissal of the misdemeanor in the justices' court constituted a bar to the prosecution of the felony charge upon the indictment. This contention is based upon section 1387 of the Penal Code, which provides:

"An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; * * * but an order for the dismissal of the action is not a bar if the offense is a felony."

In the justices' court defendant by the complaint was charged merely with the commission of a misdemeanor, namely, that of battery. Hence, under the plain reading of the statute, the dismissal would have barred further prosecution upon a new charge for the commission of such misdemeanor. But the indictment charged a felony, and, though based upon the acts which constituted the battery, other facts were alleged in connection therewith which made the offense a felony, in the prosecution for which it is expressly provided by the statute that such dismissal shall not constitute a bar to the prosecution of defendant for the felony charge. Not only, to our minds, is the statute perfectly clear, but the interpretation given is sustained by the opinion in the case of *People v. Smith*, 143 Cal. 597, 77 Pac. 449, where defendant was charged upon a complaint filed in a justices' court with petty larceny, which action was dismissed and defendant indicted for petty larceny and a prior conviction of burglary, constituting a felony, and it was there held that the dismissal of the charge of petty larceny on motion of the district attorney for the purpose of charging a felony for the same offense against the same defendant based upon a prior conviction of burglary, does not operate as a former acquittal or constitute jeopardy

within the meaning of the statute. As said in the case cited:

"It was never intended that the dismissal should be a bar to a prosecution for a felony. The defendant has never been in jeopardy for the felony, if the act charged against him be a felony."

By reason of defendant in that case having, prior to committing the crime of petty larceny, been convicted of burglary, the commission of petty larceny made the latter crime a felony. So here, by reason of the battery being accompanied by means and force likely to produce great bodily injury, the acts constituted a felony for which defendant was subject to prosecution.

Since the statute not only in its terms, but as interpreted by the Supreme Court in *People v. Smith*, supra, is perfectly clear, it is unnecessary to review authorities cited by defendant in support of his contention, from other jurisdictions.

We find no merit in the points urged for a reversal. The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

AMERICAN STEEL PIPE & TANK CO. v. HUBBARD. (Civ. 2363.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1919.)

1. SALES \S 441(3)—EVIDENCE INSUFFICIENT TO SHOW DIFFERENCE IN GOODS DELIVERED FROM SAMPLE.

In an action for the price of oil orchard heaters, evidence held insufficient to sustain the defense urged, under Civ. Code, \S 1766, that the goods delivered differed from the sample exhibited to defendant buyer when she gave plaintiff seller's agent the order.

2. SALES \S 288(2) — DIFFERENCE IN GOODS DELIVERED FROM SAMPLE WAIVED BY ACCEPTANCE.

Where plaintiff seller of oil orchard heaters, purchased by sample, delivered to defendant buyer heaters differing from the sample, but the buyer, with opportunity to inspect, nevertheless accepted and used the heaters, she must be deemed to have waived any objection on account of their being otherwise than as represented.

3. SALES \S 437(1) — IMPLIED WARRANTY WAIVED BY FAILURE TO PLEAD.

In an action for the price of oil orchard heaters, where defendant buyer did not plead as a defense violation of an implied warranty, under Civ. Code, \S 1770, she could not rely upon such violation either in support of a cause of action or as defense.

4. SALES \S 267—EXTENT OF WARRANTY ESTABLISHED BY WRITTEN CONTRACT.

Where a writing exists between the parties to a sale, the extent of a warranty made is limited

ited to the language used, and parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the American Steel Pipe & Tank Company against Ella P. Hubbard. From judgment for plaintiff, defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Hanson, Hackler & Heath, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought to recover for the price of a lot of oil orchard heaters sold and delivered to defendant upon her order in writing made therefor. Judgment went for plaintiff, from which defendant appeals.

The giving of the order is admitted in the answer, pursuant to which it is therein alleged "that said plaintiff did send certain heaters to the premises of this defendant, but denies that the same were of the class, character, or kind represented to this defendant or by her purchased." As to this allegation the court found "that it is not true, as alleged in defendant's answer, that the said heaters were not of the class, character, or kind represented to or purchased by the defendant," but, on the contrary, found that pursuant to the written contract plaintiff delivered the heaters so ordered to the defendant, who received, accepted, and used the same, for which she agreed to pay \$916.65, no part of which was paid.

[1] Appellant attacks the finding of the court to the effect that the heaters delivered by plaintiff were of the class, character, and kind purchased by her. Her argument is based upon the claim that the order as given was based upon a sample of the heater exhibited to her by plaintiff's selling agent, compared with which the heaters delivered were mechanically different. Section 1766, Civil Code, provides that "one who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample." While it appears from the evidence that a sample heater was exhibited to defendant at the time she gave the order, it fails to show wherein the heaters delivered differed from such sample. Not only was defendant uncertain as to the identity of the heater produced by her at the trial, but her meager testimony was flatly contradicted by plaintiff's selling agent and other witnesses, thus at least creating a conflict, in solving which the court found in favor of plaintiff. Hence, assuming that the heaters delivered differed from the one produced in court by de-

fendant, it cannot be said that the goods delivered differed from the sample exhibited to defendant when she gave the order.

[2] Moreover, the written contract was made June 19, 1913, and called for "Coe Orchard Heaters of 5 gallons capacity," and contained a provision to the effect "that this paper, in writing and printing, contains the entire agreement between the parties hereto named and that no outside verbal understanding with any one will be of any force or effect." The heaters, some 1,400 in number, were delivered on November 23, 1913, and defendant, having full opportunity for examination of the same, accepted them, distributed them through her orchard, and used them during the winter of 1913-14. While the court, in our opinion, upon sufficient evidence, found the goods were of the class and kind purchased by defendant, nevertheless, having opportunity to inspect the same, even were they different from those contracted for, she, by accepting and using them, must be deemed to have waived any objection on account of the heaters being otherwise than as represented by the seller. *Jackson v. Porter Land & W. Co.*, 151 Cal. 32, 90 Pac. 122; *Treis v. Berlin Dye Works, etc., Co.*, 11 Cal. App. 421, 105 Pac. 275; *Byron Jackson Machine Works v. Duff*, 158 Cal. 47, 109 Pac. 616.

[3, 4] Appellant also insists that the heaters were constructed in a manner which permitted water to leak into them during rainstorms, which fact constituted a violation of an implied warranty under section 1770 of the Civil Code. As to this contention, it is sufficient to say that defendant's pleading contains no defense predicated upon a violation of an implied warranty. Code warranties which are not pleaded or proved cannot be relied upon, either in support of a cause of action or as a defense thereto. *Kullman, Salz & Co. v. Sugar, etc., Co.*, 153 Cal. 725, 96 Pac. 369. Moreover, the contract was in writing, and the only warranty given by plaintiff was a written warranty under date of June 20, 1913, which is silent as to the matters upon which appellant bases her contention. Where a writing exists between the parties, the extent of a warranty made is limited to the language used therein. "Parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies." *United Iron Works v. Outer Harbor D. & W. Co.*, 168 Cal. 81, 141 Pac. 917. Not only was there ample evidence to support the finding of which appellant complains, but, even were it otherwise, defendant is in no position to invoke such defense.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

BURMESTER et ux. v. McNEAR et al.
(Civ. 2908.)

(District Court of Appeal, First District, Division 2, California. Aug. 4, 1919.)

1. APPEAL AND ERROR §231(2) — SPECIFIC OBJECTION TO COMPLAINT AGAINST EXECUTOR ESSENTIAL TO REVIEW.

In an action against executors, the objection in the trial court that no proper, or any, foundation has been laid, either for the suit, or the cause of action, or the testimony, or the evidence, is too general to require review of the objection that the complaint states no cause of action, because it does not allege compliance with Code Civ. Proc. § 1502, requiring proof of filing or presentation of claim.

2. APPEAL AND ERROR §193(5) — THAT COMPLAINT AGAINST EXECUTOR WAS DEFECTIVE NOT REVIEWABLE WITHOUT OBJECTION BELOW.

The objection that complaint against an executor states no cause of action, because not alleging presentation of claim against estate, as required by Code Civ. Proc. § 1502, cannot be made for the first time on appeal.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Otto Burmester and wife against J. W. Horn, in which George P. McNear, as executor, and Louise W. Horn, as executrix, of the last will and testament of the defendant, J. W. Horn, were substituted as parties defendant. Judgment for plaintiffs, and defendants appeal. Affirmed.

F. A. Meyer, of Petaluma, for appellants.
Gil P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for respondents.

LANGDON, P. J. This action was originally commenced against John W. Horn, defendants' testator. Plaintiffs sought to obtain a judgment for \$1,646, the amount alleged to have been paid to Horn by them under a contract of purchase of real and personal property, the possession of which was later taken from plaintiffs in breach of their contract of purchase, and also for \$1,000 damages suffered by them by reason of the breach of the said contract by Horn. Judgment was rendered by the superior court for the county of Sonoma against the plaintiffs herein, from which judgment an appeal was taken. Upon the appeal the judgment was reversed. In the meantime the defendant Horn had died, and the superior court, on February 18, 1918, made its order of substitution of parties defendant, ordering that the present defendants be substituted as executor and executrix, respectively, of the last will of J. W. Horn, deceased. Upon the retrial judgment was rendered for the plaintiff in the sum of \$1,365.80.

[1] The defendant appeals, and presents

but one question, namely: Does the amended complaint state a cause of action? The argument upon this point is that, as the amended complaint contains no allegation that plaintiffs, or either of them, has filed a claim with the clerk, or presented such a claim to the executors for allowance or rejection, it does not meet the requirements of section 1502, Code of Civil Procedure, declaring that "no recovery shall be had in the action unless proof be made of such filing or presentation." One of the cases relied upon by appellant is the case of *Falkner v. Hendy*, 107 Cal. 49, 40 Pac. 21, 386, but that case expressly states that a judgment would not be void, although the fact of presentation of the claim to the executor was neither alleged nor proven; that such judgment would merely be erroneous, and would not be reversed on appeal, unless the objection was first made in the trial court. To the same effect are the cases of *Bank of Stockton v. Howland*, 42 Cal. 129, 134; *Drake v. Foster*, 52 Cal. 225. In the case of *Bank of Stockton v. Howland*, supra, it is said that the purpose of the rule requiring objection to be made in the trial court is to give the claimant an opportunity of supplying the requisite pleading or proof, as the case may require.

The objection made by the appellant in the trial court, and which he relies upon now to meet this rule, was: "That no proper or any foundation has been laid either for the suit or the cause of action or the testimony or the evidence." While this broad general objection might include a number of specific objections, we think it was the duty of the defendants to have made their objection specific, so as to call to the attention of the plaintiffs the precise point upon which they are now relying on appeal. As was said in the case of *Martin v. Travers*, 12 Cal. 243-245: "The party should have laid as the authorities say, his finger on the point at the time." *Mott v. Smith*, 16 Cal. 533, 555. In the case of *Cochran v. O'Keefe*, 34 Cal. 554, 556, the court, in considering a similar objection that a proper foundation had not been laid for the introduction of a deed in evidence, said that such an objection failed to specify the point upon which it rests; that had the point been specified when objection was made on the trial, plaintiffs might have entirely obviated the objection by preliminary or subsequent evidence.

[2] So in the present case, if the objection had been specifically made so as to call the matter to the attention of the plaintiffs, presentation could have been made because the action was brought within the time allowed for presentation of claims, and a supplemental complaint could have been filed alleging presentation, which has been held to be the proper method of procedure. *Falkner v. Hendy*,

supra. We are therefore of the opinion that proper objection was not made in the trial court, and under the authorities herein cited such objection may not be made for the first time upon appeal.

The judgment is affirmed.

We concur: BRITTAI, J.; HAVEN, J.

HALE v. PENDERGRAST et al.
(Civ. 2831. S. F. 8670.)

(District Court of Appeal, First District, Division 1, California. July 7, 1919. Opinion of Supreme Court Denying Rehearing, Sept. 4, 1919.)

1. VENDOR AND PURCHASER ⇐231(13)—INSTRUMENT UNLAWFULLY RECORDED NOT CONSTRUCTIVE NOTICE.

An instrument not entitled to go upon record is not constructive notice, although recorded.

2. VENDOR AND PURCHASER ⇐231(15)—UNACKNOWLEDGED AGREEMENT TO REPURCHASE CANNOT BE RECORDED.

An agreement to repurchase land on demand by the purchaser within a certain specified time is not entitled to be recorded unless it is acknowledged.

3. VENDOR AND PURCHASER ⇐231(15)—UNACKNOWLEDGED AGREEMENT TO REPURCHASE NOT AN "INSTRUMENT" TO BE RECORDED.

An unacknowledged agreement to repurchase land, although physically attached to and by reference made a part of a purported notice signed and acknowledged by the purchaser of the land to the effect that the agreement was given in consideration of the sale of land, was not an "instrument" which could be recorded under Civ. Code, § 1158.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Instrument.]

4. VENDOR AND PURCHASER ⇐84—AGREEMENT TO REPURCHASE VALID.

On sale of land, the vendor and purchaser may legally enter into an agreement whereby the purchaser may require the vendor to repurchase within a specified time.

5. MORTGAGES ⇐275—ONE ASSUMING MORTGAGE DEBT CANNOT ALLEGE IN FORECLOSURE THAT NOTHING WAS DUE.

Where land was sold subject to the right of the purchaser to demand a repurchase by the vendor, and the vendor sold and assigned note and mortgage given on repurchase, being required by the purchaser, it mattered not to the vendor to whom the purchase money should be paid; and, if the purchaser was satisfied that she owed the assignee of the mortgage, the vendor, having assumed the indebtedness, cannot complain on foreclosure that nothing is due on the mortgage.

Opinion of Supreme Court Denying Rehearing.

6. MORTGAGES ⇐559(3)—RIGHT OF PURCHASER TO COMPEL REPURCHASE DEFENSE TO PURCHASE MONEY MORTGAGE.

Where purchaser of land has the right, under an agreement, to require vendor to repurchase within a specified time, the agreement, where the purchaser chooses to avail himself of it, is a good defense to claim for deficiency judgment in an action to foreclose a mortgage given in part payment of the purchase price.

7. MORTGAGES ⇐258—WHERE MORTGAGE NOTE WAS NOT NEGOTIABLE, ANY DEFENSE WAS GOOD AGAINST ASSIGNEE OF MORTGAGE.

Where a mortgage note was not negotiable where executed in an action to foreclose by assignee, the maker can set up defenses he has against the assignor.

8. MORTGAGES ⇐253—ASSIGNOR OF MORTGAGE ESTOPPED ON FORECLOSURE TO DENY VALIDITY.

Where land was sold and a collateral agreement was entered into whereby purchaser could require vendor to repurchase within a specified time, and a mortgage, given for part of the purchase price, was assigned by the vendor, and thereafter the purchaser required the vendor to repurchase, transferring the property to him on return of the actual cash paid, the assignee of the mortgage is entitled to a judgment against the purchaser foreclosing him of any interest in the mortgage property and not to deficiency judgment; but, as far as the vendor is concerned, the latter is estopped, in view of his implied warranty of the validity of the mortgage, under Civ. Code, § 1774, from claiming that the mortgage was rendered ineffective by reason of the repurchase.

In Bank.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Thomas P. Hale against Lucy Pendergrast and another. Judgment for defendants reversed by the District Court of Appeal, and a rehearing denied by the Supreme Court.

Theodore Hale, of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for appellant.

W. D. L. Held, of Ukiah, for respondent Pendergrast.

Mannon & Mannon, of Ukiah, for respondent Waldteufel.

WASTE, P. J. Plaintiff brought this action to foreclose a mortgage. Judgment was entered for the defendant, and plaintiff appeals.

The defendant and respondent Waldteufel was the owner of the lands and premises in Mendocino county, described in the mortgage sought to be foreclosed. He agreed, with the defendant and respondent Mrs. Pendergrast, that he would sell and convey the said lands and premises to her for the

purchase price of \$10,000, payable \$2,000 in cash and \$8,000 according to the terms of the promissory note and mortgage sued on in this action, and, as part of the same transaction, Waldteufel agreed with defendant Pendergrast that he would repurchase the said premises from her, for the sum of \$10,000, at any time within one year from the date of the consummation of her purchase, if she should elect to so require.

Mrs. Pendergrast agreed with Waldteufel to purchase said premises from him on said terms, and on the 25th day of August, 1916, Waldteufel conveyed said premises to her by a grant, bargain, and sale deed, and she paid him therefor the sum of \$2,000, and made, executed, and delivered to him the promissory note for \$8,000 and mortgage which is sought to be foreclosed in this action. The note was payable in eight equal installments of \$1,000 each, beginning one year after date, with interest from date at the rate of 6 per cent. per annum, payable semiannually.

As a part of the same transaction, defendant Waldteufel on the same day made, executed, and delivered to his codefendant the following receipt:

"August 25, 1916. Received of Lucy Pendergrast the sum of two thousand dollars (\$2,000) as first payment of the Waldteufel ranch in Redwood Valley, Mendocino county, California, consisting of 70 acres of the former 'Beasore ranch' (describing the boundaries thereof); also all personal property on said 70 acres (with certain exceptions), and growing crops; also all water and water rights. Balance of \$8,000.00 to be paid at the rate of \$1,000 per annum with interest on deferred payments at six per cent. per annum payable semiannually. Said J. A. Waldteufel agrees to buy said premises back from said Lucy Pendergrast at any time within one year for \$10,000 if she so elects, but has no option to buy unless called upon to do so by her. [Signed] J. A. Waldteufel. I agree to the above contract. [Signed] Mrs. Lucy Pendergrast."

The lower court found that this receipt was duly acknowledged and entitled to record, and was duly recorded September 14, 1916. The manner of its recordation will be referred to presently.

On the 31st day of March, 1917, after the first installment of interest had been paid, defendant Waldteufel, for a good and valuable consideration, duly sold and assigned the note and mortgage of Mrs. Pendergrast to plaintiff, which assignment, the court found, was duly recorded in the office of the county recorder of Mendocino county. No actual notice to plaintiff of the collateral agreement to repurchase, made between the two defendants, is pleaded, or attempted to be proved. So far as the record discloses there was no notice, other than whatever constructive notice may be imputed to plaintiff, by the placing of record in the recorder's office

of that document, in the manner hereinafter set forth. Waldteufel did not disclose to plaintiff the true situation until just before the foreclosure action was commenced.

On the 8th day of August, 1917, the defendant Pendergrast elected to, and did, require the repurchase of said premises by the defendant Waldteufel, under the terms of his agreement, and on said date Waldteufel accepted from Mrs. Pendergrast a deed of said premises, containing this clause:

"This deed is made pursuant to instrument recorded in Book 147 of Deeds, page 292, records of said county, and the intention is to convey to the grantee all the property and right acquired by the grantors by that certain deed recorded in Book 146 of Deeds at page 90, records of said county. The grantee assumes all the incumbrances on said property subject to all the equities and defenses of the grantors."

The first installment of the principal, \$1,000, was not paid when it became due, and plaintiff instituted this action. Upon these facts, which appear in the findings, the trial court made another finding to the effect that plaintiff, ever since the date of the assignment of the mortgage to plaintiff by Waldteufel, "has been and now is the true and lawful owner of said note and mortgage, subject to the rights and equities of the defendant Lucy Pendergrast," under and by virtue of her agreement of repurchase made and entered into with defendant Waldteufel, and that, notwithstanding the terms of said promissory note, there never has become due thereon the sum of \$1,000, or any other sum, on account of principal thereof. Judgment was thereupon entered, in accordance with the findings, that plaintiff take nothing by the action.

From the testimony it appears that the recordation of the collateral agreement, or receipt, wherein Waldteufel agreed to repurchase the mortgaged land from Mrs. Pendergrast, was accomplished as follows: Some time after the closing of the transaction, and before the assignment by Waldteufel to the plaintiff, Mrs. Pendergrast caused to be prepared by her attorney a purported notice, written at the bottom of the repurchase agreement and on the same sheet of paper. This notice stated that—

"The foregoing receipt was given on the sale of the said Waldteufel ranch, and that a promissory note and mortgage dated August 6, 1916, and recorded [setting out the record], was given in consideration of the sale of said ranch, and all and each of the terms of the above and foregoing receipt and agreement, and all assignees of said promissory note and mortgage are hereby notified accordingly, and they take said note and mortgage subject to my equity and defense as set forth in said receipt and agreement."

This notice was signed by Mrs. Pendergrast, acknowledged by her alone, and subse-

quently recorded in the book of deeds in the recorder's office.

[1-3] Appellant contends that the document did not affect title to the land, was not entitled to be recorded in the book of deeds, was acknowledged only by the obligee, not by the person to be bound, and was therefore never so recorded as to give constructive notice. An instrument, not entitled to go upon record, is not constructive notice, although recorded. *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 431, 137 Pac. 21. The repurchase agreement of August 25, 1916, was not acknowledged by either Waldteufel or Mrs. Pendergrast. Of itself, therefore, it was not entitled to be recorded. Neither does the fact that it was physically attached to, and by reference made a part of, the purported notice, signed and acknowledged by Mrs. Pendergrast add to its function as imputing notice. "Any instrument or judgment affecting the title to or possession of real property may be recorded under" chapter 4 of the Civil Code, relating to the recording of transfers. Civil Code, § 1158. By "instrument," as used in this section, is meant "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty." *Hoag v. Howard*, 55 Cal. 564, 565. The Supreme Court, in that case, after a careful examination of the various sections of the Civil Code, included in the chapter on recording transfers, *supra*, continues:

"Reference is particularly made to sections 1195 and 1215. Section 1195 relates to the proof of the execution of the instrument, and provides that it may be proved 'by the party executing it, or either of them.' Section 1215 defines the meaning of the term 'conveyance' as used in the two preceding sections, as embracing 'every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to real property may be affected, except wills.'" *Hoag v. Howard*, *supra*.

Measured by the foregoing test, the purported notice of Mrs. Pendergrast was not entitled to recordation, and imparted constructive notice to no one.

[4, 5] The repurchase agreement between Mrs. Pendergrast and Waldteufel was one which the parties had the right to make, and one which they did voluntarily and expressly enter into. *Davis v. Davis*, 19 Cal. App. 797, 800, 127 Pac. 1051. On the repurchase of the ranch being required by Mrs. Pendergrast it mattered not to Waldteufel to whom the purchase money should be paid. If Mrs. Pendergrast was satisfied that she owed plaintiff the \$8,000 on the note and mortgage, Waldteufel cannot after agreeing to pay the indebtedness, claim that nothing is due. *Washer v. Independent M. & D. Co.* 142 Cal. 708, 76 Pac. 654. "An agreement on the part of a grantee to pay and dis-

charge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor or may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety. [After citing cases.] The argument of these cases is that a party who expressly agrees to pay a particular debt, which the person contracting with him admits that he owes to a third party cannot thereafter be heard to say that the debt is not owing." *Davis v. Davis*, *supra*.

That Waldteufel and Mrs. Pendergrast well understood the nature of the transaction relating to the repurchase of the land is indicated by the testimony of the latter. To do other than apply the law we have just quoted to the facts of this case would, for reasons which must be apparent to anyone, be most inequitable and unjust.

The claim of the respondent, based upon the collateral agreement to repurchase, is that the mortgage of Mrs. Pendergrast conferred upon its holder a right of foreclosure only in case she failed to demand repurchase, and repayment, within the year, and thereafter breached the conditions of the mortgage; that is, that plaintiff took only such rights as Waldteufel had under the original transaction. Almost the identical claim was made in the case of *Merchants' Bank of Buffalo v. Weill*, 163 N. Y. 486, 57 N. E. 749, 79 Am. St. Rep. 605. The facts of that case are so similar with those of the case at bar as to be "on all fours" with it, except that in that case no attempt was made to record the collateral agreement, while here the attempt failed. It was there said:

"When this assignment was made, there was no defense to the mortgage. It was a subsisting and valid obligation for the amount expressed as owing by Weill, and his present defense to the enforcement of his liability arises from his exercising an option, conferred by an unrecorded and collateral agreement, to rescind the sale of the property, and thus be relieved from the obligation growing out of it. But this could not be said to have been a defense to the mortgage existing at the time of its assignment, for it was one which was brought into existence by the mortgagor at a time subsequent. Non constat that he would ever exercise his option to rescind under the collateral agreement, and whether he would do so would depend upon

events and considerations, subsequently occurring and influencing its exercise.

The court held that the plaintiff there, who was in the same position as the plaintiff here, was entitled to enforce the appellant's liability (the same as Mrs. Pendergrast here) for any deficiency arising from a sale of the mortgaged premises.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

Opinion of Supreme Court Denying Rehearing.

On application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division One.

PER CURIAM. [8-8] The opinion of the lower court discusses the recordability of the notice by the defendant Pendergrast. In this portion of the opinion we are not ready to concur without further consideration. It is immaterial, however, whether it was recordable or not. In any event the contract of repurchase between the defendant Waldteufel and Mrs. Pendergrast, if the latter chose to avail herself of it, would have been a good defense to an action by Waldteufel to foreclose the mortgage. Being a good defense against him, it would be a good defense against his assignee, the plaintiff, since the mortgage note was not negotiable under the law of this state at the time of the transactions here involved. The result, so far as the defendant Pendergrast is concerned, is that upon the facts found by the lower court the plaintiff is entitled to a judgment against her foreclosing any interest of hers in the mortgaged property, but not to a deficiency judgment. As to the defendant, Waldteufel, he warranted to the plaintiff the validity of the mortgage against the defense interposed in this case (section 1774, Civ. Code), and is estopped from making such defense.

The application for a rehearing is denied. All concur.

PEOPLE v. HOPPER. (Cr. 643.)

(District Court of Appeal, Second District, Division 1, California. July 30, 1919.)

1. CRIMINAL LAW §1037(1)—OBJECTION TO ARGUMENT, NOT ASSIGNED AT TIME, NOT REVIEWABLE.

Where defendant did not assign misconduct of the prosecuting attorney in argument at the time when the objectionable statement was made to the jury, such objection will not be considered on appeal.

2. CRIMINAL LAW §814(12) — INSTRUCTION AS TO PRESUMPTION OF GOOD REPUTATION OF DEFENDANT ERRONEOUS WHEN NOT IN ISSUE.

In a prosecution for manslaughter, where no evidence was offered for or against defendant's reputation, an instruction that the law presumed defendant had a good reputation for truth, honesty, and integrity was properly refused, despite Code Civ. Proc. § 1847.

3. CRIMINAL LAW §829(5)—REFUSAL OF INSTRUCTION COVERED BY ONE GIVEN NOT ERROR.

In a prosecution for manslaughter, the court properly refused to instruct that defendant was entitled to act on the appearances as they presented themselves to him as a reasonable man, though it might subsequently turn out that decedent was unarmed, and there was no danger to defendant, where another instruction covered the same ground, without error of which defendant can complain.

4. CRIMINAL LAW §829(11) — INSTRUCTION, REPETITION OF ONE GIVEN, PROPERLY REFUSED.

In a prosecution for manslaughter, where the court charged that the jury should consider with caution any testimony as to defendant's oral admissions, it did not err in refusing to instruct that declarations are weak and unsatisfactory in their nature as evidence, etc.

5. CRIMINAL LAW §829(8) — INSTRUCTION, REPETITION OF ONE GIVEN, PROPERLY REFUSED.

In a prosecution for manslaughter, the trial court did not err in refusing to charge that evidence of decedent's bad character for peace and quiet could be considered by the jury, where the subject-matter was sufficiently covered by another instruction.

6. HOMICIDE §341 — ON CONVICTION OF MANSLAUGHTER DEFENDANT CANNOT COMPLAIN OF INSTRUCTION AS TO MURDER.

Where defendant was convicted of manslaughter only, he cannot complain of the court's act in omitting to give part of his requested instruction enumerating the facts on which a reasonable doubt should cause acquittal of murder.

7. HOMICIDE §199—EVIDENCE OF DRUNKENNESS GOES ONLY TO DEGREE OF CRIME.

In a prosecution for homicide, evidence of drunkenness can be considered only to determine the degree of the crime, the weight to be given which is a matter for the jury to determine in connection with all the other evidence and circumstances.

8. HOMICIDE §173 — IN DETERMINING INTENT JURY CAN CONSIDER MEANS USED.

In determining the intention, at the time of the killing, of defendant, charged with the homicide, the jury is entitled to consider the means used in making the fatal assault.

9. HOMICIDE §290 — INSTRUCTION TO CONSIDER MEANS OF KILLING IN DETERMINING DEGREE PROPER.

In a prosecution for homicide, in defining murder of the first and second degrees and

manslaughter, the trial court properly stated that in determining defendant's intention it was important to consider the means used to accomplish the killing.

10. CRIMINAL LAW §922(16)—INSTRUCTION AS TO NECESSITY OF PROOF BEYOND REASONABLE DOUBT PROPER.

In a prosecution for manslaughter, when taken with the other instructions, a charge that, if the commission of the homicide by defendant is proved to a moral certainty and beyond a reasonable doubt, it devolves on defendant to prove circumstances of mitigation, etc., held not erroneous, as virtually instructing that defendant should prove mitigation or justification, and not that he might raise a reasonable doubt as to such defense.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

John Albert Hopper was convicted of manslaughter, and he appeals. Affirmed.

E. J. Emmons, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

CONREY, P. J. The defendant appeals from a judgment rendered against him upon conviction of the crime of manslaughter.

[1] Appellant charges the district attorney with misconduct in making a certain statement in his argument to the jury. No assignment of such misconduct was made by defendant at the time when the statement was made to the jury, and the objection will not be considered now.

Appellant claims that the court erred in refusing the following instructions requested by him:

1. "You are instructed that the law presumes that the defendant has a good reputation for truth, honesty, and integrity."

2. "The defendant would be entitled to act upon the appearances as they presented themselves to him as a reasonable man, although it might subsequently turn out that Warn was unarmed, and in fact there was no danger to the defendant."

3. "You are instructed that declarations are very weak and unsatisfactory in their nature as evidence, and you are instructed that it is your duty to scrutinize closely any evidence of declarations owing to such fact. The extrajudicial statements of a prisoner, unaccompanied with other facts or circumstances, are not sufficient, and will not justify a conviction."

4. "Evidence of the bad character of the deceased for peace and quiet can be considered by you as having a tendency to show the purpose and intent at the time of the affray that actuated the deceased, and can be considered further by you for the purpose of arriving at the condition of the defendant's mind at the time of firing the fatal shot, if the defendant is shown by the evidence to have known the reputation of the deceased for peace and quiet."

5. "You are instructed that it is the duty of the prosecution to prove every material fact necessary to constitute the charge against the defendant beyond all reasonable doubt and to a moral certainty, and in this case among the material facts to be proven are, first, that the deceased was killed by the defendant; second, that the killing was done with malice aforethought and with premeditation. And if you have a reasonable doubt upon any one of these material facts, it is your duty to acquit the defendant of murder in the first degree."

[2] The court did not err in refusing any of these requested instructions. Under the first point, appellant relies upon section 1847 of the Code of Civil Procedure. The requested instruction does not conform to that section. Moreover, no evidence was offered in this case for or against the reputation of the defendant in any particular, and we are unable to see that appellant has been prejudiced by the absence of this instruction, even if appropriately it could have been given.

[3] The second point is sufficiently met by the fact that the court did give to the jury the following instruction:

"The jury are instructed that the defendant as a reasonable man, knowing what he knew and seeing what he saw, had a right to act upon the appearances as they presented themselves to him as a reasonable man, even if you find that Warn at the time was actually unarmed, and if the defendant as such reasonable man, knowing what he knew and seeing what he saw, had a right to believe and did believe from such appearances that he was about to suffer great bodily harm at the hands of Warn, and that if, acting alone upon such belief, he fired the shot at Warn, then I instruct you that the defendant is entitled to an acquittal at your hands."

Without saying that the instruction given is entirely correct, we do say that it is free from any error of which the defendant is entitled to complain. This instruction having been given, the defendant could not be prejudiced by the refusal of the court to instruct the jury in the language requested by him.

[4] In connection with point 3, it should be noted that the court instructed the jury that, "if there is any testimony as to the oral admissions alleged to have been made by the defendant, you are instructed that you are to receive the same and consider them with caution," and also fully charged the jury as to the necessity for proof of defendant's guilt beyond all reasonable doubt. From the defendant's own testimony it appears that he fired the shot by which Warn, the deceased, was killed. Aside from the extrajudicial admissions shown by the testimony, the evidence against the defendant is abundant and clear as to all matters connected with such extrajudicial statements or admissions by the defendant.

[8] Under point 4, we note that the court instructed the jury as follows:

"You are instructed that the defendant had a right, at the time of firing the fatal shot, to consider fully all acts of violence that he had seen the deceased commit, all threats that he had heard the deceased make, together with the disposition of the deceased, as the defendant knew it, in order that the defendant might know or believe what the deceased meant or intended at the time that the fatal shot was fired."

There was no evidence of bad "reputation" of the deceased for peace and quiet, but the defendant testified concerning a quarrel which he had recently witnessed between the deceased and another person, in which the deceased used threatening language toward that other person. The subject-matter of the instruction refused by the court was sufficiently covered by the instruction given as above stated.

[8] Under the fifth point, it is admitted that the court gave all of the requested instruction except the last sentence thereof. In view of the fact that defendant was convicted of manslaughter only, he is in no position to complain of this modification of the instruction, and we need not discuss the merits of appellant's criticisms thereon.

[7] 6. Appellant objects to the closing sentence of the fourteenth instruction, which is as follows:

"Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and the weight to be given it is a matter for the jury to determine in connection with all the other evidence and circumstances in proof in the case."

The language quoted is a correct statement of the law. *People v. Keyes*, 715 Pac. 6.

[8, 9] 7. Instruction No. 17 defines murder of the first and second degrees and manslaughter. In that instruction the court said:

"In determining the intention of the defendant at the time of the transaction complained of it is important to consider the means used to accomplish the killing."

It is of this statement in the instruction that appellant complains. There is no doubt in our minds that the jury is entitled to consider the means used by one in making an assault as an element in the determination of his intention at the time. The statement quoted, especially in the connection in which it was used, is without error.

[10] 8. Instruction No. 21 reads as follows:

"Upon a trial for murder, if the commission of the homicide by the defendant is proved to a moral certainty and beyond a reasonable doubt, then it devolves upon the defendant to prove circumstances of mitigation or that justify or excuse the act, unless the proof on the part of

the prosecution tends to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable."

Appellant's objection to this instruction is that—

"It was virtually instructing the jury that the defendant should prove mitigation or justification, and not that he might raise a reasonable doubt as to these defenses."

We think that the instruction, when taken together with the other instructions given by the court to the jury, was without error. The jury was fully instructed that the burden was upon the prosecution to prove defendant's guilt beyond a reasonable doubt.

9. The last point insisted upon refers to an instruction concerning the right of self-defense. That the instruction correctly stated the law is not denied, but appellant claims that there was no evidence to which it could apply, and therefore that the instruction was confusing and misleading. There was evidence of circumstances to which the instruction reasonably might be applied.

Our examination of the case convinces us that the defendant had a fair trial, free from prejudicial error, and that he was fortunate to escape with a conviction which reduced his offense to manslaughter.

The judgment is affirmed.

We concur: SHAW, J; JAMES, J.

ANDREWS v. KARL. (Civ. 2928.)

(District Court of Appeal, Second District, Division 2, California. July 31, 1919.)

1. VENDOR AND PURCHASER \S 93, 95(2), 187—WHERE TIME IS OF THE ESSENCE, FORFEITURE RESULTS ON BREACH OF CONTRACT.

Where time is made of the essence of a contract for the sale of land, terminating it on failure to comply strictly and punctually with conditions, the effect is to entail a forfeiture on the mere default of the purchaser by his failure to make payments when and as he obligated himself to do, if the vendor has not waived the default or forfeiture, as is within his right by express agreement or unequivocal acts or demeanor.

2. VENDOR AND PURCHASER \S 95(2), 101—WAIVER SUSPENDS RIGHT OF FORFEITURE WHICH CAN BE REVIVED ONLY ON NOTICE.

Where the conduct of the vendor of land, or the entire course of business between him and the purchaser, amounts to a waiver of the clause in the contract making time of the essence, the waiver creates a temporary suspension of the right of forfeiture in the vendor for delay in payment by the purchaser, which can be revived only by giving definite and specific notice of the vendor's intention.

3. VENDOR AND PURCHASER \S 95(2), 101—
WAIVER OF FORFEITURE NOT REVIVED.

Where the vendor of land on maturity of the first annual installment stated that he did not need the money, but that instead the purchasers could continue to improve the property, increasing its value, and endeavor to resell it, the vendor thereby waived any forfeiture incurred by the purchasers through failure to make payment promptly on time, and, the vendor never having given notice of intention to restore the right, it was not revived.

4. VENDOR AND PURCHASER \S 86, 191, 296—
REFUSAL OF VENDEE TO PERFORM, ABANDONMENT OF CONTRACT.

Willful refusal by a vendee of land to perform his agreement amounts to an abandonment of the contract by him, and the repudiated contract is no protection to the vendee in possession against the legal title, but the vendor may recover possession in an action of ejectment.

Appeal from Superior Court, Orange County; Wm. D. Dehy, Judge.

Action by R. C. Andrews against A. Karl. From conditional judgment for plaintiff, he appeals. Affirmed.

Kendrick & Ardis, of Los Angeles, for appellant.

H. C. Head, of Santa Ana, for respondent.

FINLAYSON, P. J. This is an action in ejectment to recover possession of real property in Orange county. The judgment, after adjudging plaintiff to be the owner, directs defendant to deliver possession upon the payment to him by plaintiff of \$1,000. Plaintiff, claiming that he is entitled to possession unconditionally, appeals from the judgment.

The outstanding facts, as shown by the findings, are substantially as follows: On November 7, 1913, plaintiff, being then the owner of the property, and defendant and one M. Neimark, executed a written contract whereby plaintiff, as the vendor, agreed to sell and convey the property to defendant and Neimark, as the vendees, for \$21,350, payable, \$2,000 at the date of the execution of the contract, and the balance in equal installments, the first installment, \$1,000, to be paid on February 10, 1914, the second, \$1,350, on January 1, 1915, and the remaining installments on the 1st day of January of each succeeding year to and including January 1, 1924, with interest on all deferred payments. The vendees likewise agreed to pay all state and county taxes and assessments. The vendees were to be entitled to all crops grown upon the land. Time was made of the essence of the contract. It also was provided that if the vendees failed to comply with the terms of the contract, they should forfeit all rights to the property and to any moneys paid by them. Upon the execution of the contract the vendees entered into possession thereun-

der. No part of the purchase price has been paid, except the \$2,000 paid at the date of the execution of the contract. Nor have the vendees paid any part of the taxes for the year 1915. The action was commenced December 17, 1915. After the execution of the contract, but prior to February 10, 1914—on which date the first annual installment was payable by the vendees—plaintiff orally informed the vendees "that he did not need the money, and that it would be better for them to use the money in working and improving the land, and thereby increase the value thereof, and that after they had improved the land it could be sold and the plaintiff receive from the purchase price the amount due him under the terms of the contract; * * * that defendant had said M. Neimark would then be repaid the sum of \$2,000 which they had paid on account of the purchase price of the land, * * * and that the balance obtained on the sale of said land could be divided equally between the plaintiff and defendant and said M. Neimark, and that the defendant and said M. Neimark could, in that way, make a good profit from their labor in working and improving the land." In May, 1915, defendant purchased all the interest of his covendee, Neimark. Ever since plaintiff informed the vendees that he did not need the money, and that it would be better for them to use the money in working and improving the land, etc., defendant has worked upon and improved the property in accordance with the proposal thus made to him and his covendee. Plaintiff purchased from the vendees for \$1,000, the crop that was on the land at the time they took possession; and the court finds that, of the \$2,000 paid to plaintiff at the date of the execution of the contract of sale, \$1,000 was repaid to the vendees for the crop. Wherefore, the court finds that the vendees "received the benefit of the said crops so purchased by plaintiff, and plaintiff received the use and benefit of the other \$1,000, and no more." Prior to the action, but how long prior thereto the court's findings do not state, plaintiff demanded possession, with which demand defendant refused and still refuses compliance. As a conclusion of law, the court found that—

"Plaintiff is entitled to a judgment adjudging that he is the owner of all the real property described in plaintiff's complaint; and for a judgment that the defendant deliver possession thereof to the plaintiff upon the payment to defendant, A. Karl, by plaintiff, of the sum of one thousand dollars with interest at the rate of seven per cent. per annum from November 17, 1913."

For reasons presently to be stated, we think the facts found by the court show a waiver of the clause making time of the essence of the contract, and that plaintiff's right to a

forfeiture of the vendees' rights under the contract was temporarily suspended—so temporarily suspended that his right to a forfeiture could be restored only by giving a definite and specific notice of his intention to exercise the right if the vendees should fail to pay, within a reasonable time, all sums due under the contract. If there was such a waiver and suspension of the right of forfeiture, then plaintiff is not in a position to complain of the judgment. For if there was such waiver and temporary suspension of the right of forfeiture—not restored by a sufficient notice of intention to revive the original contractual relations and obligations—then plaintiff was not entitled to the possession for failure of the vendees to make the payments at the times fixed therefor in the written contract. And if not entitled to a judgment awarding him possession, plaintiff cannot complain of a judgment that gives him the possession conditionally, i. e., possession conditioned upon his payment of the sum of \$1,000.

It should be stated here that the facts found by the court, and which, for reasons presently to be given, were sufficient to establish a waiver of the stipulation making time of the essence, are fairly within the issues tendered by respondent's answer. Defendant, it is true, did not plead the written contract set forth in the findings. He did, however, plead a contract of purchase, made with plaintiff, under which he and his coveegee took possession, though his answer does not attempt to set forth all the terms of the contract, nor does it specifically allege whether it was written or oral. But his answer does allege substantially all the facts found by the court respecting what plaintiff said to the vendees, some time prior to February 10, 1914, to the effect that he did not need the money, that it would be better for them to use it in improving the land, and that they could then sell, etc. That is, the answer alleges all the facts which constitute the waiver upon which defendant relies.

[1, 2] Thus, then, is presented the question of the correlative rights of the parties under the facts as found by the court. Where time is made of the essence of the contract, terminating it upon a failure to comply strictly and punctually with its conditions, its effect is to entail a forfeiture by sheer force of the contract itself, upon the mere default of the purchaser by his failure to make payments at the times and in the manner that he obligated himself to, provided, however, that the vendor has not waived the default or consequent forfeiture, which he has the right to do. This he may do by express agreement to that effect, or by unequivocal acts or demeanor affording reasonable inducement for the purchaser, in reliance thereon, to alter his course as to strict and punctual compliance with his contract, either in advance of or

after the prescribed time. The stipulation that time shall be of the essence of the contract is made solely for the benefit of the vendor. The rule that the vendor, by his conduct, may waive strict performance and temporarily suspend his right of forfeiture is based on the doctrine that he should not be permitted to use a provision intended for his benefit as a means of intrapping the purchaser. And where the conduct of the vendor, or the entire course of business between the parties, amounts to a waiver of the clause in the contract making time of the essence, such waiver creates a temporary suspension of the right of forfeiture, which can only be revived by giving definite and specific notice of an intention to revive and enforce it. *Stevinson v. Joy*, 164 Cal. 279, 285, 128 Pac. 751; *Boone v. Templeman*, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126; *Myers v. Williams*, 173 Cal. 304, 159 Pac. 982; *Pearson v. Brown*, 27 Cal. App. 125, 129, 148 Pac. 956; *Burmester v. Horn*, 35 Cal. App. 549, 170 Pac. 674; *Gray v. Pelton*, 87 Or. 239, 135 Pac. 755.

[3] The proposal made by plaintiff to defendant and his coveegee, prior to the maturity of the first annual installment on February 10, 1914, could only have the effect to lull the vendees into a sense of security, and induce them to believe that no payments need be made at the times provided by their contract, but that, instead, they could continue to improve the property, thereby increasing its value, look for a purchaser, endeavor to sell the land, and, if they succeeded in finding a purchaser willing to buy for an adequate price, adjust, after such sale, all the financial matters between plaintiff and themselves growing out of their contract. And because the natural consequence of plaintiff's proposal was to lull the vendees into a sense of security and cause them to believe that no payments need be made until they succeeded in finding a purchaser for the land, his conduct was tantamount to a waiver of any default on the part of the vendees, not only as to the one payment, but as to all that they should have made, under the strict terms of their contract, prior to the action. It is a reasonable inference from the facts found by the court that defendant and his coveegee had not succeeded in finding a purchaser before the action was begun. The court found that the plaintiff told the vendees, not only that he did not need the money, but that "it would be better for them to use the money in working and improving the land, * * * and that after they had improved the land it could be sold and the plaintiff receive from the purchase price the amount due him." Thus no definite time was fixed within which the vendees might sell the property. Unless notified by the plaintiff that he had changed his mind, the time within which they might find a satisfactory purchaser might run on indefinitely, so that no payment need be

made, under the terms of the written contract, unless and until plaintiff notified them of his intention to revive the original contractual obligations. And since plaintiff never gave defendant or his covenantee definite and specific notice of an intention to restore the right of forfeiture, by giving notice to make the payments as provided by the contract, and a reasonable time thereafter within which to comply therewith, it follows that the right of forfeiture, temporarily suspended by plaintiff's conduct, was not revived before he began his action to recover possession.

[4] Appellant cites authorities to the effect that where the vendee refuses to perform the contract, the vendor, at his election, may treat the vendee as a trespasser or as a tenant at will, against whom ejectment will lie. Undoubtedly it is the rule that where a vendee in possession, neither performing nor willing to perform, has absolutely refused to complete the contract, he may be treated as one who has abandoned the contract under which he entered, and the vendor, by an action in ejectment, may recover the possession. The wilful refusal of the vendee to perform his agreement amounts to an abandonment of the contract by him; and a repudiated contract is no protection to a vendee in possession against the legal title. *Whittier v. Stege*, 61 Cal. 238; *Hicks v. Lovell*, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 679. While there can be no doubt of the existence of the rule invoked by appellant, the difficulty that confronts him is that the facts pleaded by respondent, and found by the court, do not show an abandonment of the contract on the part of the respondent, nor a refusal to perform. Instead, they show that respondent was relying upon appellant's statement that after the vendees "had improved the land"—an indefinite period of time—it could be sold, and then the sums due appellant, whatever they might be, could be paid. True, the oral proposal made by appellant to respondent and his covenantee and acted upon by them, did not create an enforceable contract; but, under the doctrine of estoppel, it did effect a waiver of the time clause and a temporary suspension of appellant's right to a forfeiture—a temporary suspension that could be revived only by giving a definite and specific notice of an intention to that effect and a reasonable opportunity to the vendees to comply therewith. There is no pretense that appellant ever gave either of his vendees notice of his intention to revive the original contractual relations and obligations. It is true the complaint alleges, and the court finds, that "plaintiff has demanded of said defendant A. Karl the possession of said property." But a demand for possession is not the equivalent of a notice to the vendee to perform the covenants stipulated by him in his contract of

purchase. Nor does it appear when the demand for possession was made. It may have been made on the very day the action was commenced. So that, even if a demand for possession could be deemed the equivalent of a "definite and specific notice of intention to enforce" the obligations of the contract, so as to revive the temporarily suspended right of forfeiture, it does not appear that the vendees were afforded a reasonable time before the action within which to perform the stipulations of their contract. Until appellant shall have given a definite and specific notice of his intention to restore the original contractual relations and obligations—waived by his oral proposal to the vendees—respondent need not show either a readiness or an ability to perform the strict letter of his written contract.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

BECHTOLD et al. v. CONEY. (Civ. 2802.)

(District Court of Appeal, First District, Division 2, California. Aug. 6, 1919. Rehearing Denied by Supreme Court Oct. 2, 1919.)

1. EVIDENCE \S 434(11) — PAROL EVIDENCE OF MISREPRESENTATIONS INDUCING CONTRACT ADMISSIBLE.

In view of Civ. Code, §§ 1566, 1567, in an action for cancellation of a contract for the purchase by plaintiffs of territorial rights in a patent, plaintiffs, in attempting to show actual fraud, as defined by section 1572, and which is always a question of fact by section 1574, were entitled to show all the misrepresentations which were matters of inducement for entering into the written contract.

2. PATENTS \S 215—CANCELLATION OF SALE OF PATENT FOR "ACTUAL FRAUD."

Purchasers of territorial rights in a patent were entitled to cancel the contract for either of two misrepresentations of the seller that he owned the patent, whereas he owned only an undivided sixth interest, and that he would furnish a machine as designated, together with specifications for manufacture, which he never intended to do; Civ. Code, § 1572, defining "actual fraud" to be a promise made without intention to perform.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

3. PATENTS \S 214—SUIT BY PURCHASER OF TERRITORIAL RIGHTS TO CANCEL SALE NOT BARRED BY LACHES.

In view of circumstances, purchasers of territorial rights in a patent held not barred by laches from maintaining their suit to cancel the contract as induced by fraud, because they did not formally rescind until June 1st, the contract having been made March 23d, after efforts to obtain repayment of money received by the seller.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Harry Bechtold and another against K. Coney. From a judgment for plaintiffs, defendant appeals. Affirmed.

Edward E. Gehring and Burton Jackson Wyman, both of Oakland, for appellant.

M. J. Rutherford, of Oakland, and E. C. Miles, of San Francisco, for respondents.

LANGDON, P. J. This is an action for the cancellation of a certain contract for the sale and purchase by the plaintiffs of certain territorial rights in a United States patent covering a file-sharpening device, and the recovery of \$250 paid by plaintiffs on account of the purchase price of such rights. Plaintiffs claim the right to rescind and cancel the contract because of certain alleged misrepresentations and fraud practiced upon them by the defendant, which induced them to enter into said contract. Judgment was for the plaintiffs, and the defendant appeals.

[1] The contract of sale was in writing and is in evidence. It provides for the sale to the plaintiffs of all the right, title, and interest of the defendant in and to a certain patent right, for the price of \$500, \$250 to be paid upon the signing of the agreement and the balance to be paid within 60 days, and also that the written assignment of such right was to be left with a bank in escrow, to be delivered to the purchasers upon payment of the second installment of the purchase price, and also provides for a forfeiture of all rights of the plaintiffs, provided payment was not made within the 60 days. Appellant contends that this written agreement superseded all previous negotiations, and such previous negotiations, representations, etc., were all merged in the contract, and may not be shown by the plaintiffs to vary the terms of the written contract. If this contention were true, it would never be possible to avoid a written contract for fraudulent misrepresentations, unless such misrepresentations were also in writing and made a part of the contract. This clearly is not the law. The Civil Code provides (section 1566) that a contract may be rescinded where the consent is not free, and in the following section it is provided that consent is not free when such consent is induced by fraud. Actual fraud is defined in section 1572, Civil Code. The plaintiffs, in attempting to show actual fraud, as defined by said last-mentioned section, were entitled to show all the matters of inducement for entering into the contract.

Actual fraud is always a question of fact (Civ. Code, § 1574), and the trial court has made very complete findings, covering numerous fraudulent misrepresentations by the defendant, any one of which is sufficient to warrant the relief granted to the plaintiffs.

It is therefore not necessary for us to discuss each of said findings. The court found that before the signing of the contract defendants made statements and representations to the plaintiffs which were fraudulent, and that, among other things, said defendant represented that he was the exclusive owner of a certain United States patent right, the said patent number being 680,152, as said patent is filed of record in the Patent Office of the United States of America. The court further found that the plaintiffs believed and relied upon said representation and statement, and were induced and influenced thereby, and, while believing and relying upon such representation, made and entered into the contract in question; that said statement was false and untrue, and known by the defendant to be false and untrue, and that the defendant was not the exclusive owner of the said patent rights so designated, but that defendant is only the owner of a one-sixth undivided interest in said patent right; and that said one-sixth interest did not and does not entitle said defendant to the exclusive right in any territory in the state of California or any other state. This finding is sustained by the testimony of the plaintiff Bechtold, who testified that the defendant represented that he was the sole owner of the patent. The answer admits that the defendant was the owner only of a one-sixth interest in said patent.

[2] The court also found that the defendant represented to the plaintiffs that, upon the signing of the agreement and the payment of the first installment of the purchase price, he would furnish to said plaintiffs a machine for sharpening files, as said machine is set forth and designated in said patents, together with specifications for the manufacture of other machines. The plaintiff Bechtold testified positively that the defendant agreed to deliver such a machine to him upon the signing of the agreement, and that said machine was never delivered. The trial court found that the defendant never had any intention of delivering said machine, and this finding is of a fact fairly inferable from the entire evidence. This brings the case within the fourth subdivision of section 1572, Civil Code, defining actual fraud to be a promise made without any intention of performing it. Either of the findings discussed herein would support the judgment, and to such matters the doctrine of caveat emptor clearly has no application, and we think appellant's argument upon this doctrine needs no further discussion.

[3] Appellant also urges that the plaintiffs were guilty of laches in failing to rescind the contract earlier. The contract was entered into upon March 23, 1917. Plaintiffs allege that they did not discover the falsity of the

representations until about May 1, 1917, and at that time demanded a return of their money, and that they formally rescinded the contract upon June 1, 1917. The plaintiff Silva testified that about April 23, 1917, one month after the agreement was signed, he asked for a return of his money, which was two or three weeks after plaintiffs discovered that misrepresentations had been made. He testified that, when he received the information from Washington regarding the defendant's limited ownership of the patent right, he showed the papers and abstract to the defendant, and that the defendant promised to return his money when he succeeded in selling more territorial rights in the patent; that, because of this promise by the defendant, the plaintiff continued his visits and demands for his money, and discussed the matter with the defendant seven or eight times, relying upon defendant's promise from time to time that he would return the money; and that he (Silva) finally became tired of waiting, and formally rescinded the contract on June 1st, and brought suit on June 8th. Under such circumstances, we do not think there was any lack of diligence upon the part of the plaintiffs.

The judgment is affirmed.

We concur: BRITTAI, J.; HAVEN, J.

SAYLOR v. TAYLOR. (Civ. 2357.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. APPEAL AND ERROR §110 — ORDER DENYING MOTION FOR NEW TRIAL NOT APPEALABLE.

An order denying motion for new trial made January 13, 1917, is not an appealable order in view of Code Civ. Proc. § 963, as amended by St. 1915, p. 209, and an appeal therefrom must be dismissed.

2. NEGLIGENCE §111(1) — ALLEGATION IN GENERAL TERMS SUFFICIENT.

An allegation that defendant so carelessly and negligently drove and managed his automobile that it struck the automobile in which plaintiff was riding was sufficient, though in general terms.

3. MUNICIPAL CORPORATIONS §706(7) — WHETHER DRIVER OF PLAINTIFF'S AUTOMOBILE WAS EXERCISING DUE CARE, FOR THE JURY.

In an action for personal injuries from an automobile collision, where defendant was on the wrong side of the street and the machine in which plaintiff was riding was on the right side, and its driver attempted to turn toward the center of the street and avoid defendant, and defendant turned in the same direction, causing the collision, it was a question for the jury

whether the driver of plaintiff's automobile, as a reasonably prudent man in the exercise of due care, was justified in so turning his car.

4. MUNICIPAL CORPORATIONS §706(5) — EVIDENCE JUSTIFYING VERDICT FOR PLAINTIFF FOR PERSONAL INJURIES IN AUTOMOBILE COLLISION.

In an action for personal injuries resulting from an automobile collision, evidence held sufficient to justify a verdict for plaintiff.

5. APPEAL AND ERROR §1048(6) — ERROR IN CROSS-EXAMINATION, CLEARLY WITHOUT PREJUDICE, HARMLESS.

In an action for personal injuries resulting from an automobile collision, although cross-examination by plaintiff of defendant's witnesses as to radius in which it was possible to turn a car, of the make and manufacture of that driven by defendant, was erroneous, yet where it is apparent from the nature of the questions and answers thereto that it was without prejudice it must be considered harmless.

6. PLEADING §122 — DENIAL OF ALLEGATION OF APPOINTMENT OF GUARDIAN AD LITEM UPON INFORMATION AND BELIEF INSUFFICIENT.

In a personal injury action by an infant by a guardian ad litem, defendant's denial of the appointment of such guardian upon information and belief is insufficient to require plaintiff to submit proof thereon; the order and records affording defendant ready means of ascertaining the truth of the allegation.

7. DAMAGES §216(7)—INSTRUCTION AS TO COMPENSATION FOR FUTURE SUFFERING ERRONEOUS.

An instruction that if the jury believed plaintiff was "liable" to continual suffering and future mental anguish and bodily pain the verdict should be commensurate therewith was erroneous, since Civ. Code, § 3283, provides that "damages may be awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future," and the word "liable" must be construed, not as referring to a detriment certain to result, but rather to a future possible or probable happening which may not actually occur.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liable.]

8. APPEAL AND ERROR §1170(9) — WHERE JUDGMENT IS FOR THE RIGHT PARTY IT WILL NOT BE REVERSED.

Although an instruction was erroneous where the appellate court is satisfied upon examination of the evidence that it did not result in miscarriage of justice, the verdict should not be set aside in view of Const. art. 6, § 4½.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Ruth Saylor, a minor, by Edgar F. Saylor, her guardian ad litem, against A. V. Taylor. From judgment for plaintiff and from order denying defendant's motion for a new trial, defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant.
 R. Justin Miller, of Hanford, for respondent.

SHAW, J. Action to recover damages for injuries alleged to have been sustained as the result of defendant's negligent operation of an automobile. Judgment upon verdict in favor of plaintiff was entered for \$450, from which and an order denying his motion for a new trial defendant appeals.

[1] The order denying the motion for new trial, made on January 13, 1917, is not an appealable order (section 963, Code Civ. Proc., as amended in 1915; Stats. 1915, p. 209), and the appeal therefrom is therefore dismissed.

[2] Upon the ground of uncertainty defendant interposed a demurrer to the complaint, which was overruled, and this ruling is assigned as error. His contention is that the allegation, to wit, "that defendant * * * so carelessly and negligently drove and managed his said automobile that by reason of his negligence the said automobile violently collided with and struck the automobile in which this plaintiff was riding, and that as a result of the said collision so caused as aforesaid, this plaintiff was" injured, was, in general terms and by reason thereof, insufficient. That the allegation was sufficient admits of no question. "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 147 Pac. 954.

[3, 4] At the close of plaintiff's evidence defendant moved for a nonsuit upon the ground that the evidence showed that plaintiff was guilty of contributory negligence, which motion was denied, and this ruling is assigned as error. The evidence clearly tended to show that the automobile in which plaintiff was riding was traveling westerly on the north side of the center of a street running east and west and near the curb line, at which time defendant was approaching from the opposite direction, driving his automobile on the same side of the street and also near the curb line, between which and defendant's automobile there was not room to pass; that when the driver of plaintiff's car reached a point less than 20 feet from defendant's car, which was still approaching, he, in order to avoid the threatened head-on collision, turned to the left, at which time defendant also turned in the same direction and the two cars collided. Admittedly defendant was on the wrong side of the street, and under the evidence it was a question for the determination of the jury as to whether, under the circumstances shown, the driver of plaintiff's automobile, as a reasonably prudent man and in the exercise of due care, was justified in turning his car to

the left to avoid the collision threatened by the negligent act of defendant. Not only was there no error in the ruling of the court in denying the motion for nonsuit, but there is likewise no ground for appellant's contention that the evidence was insufficient to justify the verdict. Indeed, the testimony of plaintiff's witnesses is such that if the jury believed the truth of their statements it could not have arrived at a different verdict.

[5] Error is predicated upon the ruling of the court in permitting the cross-examination of two witnesses called by defendant and questioned as to the damage suffered by defendant as a result of injuries to his car in the collision. Thereupon, on cross-examination, plaintiff questioned them as to the radius within which it was possible to turn a car of the make and manufacture of that driven by defendant. The ruling of the court in permitting these questions was erroneous. Nevertheless, it is apparent from the nature of the questions and the answers thereto that such error was absolutely harmless and without prejudice.

[6] Plaintiff sued by her guardian ad litem, alleging that on July 22, 1914, Edgar F. Saylor was by an order of court appointed in such capacity. In his answer defendant, upon information and belief, denied the allegation. No proof was offered thereon, for which reason he claims the judgment should be reversed. The order was made in the case, the records of which afforded defendant a ready means of ascertaining the truth of the allegation, and hence it was not an allegation as to which issue could be joined by a denial for want of information and belief. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066.

[7] The court instructed the jury that plaintiff's right to recover was not limited to such damages as may have occurred up to the time of the filing of her complaint in the action, and further said, "But in case you find from the evidence, that plaintiff is liable to continual suffering, and is liable to future mental anguish and bodily pain, then your verdict should be commensurate to such subsequent suffering, mental anguish, and physical suffering as by the evidence she may reasonably suffer in the future, as well as for that suffered down to the time of the filing of her complaint, not exceeding the amount claimed" therein. We agree with appellant that the giving of this instruction was error, since under section 3283, Civil Code, "damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." As used, the word "liable" must be construed, not as referring to a detriment certain to result, but to a future possible or probable happening which may not actually occur. *Home Insurance Co. v. Peoria & P. U. Ry. Co.*, 178 Ill. 64, 52 N. E. 862. The jury,

notwithstanding an instruction later given by the court in the language of section 3283, might have considered the first one applicable to the facts established and, as claimed by appellant, indulged in the realm of speculation and conjecture as to the liability of future suffering and detriment. That it was error and not cured by the subsequent instruction with which it was in conflict, see *Martin v. Southern Pacific Co.*, 130 Cal. 285, 62 Pac. 515, *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522, and *Walker v. Southern Pacific Co.*, 162 Cal. 121, 121 Pac. 369.

[8] Nevertheless, and conceding the error, we are satisfied, upon an examination of the evidence, that it did not result in a miscarriage of justice, without which, as provided in section 4½ of article 6 of the Constitution, this court should not set aside the judgment rendered. It appears without contradiction that plaintiff was seriously, if not permanently, injured; that in addition to both limbs and an artery being badly cut, necessitating a number of stitches being taken to close the wounds, a ligament of the kneecap was almost severed, which likewise had to be drawn together by stitches; in addition to all of which her nervous system was more or less impaired. It further appeared that at the time of the trial, about a year after the accident, plaintiff's condition, as a result of the injuries, was such that she could not stand upon the limb affected by the severed ligament without suffering pain. Hence conceding the jury, as claimed by appellant, might have indulged in speculation and conjecture, it is apparent, when considering the amount of the verdict as compared with the serious injuries sustained by plaintiff, that if they did enter into the realm of speculation the voyage therein was of exceedingly short duration and not to an extent that affected the verdict.

An examination of other alleged errors predicated upon the giving and the refusing to give instructions discloses no merit in appellant's contentions based thereon.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

SAYLOR v. TAYLOR. (Civ. 2356.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Edgar F. Saylor against A. V. Taylor. From judgment for plaintiff, defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant.
R. Justin Miller, of Hanford, for respondent.

PER CURIAM. This is an appeal from a judgment entered on the verdict of a jury, wherein the plaintiff recovered damages for injuries and loss occasioned by defendant's negligent driving and management of an automobile, whereby said automobile was caused to collide with an automobile of the plaintiff.

This case was tried with the action of Ruth Saylor, a minor, against A. V. Taylor, defendant (Civil No. 2357 of this court, 183 Pac. 843), wherein the minor sued for damages for personal injuries received by her in the same collision. All of the points relied upon by counsel for appellant in support of the appeal herein are included among those presented and considered in the appeal in said case No. 2357, in which the decision is this day filed. The arguments made in support of the points presented in this case are identical with the arguments made upon the same proposition in the other case. The judgment in that case having been affirmed, this appeal should take the same course.

The judgment is affirmed.

PEOPLE v. CAMP. (Cr. 471.)

(District Court of Appeal, Third District, California. July 28, 1919.)

1. **STATUTES** ~~§~~285—WHEN DULY CERTIFIED, CANNOT BE IMPEACHED BY LEGISLATIVE JOURNALS.

The validity of a statute, which has been duly certified, enrolled and approved, and deposited in the office of the secretary of state, cannot be impeached by a resort to the journals of the Legislature, or by extrinsic evidence of any character.

2. **STATUTES** ~~§~~118(6)—TITLE OF STATUTE AS TO CRIMES AGAINST CHILDREN SUFFICIENT.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon a child under the age of 14, etc., entitled, as enacted by St. 1901, p. 630, "An act to amend the Penal Code by adding a new section thereto to be numbered," etc., "relating to crimes against children," held not in violation of Const. art. 4, § 24, requiring expression of the subject of an act in the title.

3. **STATUTES** ~~§~~118(6) — ACT AS TO CRIMES AGAINST CHILDREN NOT CONTRADICTIONARY TO ITS TITLE.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, etc., entitled, as enacted by St. 1901, p. 630, "An act to amend the Penal Code by adding a new section thereto to be numbered," etc., "relating to crimes against children," held not violative of Const. art. 4, § 24, as explicitly negating and contradicting the subject expressed in the title; it not being misleading or calculated to deceive.

4. **STATUTES** ~~§~~86 — ACT AS TO CRIMES AGAINST CHILDREN NOT CLASS LEGISLATION.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14,

held not to involve special legislation, within the meaning and contemplation of Const. art. 4, § 25, subd. 2, applying, as it does, to all children under 14 years of age and to all of a class.

5. CONSTITUTIONAL LAW ¶250, 258—INFANTS ¶12—ACT AS TO CRIMES AGAINST CHILDREN NOT A VIOLATION OF FEDERAL CONSTITUTION.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not to deny to persons prosecuted under its provisions the equal protection of the laws, or to deprive them of liberty without due process, contrary to Const. U. S. Amend. 14, § 1, though other sections of the Penal Code relating to crimes against children, such as sections 272, 273, 273g, and 650½, made the condemned acts misdemeanors only.

6. CRIMINAL LAW ¶1213—PUNISHMENT IN STATUTE AS TO CRIMES AGAINST CHILDREN NOT UNUSUAL.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not to authorize the infliction of unusual punishment, within the meaning of the inhibition of Const. Cal. art. 1, § 6.

7. STATUTES ¶183—WHEN LITERAL MEANING OF TERMS ABSURD, MEANING CONSISTENT WITH CONTEXT FOLLOWED.

A cardinal rule of statutory construction is that, if giving a word or phrase its literal meaning would result absurdly, such meaning must be disregarded, and a meaning ascribed consistent with the context and evident object of the act, that would render it not only consistent, but reasonable in effect, and therefore effectual.

8. CRIMINAL LAW ¶18—CLERICAL ERROR IN STATUTE INSUFFICIENT TO RENDER IT UNCERTAIN.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, is not rendered incurably uncertain, vague, and unintelligible, in that it cannot be ascertained what lewd and lascivious acts are prohibited, because the section, by clerical error or otherwise, refers to Pen. Code, pt. 2, relating solely to criminal procedure, instead of part 1.

9. INFANTS ¶20—VERDICT IN PROSECUTION FOR CRIME AGAINST CHILD SUFFICIENT.

Verdict that defendant was guilty of the crime of lewd and lascivious conduct with a male child under the age of 14 years, a felony, as charged in the indictment, which must be presumed on collateral attack to have sufficiently stated the offense as defined by Pen. Code, § 288, by following substantially the language of the statute, *held* sufficiently to have found that the crime was committed upon or with the body of a child, as prohibited by the statute and as charged by the indictment.

10. CRIMINAL LAW ¶1088(1)—WHAT PAPERS INCLUDED IN RECORD OF CRIMINAL TRIAL.

The record of a criminal action consists of, first, the indictment or information and a copy of the minutes of the plea or demurrer; second,

a copy of the minutes of the trial; third, the written instructions, etc.; and, fourth, a copy of the judgment.

11. INFANTS ¶20—STATUTE RELATING TO CRIMES AGAINST CHILDREN NOT REPEALED.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not impliedly repealed by Juvenile Court Law, § 28; there being no inconsistency between them.

12. INFANTS ¶20—LENGTH OF SENTENCE ON PROSECUTION FOR CRIME AGAINST CHILD AUTHORIZED.

In view of Pen. Code, § 671, despite section 18, the court had jurisdiction to sentence to imprisonment for more than five years defendant, convicted of lewd and lascivious conduct upon a child under 14, in violation of section 288.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Charles Camp was convicted of lewd and lascivious conduct with and upon the body of a male child under the age of 14 years. From an order denying his motion for order vacating and setting aside the conviction and judgment for want of jurisdiction, he appeals. *Affirmed.*

George D. Collins, Jr., of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. On the 16th of October, 1914, defendant, having been convicted by a jury of the crime of "lewd and lascivious conduct with and upon the body of a male child under the age of 14 years," was sentenced by the superior court of the county of Sacramento to imprisonment in the state prison for the term of 15 years. On the 21st day of January, 1919, defendant made a motion "that an order be made and entered herein vacating and setting aside the conviction and judgment for want of jurisdiction in said court." An order to show cause was issued and, after a hearing, the motion was by the court denied, and the defendant remanded to the custody of the warden of the state prison. The appeal is by the defendant from the order denying said motion.

It is stated in the grounds of appeal that said order is "contrary to law, and that said conviction and judgment are void on the face of the record, for want of jurisdiction in said superior court over the subject-matter of the action, and that said judgment in said action is also void, because in excess of the authority of said superior court to the extent that the sentence therein specified exceeds the term of 5 years." Defendant was tried and convicted under the provisions of section 288 of the Penal Code, which reads as follows:

"Any person who shall willfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided for in part two of this Code, upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, shall be guilty of a felony, and shall be imprisoned in the state prison not less than one year."

Appellant urges the following points as grounds for reversal of said order: That said section 288 is void for the following reasons: (1) That the same, after being amended in the senate, was not read at length in the assembly; (2) that it is in violation of section 24 of article 4 of the Constitution, in that the subject of the act is not expressed in the title, but, on the contrary the act itself explicitly negatives and contradicts the subject expressed in the title; (3) that it is in violation of subdivisions 2 and 33 of section 25, article 4, of the Constitution; (4) that it operates to deny to the defendant the equal protection of the laws guaranteed him by the Fourteenth Amendment of the Constitution of the United States; (5) that it operates to deprive defendant of his liberty without due process of law in violation of the Fourteenth Amendment; (6) that the act is incurably uncertain, vague, and unintelligible, in that it cannot be ascertained what lewd and lascivious acts are prohibited, as the statute refers to part 2 of the Penal Code, which relates solely to criminal procedure, and that the courts are denied the power to strike out from said section "part 2" and substitute "part 1"; that so to amend the section is to deprive defendant of his liberty without due process of law, in violation of said Fourteenth Amendment; (7) that said section and said judgment are in violation of article 1, section 6, of the Constitution, in that they inflict unusual punishment; (8) that the conduct of which defendant has been convicted is made a misdemeanor by sections 273 and 273g of the Penal Code, and is therefore expressly excluded from section 288; (9) that section 288 has been repealed by section 28 of the juvenile court law of 1913; (10) that by section 18 of the Penal Code the maximum penalty for a violation of section 288 is 5 years, which the defendant has served.

Most, if, indeed, not all of the objections to section 288 of the Penal Code urged here on constitutional grounds have been decided adversely to the position of the appellant by the courts. The objections will nevertheless, be given some notice.

[1] 1. It has been so often held in this state that it is no longer an open question that the validity of a statute, which had been duly certified, enrolled and approved, and deposited in the office of the secretary

of state, cannot be impeached by a resort to the journals of the Legislature, or by extrinsic evidence of any character. *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *County of Yolo v. Colgan*, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41; *Kingsbury v. Nye*, 9 Cal. App. 574, 577, 99 Pac. 985. See, also, *De Loach et al. v. Newton*, 134 Ga. 739, 68 S. E. 708; *State of Washington v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340; *Field v. Clark*, 148 U. S. 672, 12 Sup. Ct. 495, 36 L. Ed. 294. This point requires no further consideration herein than such as is involved in the citation of these cases.

[2, 3] 2. The title to section 288 of the Penal Code, as it was enacted by the Legislature of 1901 (Stats. 1901, p. 630), reads as follows:

"An act to amend the Penal Code by adding a new section thereto, to be numbered section two hundred and eighty-two, relating to crimes against children."

Thus it will be observed that the title of the act states generally that the crimes which the section is designed to punish are those perpetrated upon or against children. It was not necessary, to make the act conform to the requirements of the Constitution in that respect, to embrace in its title a specification of the nature of the crimes to which the section relates; and the courts of this state have held that such a title as was contained in the act in question, being an amendment of one of the Codes, sufficiently expresses the subject of the act as required by section 24 of article 4 of the Constitution. See *People v. Dobbins*, 73 Cal. 257, 14 Pac. 860; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *People v. Lovren*, 119 Cal. 88, 51 Pac. 22, 638; *Jackson v. Baehr*, 138 Cal. 266, 71 Pac. 167; *County of Butte v. Merrill*, 141 Cal. 396, 398, 74 Pac. 1036; *People v. Oates*, 142 Cal. 12, 75 Pac. 337; *People v. Merritt*, 18 Cal. App. 58, 122 Pac. 839, 844.

Nor can we perceive any merit in the contention that the act itself contradicts or is in any wise inconsistent with its title. The title, as we have seen, declares that the subject of the act involves certain crimes against children and the act itself specifically sets forth the acts constituting the crimes to which the title refers. In other words, the title declares in general terms the nature of the legislation of which it is a sort of preamble, and that it has relation to certain crimes against children, and the act itself describes or defines the particular kind of act constituting the crime thus intended to be included among those provided for in other sections of the Penal Code against the same class of persons and which define as such crimes acts of a different nature from that constituting the basis of the legislation involved in section 288. It is therefore very clear that, when compared to the act itself, no inconsistency between them can be dis-

cerned, nor can it be said, when so compared, that the title is misleading or calculated to deceive or convey an erroneous impression as to the subject of the legislation involved in the act.

[4] 3. Section 288 does not involve special legislation, within the meaning or contemplation of subdivision 2 of section 25, article 4, of the state Constitution. The act applies to all children under 14 years of age, or to all of a class. It has been held time and again that an act of the Legislature which applies uniformly upon the whole or any single class of individuals or objects, when the classification is founded upon some natural, intrinsic, or constitutional distinction is a general law. See cases cited in Treadwell's Constitution, p. 255. That children or minors constitute a class founded upon a natural or intrinsic distinction, and as to whom legislation peculiarly applicable to individuals of their immature years is necessary for their proper protection, are propositions which cannot well be controverted. As to some matters in connection with the welfare of minors, particularly those not beyond or far beyond their infancy, a general law, in the more comprehensive sense of that phrase, could not be made.

Section 288 is particularly directed to the prevention and punishment of lewd and lascivious conduct with and upon the bodies of children under 14 years of age because as a rule, it may properly be assumed, they are not sufficiently matured mentally to appreciate as fully as older persons the consequences to them, both morally and physically, of such acts of degeneracy, and they therefore generally have neither the judgment nor the physical power, which in such cases is often minimized where there is no developed mental power, to protect themselves against the perpetration upon them of such outrages which it is the object of this law to prevent, if it can be done, or to punish where such acts have been done. Such crimes as the one denounced by section 288 are (we think experience shows to be true) ordinarily committed by persons of mature years, or who at any rate are old enough to know that the inevitable tendency of conduct so abnormal and utterly diabolical is to corrupt the morals of children and to make them what the perpetrator of such crime himself is. It was therefore quite natural that the people should by their Constitution authorize the enactment of laws for the special protection of a class of persons not of sufficient mental and physical development by reason of their youth to protect themselves against those human parasites who make a practice of satiating in a measure their abnormal sexual appetites by that sort of conduct with such minors.

[5, 6] The contention that section 288 denies to persons prosecuted under its provisions the equal protection of the law, con-

trary to the mandates of the first section of the Fourteenth Amendment of the federal Constitution, is founded upon the theory that, while said section makes the act therein denounced as criminal a felony, other sections of the Penal Code relating to crimes against children make the acts specified therein misdemeanors only. In support of this argument, counsel refers to sections 272, 273, 273g and 650½ of said Code. None of these sections, however, relates to lewd and lascivious acts "upon or with the body or any member thereof, of a child under the age of fourteen years." But section 273g does relate to such practices in the presence of any child. It provides:

"Any person who in the presence of any child indulges in any degrading, lewd, immoral or vicious habits or practices, or who is habitually drunk in the presence of any child in his care, custody or control, is guilty of a misdemeanor."

That section was undoubtedly intended to include those cases only where the lewd or immoral conduct is carried on in the presence of children, and where the same is not practiced upon or with the body of the child. Furthermore, said section includes all children without regard to their age, while section 288 is confined in its operation to children under the age of 14 years. Section 650½ makes it a misdemeanor for any person to do certain acts or things in derogation of the rights of property or of the person of an individual, and, among other things, provides that the rights of person are violated and punishable as above indicated, when the name of a person is used by another for the accomplishment of lewd or licentious purposes, etc. This section obviously has no bearing upon nor is the subject-matter or the object thereof analogous to the crime defined by section 288. The other sections (272 and 273), while prohibiting and penalizing the abuse or misuse of minors, do not relate or refer to acts of lewdness or lasciviousness either with the body of a child or in the presence of children without practicing the same upon or with their bodies. It follows that there is no discrimination involved in our Code sections with respect to acts of lewdness or lasciviousness upon or with or in the presence of children. Indeed, there is a marked distinction between the several crimes denounced by the Penal Code for such acts. It is quite true that the crimes referred to may, in a general sense, be said to be correlated, as are robbery and larceny, because of possessing a certain element in common. Both these crimes involve the element of the felonious taking from another his personal property, but they are essentially differentiated by reason of the fact that the stealing in the one case is accomplished by

means of force or fear, while in the other a less violent method is resorted to.

So in the case before us. It is true that the act of lewdness or lasciviousness penalized by section 288 involves some of the elements to be found in section 273g. Indeed, it involves some of the elements involved in the crime of rape or the infamous crime against nature; but there are features in those crimes which not only distinguish them one from the other, but which distinguish them from any other crime denounced in our statutes involving acts appertaining, either directly or indirectly, to sexual relations. Upon such distinction it is competent for the Legislature to annex a different punishment for the different crimes, and in doing this the Legislature will be, and presumptively has always been, governed by the nature of the acts constituting the crime, or in the case of penal statutes for the prevention of crimes against children, fix the penalty in accordance with the effect that the prohibited acts would naturally have upon that class of persons (and consequently upon society), taking into consideration their age, where that element is important in the determination of such effect, or disregarding the fact of age, where it cannot logically or in the nature of the case enter as a factor into the determination of such effect. Of course, no one will question the constitutional authority of the Legislature to fix the penalty to suit the crime, or, in other words, to fix different penalties for different crimes; the penalty in each case being measured or fixed according to the nature of the particular crime and its effect upon society. See *People v. Barbieri*, 83 Cal. App. 770, 780, 166 Pac. 812; *Ex parte Selowski*, 177 Pac. 301; *Selowski v. Superior Court*, 181 Pac. 652. It follows from the foregoing that section 288, either when taken alone or when considered in comparison with the other sections of the Penal Code above named, in no way impinges upon rights guaranteed by the Fourteenth Amendment of the Constitution of the United States, or has the effect of denying to a person prosecuted under its provisions the equal protection of the law or depriving him of his liberty without due process of law. Nor does the section authorize the infliction of unusual punishment, within the meaning of the inhibition in that respect of section 6 of article 1 of the state Constitution. See *Wilkerson v. Utah*, 99 U. S. 130, 25 L. Ed. 345; *Ex parte Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; *People v. Finley*, 153 Cal. 59, 94 Pac. 248.

[7, 8] 4. There is not imparted to section 288 uncertainty or ambiguity or unintelligibility as to its meaning or intent by reason of the fact that "part 2" instead of "part 1" is therein erroneously referred to as defining crimes involving in their composition, among other elements, that of lewd or lascivious conduct, which specific conduct

is by said section excepted from the operation thereof. Part 2 of the Penal Code relates entirely to the procedure in criminal cases, while part 1 contains the definition of the several crimes and the penalties annexed thereto. It is therefore plainly manifest that the reference by section 288 to "part 2" in the connection in which it is therein used was due, not to the intention of the Legislature, but to inadvertence or an oversight—perhaps a clerical misprision, possibly a mistake of the printer. At any rate, it is, as stated, very clear that the Legislature did not intend in said section to refer to "part 2" of the Penal Code, for such a reference would make the section an absurdity, and it is one of the cardinal rules of statutory construction that if, by giving to a word or a phrase in a statute its literal meaning, absurd consequences would be the inevitable result, then the literal meaning thereof must be disregarded, and such a meaning ascribed thereto, consistent, of course, with the general context and the evident object of the act, as will render the act, not only consistent in all its parts, but reasonable in its effect, and, therefore effectual for the purposes for which it was intended. The validity of the identical section was challenged upon precisely the same ground in *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712, and the views and the conclusion expressed and arrived at in that case are in harmony with the views above expressed.

Counsel for the defendant contends, however, that the rules of statutory construction which are applied in the *Bradford Case* have application to statutes regulating or defining civil rights, and not to penal statutes or legislative acts defining crimes and fixing their penalties, referring to sections 388, 411, 498, 521 and 524 of *Sutherland on Statutory Construction* (2d Ed.), and the case of *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257, as supporting that proposition. We fully agree with what is said in the California case named, that "constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law," but we do not assent to the proposition that that case holds, or that *Sutherland* declares the rule to be, that the rules of statutory construction are not, generally, as well applicable to the construction of statutes defining crimes as to the construction of statutes concerning civil rights. There is nothing in the matter of the construction of section 288 but the simple question whether the Legislature intended to refer therein to a part of the Penal Code which would make said section mean something and what it was obviously intended to mean, or to a part of said Code which would render the section not only absurd but in truth nonsensical;

and, manifestly, it requires under the circumstances present here no strained interpretation, nor does it amount to the building up of a "constructive crime," to find that the Legislature intended to refer in said section to part 1 and not to part 2 of the Penal Code, and that the reference therein to part 2 is the result of an inadvertence.

[9, 10] 5. There is no merit, so far as the record before us shows, in the point that the "judgment and verdict do not show a violation of section 288 of the Penal Code," and therefore, "the offense not being within section 288, the superior court had no jurisdiction to sentence the appellant to the state prison." The argument addressed to the support of this point is that, while the said section defines the crime therein denounced as the commission of "any lewd or lascivious act * * * upon or with the body * * * of a child," etc., the verdict was that defendant was guilty "of the crime of lewd and lascivious conduct with a male child under the age of 14 years, a felony, as charged in the indictment," and the judgment was in similar phraseology. It will be noticed that neither the verdict nor the judgment stated or declared that the crime of which defendant was convicted was committed "upon and with the body," etc. The indictment upon which the defendant was prosecuted and convicted is not in the record here. We must therefore presume, in this collateral attack upon the judgment, that the indictment sufficiently stated the offense defined by section 288 by following substantially and in all essential particulars the language thereof; and, so viewing the indictment, the verdict sufficiently finds that the crime denounced by said section was committed by the accused by the use of the general language therein contained, viz. "a felony, as charged in the indictment." The "judgment," involving the pronouncement of sentence in a criminal case, is generally orally rendered and delivered, and is usually in informal language, and the law requires it to be no more than that. Pen. Code, § 1202; *People v. Terrill*, 133 Cal. 120, 123, 85 Pac. 303.

The record of a criminal action consists of the following papers: (1) The indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the written instructions, etc.; and (4) a copy of the judgment. "The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it, for, in view of the fact that they go into the record and make a part of it, such repetition would be idle and serve no useful purpose. The only material parts of a judgment are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and therefore not necessary to be re-

peated, and the sentence of the court." *Ex parte Williams*, 89 Cal. 421, 426, 427, 26 Pac. 887, 889. If the judgment with sufficient clearness shows that it is the pronouncement of sentence by the court upon the verdict as returned, and the penalty imposed by such sentence is authorized by the statute under which the prisoner has been convicted, then the judgment satisfies the demand of the statute in that respect. The mere omission by the court, in passing sentence on the prisoner, to state or describe the offense with technical precision, certainly should not, in reason, be held to have the effect of rendering the judgment of sentence void or even voidable. Of course, all this is upon the assumption that the verdict finds the crime as charged, and that the charge, as we are authorized to assume is true here, is correctly described in the indictment. The statement in the judgment that, "Whereas, the said Charles Camp has been duly convicted in this court of the crime of lewd and lascivious conduct with a male child under the age of 14 years," implies that he has been convicted of the offense shown by the verdict upon which the judgment must necessarily rest, and therefore further implies that the offense for which he was sentenced embraced all the vital elements constituting the offense as it is defined by the statute, just as a judgment of sentence for murder upon a verdict convicting the accused of that crime implies, without stating it in the judgment, the unlawful taking of human life deliberately and with malice aforethought. As sustaining the foregoing views, we cite the following cases in addition to those above referred to: *Matter of Ring*, 28 Cal. 248, 253; *Ex parte Gibson*, 11 Cal. 619, 91 Am. Dec. 546; *Ex parte Raye*, 68 Cal. 491; *People v. Murback*, 64 Cal. 369, 372, 30 Pac. 608.

[11] 6. There is absolutely no ground for the contention that section 288 has been repealed by section 28 of the so-called juvenile court law. Stats. 1913, p. 1303. So much of said section as pertains to the penalty for the offense therein referred to reads as follows:

"Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause, encourage or contribute to the dependency or delinquency of any person under the age of twenty-one years, as defined by any law of this state, or any person who shall, by any act or omission, threats or commands or persuasion, endeavor to induce any such person, under twenty-one years of age, to do or to perform any act or follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become, or to remain a dependent or delinquent person, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year, or by both such fine and imprisonment."

The design of that law is, so far as a penal statute can go in the accomplishment of so laudable a purpose, to protect minors against those acts and temptations which, if allowed to be practiced and to exist, will surely lead them into habits involving acts of the grossest depravity. Section 3 of the law enumerates and describes eight different acts of omission and commission, any or all of which will constitute a minor a dependent person. Section 4 of said act provides that a "delinquent person" is one who violates any law of the state, or any ordinance of any city, town, etc., defining crime and which involves moral turpitude. Among the variety of acts enumerated in section 3 as constituting the dependency of a minor, neither the act of sexual commerce nor that of lewd and lascivious conduct with or upon a minor is specifically or *eo nomine* named or mentioned. There can be no doubt, though, that either or both of the last-mentioned acts upon a minor, under the general language of certain subdivisions of section 3 or that of section 4 of the said law, would properly be construed as acts contributing to the dependency or the delinquency of a minor within the common intent of that law; yet it would hardly with seriousness be contended that the penalty fixed by section 28 of said law was intended to supersede or take the place of the penalty prescribed by section 261 of the Penal Code, defining the crime of rape, where a person is prosecuted and convicted under said Code section for the crime of statutory rape—that is, for having sexual intercourse with a female under the age of 18 years, a minor under the juvenile court law as well as under section 261 of the Penal Code.

Nor can such a contention be sustained with respect to the effect of section 28 of the juvenile court law upon section 288 of the Penal Code. Section 28 of the juvenile court law does not repeal section 288 of the Code by express language, and we find nothing in its language, either when considered alone or in connection with other provisions of the law to which it belongs, which would justify the conclusion that it does so by implication or thus affects the penalty prescribed by the Code section for the distinctive crime by said section defined. In other words, the question here is one of legislative intent, and we perceive nothing in the language of section 28 of the juvenile court law, or in that of any other section of said law, from which it is to be inferred that the Legislature intended by said section or by the act of which it is a part to expunge section 288 of the Penal Code or to repeal the penal clause thereof, and this is what the argument of counsel, if sustained, would bring about. The two acts—section 288 of the Penal Code and the juvenile court law, even with its section 28—can consistently stand together, and when this can

be said of two different legislative acts having, in a remote way, some relation to each other as to the general subject-matter thereof, then there is no such repugnancy between them as will amount to or operate as a repeal by implication of the earlier act.

[12] 7. The final point urged by appellant is that the court was without jurisdiction to inflict a greater punishment for the violation of section 288 than that of 5 years. The penalty fixed by section 288 of the Penal Code is, as will be observed, imprisonment "in the state prison not less than one year"; no maximum penalty being thereby expressly prescribed. Section 671 of said Code reads:

"Whenever any person is declared punishable for a crime by imprisonment in the state [prison] for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed."

The last-named section is obviously a complete answer to the contention of the appellant that the court was without authority to make the penalty in this case greater than that of imprisonment for 5 years. Counsel insists, however, that section 671 has no application to section 288, but that the maximum punishment under the latter section is fixed by section 18 of said Code, which provides:

"Except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years."

We are unable to see the force of the argument. Sections 288 and 671 must be read together to ascertain the maximum and the minimum penalties in cases arising under the first named section. The two together fix the lowest and the highest limits within which the court was authorized to exercise its discretion as to the punishment. Thus the case here comes within the exception made by section 18; this being as clearly a case "where a different punishment is prescribed" as though both the maximum and minimum penalties were expressly declared in section 288 of the Code.

We have now as fully as we have conceived necessary noticed all the general points made by the appellant. We have not discussed the points, though, from all the angles of the argument advanced in support of the appeal, or strictly followed the varying ramifications thereof. We have satisfied ourselves, however, that there is no substantial merit in any of the points presented, although they have been ingeniously and with as much force as

untenable legal problems may be supported pressed upon us in the briefs.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

SARTER v. SISKIYOU COUNTY.
(Civ. 1961.)

(District Court of Appeal, Third District, California. Aug. 4, 1919. Rehearing Denied by Supreme Court Oct. 2, 1919.)

1. COUNTIES §74(5) — COMPENSATION OF COUNTY SURVEYOR CANNOT BE INCREASED DURING TERM OF OFFICE.

Pol. Code, §§ 4258, subd. 12, 4044, 4290, relating to compensation of county surveyors, must be strictly construed, the fees and compensation of public officers being a matter of statutory origin and right which cannot be increased during the term for which the officer was elected, in view of Const. art. 11, § 9.

2. OFFICERS §100(2)—PROVISION AGAINST INCREASE OF SURVEYOR'S COMPENSATION DURING TERM APPLIES TO COUNTIES OF TWENTY-NINTH CLASS.

The provision of Const. art. 11, § 9, that compensation allowed by law to county officers cannot be increased during the term for which he was elected, applies as well to a county surveyor of a county of the twenty-ninth class whose compensation consists of fees or salary per diem for work done as to those whose compensation consists of specified salaries.

3. CONSTITUTIONAL LAW §63(3)—POWER OF SUPERVISORS TO DETERMINE COMPENSATION OF OFFICERS UNAUTHORIZED BY CONSTITUTION.

The Legislature alone is authorized by the Constitution to fix the compensation of officers, and any attempted delegation of that power to the board of supervisors is of no force or effect.

4. OFFICERS §96—COMPENSATION OF OFFICER AND DEPUTY FIXED BY STATUTE.

A statutory provision that a certain duty shall be performed by a specified officer means that such officer, and no other person, is chargeable with the performance of such duty, and when performed by the officer or by his authorized deputy the law regards the duty as performed by the officer, and a statutory provision for full per diem compensation of such public officer fixes the amount to be paid, regardless of who actually performs the service.

5. COUNTIES §74(6) — COMPENSATION OF COUNTY SURVEYOR AND DEPUTIES FIXED BY STATUTE CANNOT BE CHANGED DURING TERM.

Neither Pol. Code, § 4044, nor § 4290, nor any other statute, makes any provision for the payment of deputy county surveyors in the counties of the twenty-ninth class, and the

board of supervisors are limited to the \$10 per day allowable to the county surveyor, and cannot pay him or his deputies any additional amount for such day, in view of Const. art. 11, § 9, providing county officers' compensation cannot be increased during the term for which elected.

6. COUNTIES §74(6)—SURVEYOR'S COMPENSATION FOR SERVICES COVERS OFFICE EXPENSES.

A county surveyor of a county of the twenty-ninth class cannot demand the payment of \$6 or \$10 per diem for services performed by any of his deputies upon the theory that such per diem constitutes the expense necessary for conducting the duties of his office as the law requires, the services of his office being limited to a per diem compensation of \$10, allowed the county surveyor by Pol. Code, § 4044.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Harvey J. Sarter against Siskiyou County. Judgment for defendant, and plaintiff appeals. Affirmed.

Taylor & Tebbe, of Yreka, for appellant.

James M. Allen, of Yreka, for respondent.

HART, J. Plaintiff, who is the county surveyor of Siskiyou county, brought the action to recover \$1,222 for labor and services alleged to have been performed by him as such county surveyor. The case was tried by the court upon an agreed statement of facts. Judgment was rendered in favor of defendant for its costs, from which judgment plaintiff appeals.

From the agreed statement of facts, which the court adopted as its findings, the following appears: (1) That defendant is a county of the twenty-ninth class. (2) That plaintiff, at all times mentioned in the statement, was the duly elected, qualified, and acting county surveyor of Siskiyou county. (3) "That plaintiff as such county surveyor performed work and labor for defendant during the years 1915 and 1916 as follows." Then follows an enumeration of certain dates in the months of August, September, October, and November, 1915, and March, April, May, June, July, August, and September, 1916, aggregating 184 days. That plaintiff presented a bill to the board of supervisors at the rate of \$10 per day for said 184 days, which bill was duly allowed and paid, "but plaintiff refused to accept such payment as payment in full." (4) "That plaintiff as such county surveyor, in person and by duly authorized deputy, performed work and labor for defendant at other places in said county than the work mentioned in paragraph 3 of this statement, which work was performed on the same days as work mentioned in said paragraph 3, and bill was presented for said work as follows." Certain dates were mentioned which were the same as some of those for which plaintiff

was allowed \$1,840, "totaling 157½ days' work for which plaintiff presented his bill at the rate of \$8 per day, which bill was finally rejected by the board of supervisors" in December, 1916, and has not been paid. (5) "That plaintiff as such county surveyor, in person or by duly appointed and authorized deputy, performed work and labor for defendant at other places in said county than the work mentioned in paragraphs 3 and 4 of this statement, which work was performed on the following dates." The dates mentioned were the same as some of those for which plaintiff received the \$1,840, and totaled 88 days, for which plaintiff presented a bill at the rate of \$10 per day, which was disallowed by the board of supervisors. (6) That all of the work mentioned in paragraphs 3, 4, and 5 was ordered and directed to be done by the board of supervisors, "and was all such work as is required by law to be done by the office of the county surveyor, and it was his legal duty to perform all such work, either in person or by deputy, and it was all work of such nature as could be legally performed by the county surveyor or his deputy. That in order to perform all of said work as directed by defendant and its board of supervisors it was necessary to have much of it performed by deputy." The presentation of the bills to the board of supervisors was then set out, and it was stated "that the board of supervisors of said county, defendant, are ready and willing to allow the county surveyor of said county, plaintiff, \$10 per day for all work performed for the county."

[1] As illustrative of the point in dispute, plaintiff was paid \$10 for his services rendered on April 12, 1916. He also presented a bill for \$6 and another bill for \$10 for further services on said day, which, if allowed, would make his compensation for that one day \$26. It is appellant's contention that, as he and two deputies performed services on that day, he should receive \$26 therefor, while respondent claims that \$10 was the full compensation which he could receive under the law.

Subdivision 12 of section 4258 of the Political Code (which section specifies what salaries shall be paid to officers in counties of the twenty-ninth class) reads as follows:

"The county surveyor, such fees as are now or may hereafter be allowed by law; provided, he shall be given all work for the county in which the county employs a surveyor or civil engineer; and provided, further, that it shall be the duty of the board of supervisors of counties of this class to so employ him."

Section 4044 of the Political Code, enacted in 1907, provides:

"* * * In lieu of fees, as now provided by law, the surveyor shall receive such compensation as the board of supervisors may allow, not to exceed ten dollars per day for all work performed for the county, and in addition there-

to, all necessary expenses and transportation on work performed in the field."

Section 4290 of the same Code provides:

"The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided. * * *

"Acts relating to the fees and compensation of public officers are strictly construed, and such officers are only entitled to what is clearly given them by law." *Lewis' Sutherland on Statutory Construction*, § 714; *County of San Diego v. Bryan*, 18 Cal. App. 460, 123 Pac. 847; *City of Corona v. Merriam*, 20 Cal. App. 231, 128 Pac. 769; *Irwin v. County of Yuba*, 119 Cal. 686, 690, 52 Pac. 35; *State v. Wofford*, 116 Mo. 220, 22 S. W. 486.

The reason upon which this rule rests is that the right of a public officer to be compensated for his services as such is a statutory right or of statutory origin. A public officer, therefore, can receive for his services as such only such compensation as the legislative body competent under the Constitution to prescribe the salaries or compensation of such officers shall or may fix, and when this is done, neither the courts, in any case, nor the board of supervisors, in the case of any county officer, has the power or the right to increase the compensation so fixed (*Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 884, 29 Pac. 1092, 16 L. R. A. 161); and it is well settled in this state that the compensation allowed by law to a county officer cannot be increased during the term for which he has been elected. Article 11, § 9, Const.; *Dougherty v. Austin*, 94 Cal. 603, 28 Pac. 884, 29 Pac. 1092, 16 L. R. A. 161, and other cases cited in *McFadden v. Borden*, 28 Cal. App. 471, 152 Pac. 977.

[2] Nor can it be doubted that the constitutional provision just mentioned applies as well to those county officers whose compensation consists of fees as to those whose compensation consists of specified salaries. *Martin v. Santa Barbara*, 105 Cal. 213, 38 Pac. 687. Section 9 of article 6 of the Constitution does not say that the salaries of county officers shall not be increased during the term for which they are elected, but that the compensation of such officers shall not be so increased. No one would seriously contend that the payment by the day of a person for services rendered is any less a compensation for the services than a salary or a definite sum per month or year would be.

[3] It has also been held by our Supreme Court that the Legislature alone is authorized under the Constitution to fix the compensation of county officers, and that any attempted delegation of that power to boards of supervisors is wholly nugatory and of no

force or effect. *Dougherty v. Austin*, supra.

[4, 5] The question submitted here must be considered by the light of the principles thus stated.

As we have pointed out above, and, indeed, as the appellant himself claims is his right, the surveyor could, if his construction of the compensation clause of section 4044 of the Political Code be sound, put a number of deputies appointed by him to work and claim and receive for each deputy \$6, or, as he did in the case of one deputy in this instance, even \$10, per diem for every day they are employed in county work coming within the duties of the county surveyor. In fact, if his construction of said section is correct, he could do this even where the deputies were assisting him in one particular piece of work for the county. We do not think the Legislature, by the section of the Code referred to, intended or contemplated any such a situation. In other words, our opinion is that section 4044 of the Political Code is not justly or reasonably susceptible of such a construction.

The deputy of a public officer, when exercising the functions or performing the duties cast by law upon such officer, is acting for his principal or the officer himself. The deputy's official acts are always those of the officer. He merely takes the place of the principal in the discharge of duties appertaining to the office. When, therefore, the law provides that it shall be the duty of a certain public officer to do or perform certain public official acts, the deputy of such officer, if there be one, is necessarily included within the terms of the provision. If the law provides that an official act shall be performed in a particular way, it is no less the duty of a deputy to do the act in the manner so prescribed than it is that of the officer himself. In brief, a deputy under a public officer and the officer or person holding the office are, in contemplation of law and in an official sense, one and the same person. As stated, the deputy acts for and in the place of the principal, and his (the deputy's) acts are therefore not his, but those of the holder or incumbent of the office. When the holder of a public office dies or resigns, the authority of his deputy ipso facto ceases upon the happening of either event. It is true, therefore, that when the law says that certain duties shall be performed by a certain specified public officer it is meant that such officer and no other person is charged with the performance of such duties, and, when performed, whether personally by the officer himself or by an authorized deputy under him as such officer, the law regards such duties as having been performed by the officer upon whom it has expressly placed that burden, and not by a deputy in the office. It logically follows, then, that where the statute provides, as is the case here, for the compensation of a public officer, and further provides that such

compensation shall be in full payment for all services of any kind and description rendered by such officer as such, there can be no other meaning to such statute than that the compensation so provided for shall be in full for all services required to be rendered by such officer, regardless of who actually performs the services—whether the officer himself or an authorized deputy appointed to assist him in the performance of the duties of the office, and it also follows that, where there is no law providing compensation to be paid to a deputy under a public officer out of the public treasury, such deputy is not entitled to and cannot legally claim compensation to be so paid, nor can his principal claim the right to be paid compensation for such deputy. Neither section 4044 of the Political Code nor, so far as we are advised, any other Code section or statute, contains any express provision or authority for the payment of compensation to a deputy or to deputies in the office of the county surveyor of Siskiyou county. The section named merely provides, as stated, for the compensation of the surveyor or himself, and section 4290 of said Code plainly and unambiguously declares that the compensation so authorized shall be in full for all services of any kind and description rendered by the surveyor. We must hold that these sections mean precisely what their very plain and unambiguous language clearly implies. To hold otherwise, or as appellant construes section 4044, would compel us to import into said section language or a provision which it does not contain, or, under a fair and reasonable view thereof, it does not contemplate. Moreover, construed as appellant views its language, said section would violate the provisions of article 11, § 9, of the Constitution, in that it would result in increasing the compensation of the surveyor during the term for which he was elected. As above pointed out, even the Legislature itself has no power to do this, and in no event could the supervisors legally do such an act, even if the Legislature were to attempt to confer upon them such power. *Dougherty v. Austin*, supra. An act which the Constitution says cannot be done directly, obviously cannot be done indirectly, and therefore the position of the appellant that he, and not his deputies, is entitled to compensation to be paid by the county for services rendered the county by such deputies involves, if by such means the deputies are to be compensated, a proposition sanctioning the doing of an act by indirection which the Constitution plainly declares cannot be done directly; and if, on the other hand, the position is that the surveyor himself is entitled to receive more compensation than the maximum amount to which he may, by authority of law and the action of the supervisors, be entitled, then, as already shown, it would involve a proposition diametrically opposed to the mandate of the Constitution that the compensation of a

county officer shall not be increased after his election or during his term of office.

It would hardly seem necessary to cite cases to support the above construction of section 4044 of the Political Code, nor do we intend to do so at length herein, but the Indiana case of *State ex rel. Holman v. Roach*, Auditor, 128 Ind. 167, 24 N. E. 108, so closely resembles the instant case in its facts that we feel that no apology should be required for reproducing herein certain observations from the opinion therein which, it will readily be noted, have cogent application to several of the features of this case. Indeed, strange as the coincidence may appear, that case was one in which a county surveyor made precisely the same claim that appellant here makes, viz. that, under a statute in all respects similar to our section 4044 of the Political Code, he was entitled to receive or to be paid from the public treasury a certain specified per diem for each of his deputies, notwithstanding that there was no provision of law expressly or otherwise authorizing the payment of compensation to deputies in the office of the county surveyor from public funds. The court, in that case, after laying down and buttressing by innumerable authorities the elementary rule that, "where a public officer claims a compensation for official services, he must show either a statute authorizing such compensation, or a contract with some one who has the authority to bind the county," said:

"It follows that, as there is no statute fixing any compensation to be paid deputy surveyors for services rendered to the county, or to any one else, the county cannot be required to pay for such services. It is believed to be the universal rule that, where the law fixes no compensation for deputies, they must be paid by the officer who employs them, and not out of the public treasury. To hold that a county surveyor could perform the work required of him under this statute by deputy, and charge the per diem fixed by law for each day such deputy served, would be to open the door to the grossest frauds. It would allow the surveyor to employ persons less skillful and competent than himself, at a small compensation, and thus speculate upon the public. If he employed five deputies in one day at \$1.50 each, and charged \$3 for his own services, he would receive a per diem of \$10.50, instead of \$3, as the law provides. We do not think this law should receive the construction contended for by the relator."

[6] Nor can the surveyor demand the payment of \$6 or \$10 per diem for services performed by each or any of his deputies upon the theory that such per diem constitutes the expenses necessary for conducting the duties of his office as the law requires. While not a question necessary to be decided here, we may venture the opinion that the surveyors of counties of the class to which Siskiyou is assigned under the legislative classification

of counties are entitled to be reimbursed by the counties for any necessary and legitimate expenses incurred in the discharge of their official duties. But we do not understand that appellant claims such per diem for his deputies as expenses necessarily incurred in the performance of the duties of his office. His position is, as above stated and considered, that the per diem he claims for each of his deputies is compensation for services rendered by him as surveyor through or by such deputies, a proposition which, as we have shown, is clearly untenable.

We have carefully examined the brief of appellant, but we have not thus been convinced that the argument therein advanced sustains his position, or that the cases he cites are in point here. It may be true, as counsel suggest, that the compensation allowed the surveyor by section 4044 is wholly inadequate in proportion to the duties required to be rendered by him, but this fact, if it be one, cannot be made a just basis for a construction of said Code section contrary to the plain language of the statute and the manifest intent of the Legislature.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

WITHERS v. BOUSFIELD et al.
(Civ. 2859.)

(District Court of Appeal, First District, Division 1, California. July 21, 1919. Amended Aug. 8, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. VENDOR AND PURCHASER ⇔50—DEED TO THIRD PARTY AND TRIPARTY AGREEMENT AS TO SALES, ONE CONTRACT.

Where vendors executed grant, bargain, and sale deed to third parties and entered into a triparty agreement with purchaser and third parties, whereby third parties agreed to sell or execute contract for sale of small tracts of the land conveyed upon purchaser's demand, and deposit certain per cent. of proceeds in a bank to vendors' credit, the deed and triparty agreement should be considered as parts of one contract.

2. MORTGAGES ⇔1—CONVEYANCE TO THIRD PARTIES, A DEED OF TRUST SECURING PRICE.

Transaction between vendors, purchaser, and third parties, whereby third parties to whom vendors conveyed land agreed to sell separate tracts of the land upon purchaser's demand and deposit certain per cent. of proceeds in a bank to vendors' credit, was in effect a deed of trust to secure payment of purchase price; the third parties being trustees.

3. GUARANTY ⇔35—OF PRICE NOT AFFECTED BY INFIRMITIES IN TRUST SECURING PAYMENT.

The liability of guarantors of payment of purchase-money note was not affected by any

infirmity in a trust to convey created to secure payment of purchase price; the guarantors being liable on independent contract of guaranty, and not being parties to the trust.

4. MORTGAGES ⇐82 — MAIN SCHEME OF TRUST TO CONVEY LAND NOT AFFECTED BY PARTIAL INVALIDITY.

Where vendors, to secure payment of purchase price, conveyed land to third parties under third parties' agreement to sell tracts thereof upon purchasers' demand and deposit certain per cent. of proceeds in bank to vendors' credit, a provision of the trust so created, authorizing third parties to convey to purchasers upon completion of trust, even though invalid under Civ. Code, §§ 847, 857, would not affect the valid provisions of the trust, since the invalidity would not interfere with main scheme.

5. MORTGAGES ⇐27—TRIPARTY AGREEMENT INVALID AS TRUST ENFORCEABLE AS EQUITABLE MORTGAGE.

Triparty agreement between vendors, purchasers, and third parties, whereby vendors conveyed the land to third parties to secure payment of purchase money under third parties' agreement to sell separate tracts of the land upon purchasers' demand, deposit certain per cent. of proceeds in bank to vendors' credit, and convey land to purchasers upon discharge of indebtedness and payment of expenses, if invalid as a trust under Civ. Code, § 857, will be given effect as an equitable mortgage.

6. TRUSTS ⇐136 — TRIPARTY AGREEMENT WHERE THIRD PARTY TAKING TITLE WAS TO SELL LAND, NOT DRY TRUST.

Triparty agreement, whereby vendors conveyed land to third parties to secure payment of purchase price and whereby third parties agreed to sell separate tracts of land on purchasers' demand and apply certain per cent. of proceeds to payment of purchase money, and interest in outstanding contracts and remaining portion of land to purchasers when vendors shall have received payment in full of purchase price held not a dry and passive trust.

7. PERPETUITIES ⇐6(10)—TRIPARTY AGREEMENT CONVEYING LAND IN TRUST NOT INVALID.

Triparty agreement, whereby vendors conveyed land to third parties to secure payment of purchase price and whereby third parties agreed to sell separate tracts of land upon purchasers' demand and apply certain per cent. of proceeds to discharge of purchase-money indebtedness and convey interest in outstanding contracts and remaining portion of land to purchasers upon payment to vendors of purchase price, did not suspend power of alienation beyond period of lives in being under Civ. Code, § 715, since purchasers could at any time secure conveyance.

8. TRUSTS ⇐11(2) — RE-EXECUTION OF TRUST TO CONVEY LAND AFTER AMENDMENT OF STATUTE, VALID.

Even if a trust to convey was invalid under Civ. Code, § 857, a later contract, re-executing the original transaction subsequent to the taking effect of the amendment of 1913 (St. 1913, p. 438) to such statute, authorizing trusts to convey, was valid and enforceable.

9. VENDOR AND PURCHASER ⇐180 — NOTE BY PURCHASER DEPOSITED WITH THIRD PARTIES, PURCHASE MONEY, AND NOT PENALTY.

Note from purchaser to vendors, deposited with third parties to whom vendors had conveyed the land to secure payment of purchase money, held, in view of triparty agreement and the deed, and in view of Code Civ. Proc. § 1962, subd. 2, a note for the purchase price, and not merely a penalty deposited with third parties as trustees.

10. GUARANTY ⇐21—GUARANTORS OF PURCHASER'S NOTE ESTOPPED TO DENY IT WAS EVIDENCE OF PRICE.

Guarantors of purchaser's note to vendors, by consenting to and requesting ratification agreement ratifying original agreement between purchaser and vendors referring to note as representing purchase money, were estopped from claiming the note to be a penalty, and not evidence of the purchase price.

11. GUARANTY ⇐1, 45, 46 — NATURE AND ENFORCEMENT OF.

A guaranty is a promise to answer for the debt of another, and may be enforced upon default of the principal without any previous demand or notice.

12. GUARANTY ⇐70—DELAY IN ENFORCING PURCHASE-MONEY NOTE NO DEFENSE TO GUARANTORS.

In action against guarantors of payment of purchase-money note, mere delay by vendors in proceeding against purchaser was no defense.

13. GUARANTY ⇐34—NO PRIVILEGE BETWEEN PRINCIPAL DEBTOR AND GUARANTORS.

There is no privity or mutuality or joint liability between the principal debtor and guarantors who by independent contract have guaranteed payment of debt.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by W. S. Withers against Robert E. Bousfield, Jennie E. Bousfield, and others Judgment for plaintiff, and named defendants appeal. Affirmed.

Byrne & Lamson, of San Francisco, for appellants.

Robert B. Gaylord, of San Francisco, for respondent.

WASTE, P. J. Plaintiff brought this suit upon a contract guaranteeing the payment of a certain promissory note for \$150,000, executed February 21, 1913, by Brook-Wood Acres, Incorporated, payable on demand to the plaintiff or order. Judgment was entered in favor of plaintiff, and defendants Robert S. Bousfield and Jennie E. Bousfield alone appeal. The corporation maker of the note was not made a party.

On the 21st day of February, 1913, plaintiff and the Brook-Wood Acres, Incorporated a corporation, entered into a contract whereby plaintiff sold and the corporation bought

that certain real property located in the county of Contra Costa, known as Brook-Wood Acres, the purchase price being the sum of \$150,000, together with interest thereon at the rate of 6 per cent. per annum, from October 31, 1913, until paid. Concurrently with the execution of the contract, and as a part of the transaction, Withers and his wife executed and delivered to L. G. Burpee and E. N. Walter, as joint tenants, and not as tenants in common, and to the survivors of them, their heirs and assigns, a grant, bargain, and sale, deed of the property. Burpee and Walters, in writing attached to the agreement of sale, accepted the conveyance of the premises under the deed, so executed, and consented to hold the title under such deed, and accepted such title under, and subject to, and pursuant to, the terms of the entire agreement; it being the purpose of the parties that Burpee and Walter should, upon demand of the corporation, execute contracts for the sale of, or sell for cash, various portions of the Brook-Wood Acres tract at the prices and upon the terms in the contract of sale specified.

Under the terms of the agreement, 80 per cent. of the selling price of the various parcels of land, as sold, and all moneys otherwise paid to Burpee and Walter under the contract, were by them to be forthwith deposited in bank to the credit of plaintiff, the vendor of the whole tract under the contract of sale, and all such moneys were payable to him upon demand, excepting that Burpee and Walter could retain from the final payment, made by any purchaser, sufficient money to release the parcel purchased from the lien of two mortgages covering the entire tract, and which were provided for in the agreement. The remaining 20 per cent. of the purchase price belonged to the Brook-Wood Acres, Incorporated, the buyer of the whole tract under the contract of sale.

By its terms the agreement declared that it was intended to, and did, secure the payment by the corporation to plaintiff of the selling price of Brook-Wood Acres, with interest, and all moneys which might be, or become, payable to him under the agreement, including any advances made by him in connection with the improvement or sale of the property, with interest thereon, and was also intended to secure the payment to Burpee and Walter of their charges and expenses, and all moneys, with interest thereon, advanced by them for the payment of expenses under the agreement, all of which expenses and charges were to be paid by the corporation.

After providing with particularity the conditions under which the corporation should be deemed in default under the agreement, such as failure to sell portions of the tract at selling prices aggregating certain specified

sums, and amounting to a certain designated number of acres, by dates specified, and failure to pay to Burpee and Walter, either through payments by purchasers under contracts of sale, or by direct payments made by the corporation, the agreement recites the giving, by the corporation to plaintiff, and its deposit with Burpee and Walter, of a certain promissory note, for the sum of \$150,000, representing the purchase price to be paid for the tract of land, the payment of which note, the agreement further recites, "has been guaranteed jointly and severally by Robert E. Bousfield, Jennie P. Bousfield, L. M. Ver Mehr, Irene Lee Ver Mehr, W. G. Dodge, Leonie M. Dodge, F. C. Mills, and Mabel Corse Mills, but which guaranty is conditioned that the liability of said guarantors under said guaranty or any of them, respectively, shall not exceed the sum of twenty-five thousand dollars (\$25,000.00); it being the purpose of said guaranty that not more than \$25,000.00 shall be collected by said first party (plaintiff) under the same."

Concurrently, also, with the execution of the agreement of sale, the Brook-Wood Acres, Incorporated, executed to plaintiff, and deposited with Burpee and Walter, its promissory note for the principal sum of \$150,000, representing the purchase price to be paid Withers for the land. The note contained the following paragraph:

"Payment of this note is secured by a certain agreement of even date herewith entered into between Brook-Wood Acres, Incorporated, and with W. S. Withers, relating to the sale by W. S. Withers to Brook-Wood Acres, Incorporated, of certain real property of W. S. Withers in Contra Costa County, California, known as Brook-Wood Acres. The personal liability of Brook-Wood Acres, Incorporated, under this note aside from the security above mentioned, or after realizing upon such security, shall not exceed and is hereby limited to the sum of twenty-five thousand dollars (\$25,000)."

The note was executed for the corporation by its president and secretary, and the seal of the corporation attached. It was signed by each of the defendants, who each in turn acknowledged and signed, before a notary public, a joint and several guaranty of payment of the note, waiving presentation, demand, notice of nonpayment, and protest. The liability of the guarantors was, by the terms of the instrument, limited to the sum of \$25,000.

In the event of any default upon the part of the corporation, so the agreement provides, but apparently not before, Burpee and Walter are to deliver the note to plaintiff on demand, after indorsing, as payments thereon, all moneys received by them for the account of plaintiff, on the purchase price of Brook-Wood Acres, including any payments on account of interest, and certain other credits which are specified. At any time on, or

after, the delivery of the note to plaintiff, or in the event of any default upon the part of the corporation in the payment of the note according to its terms, upon demand of plaintiff Burpee and Walter are, by the agreement, required to sell all portions of Brook-Wood Acres not theretofore conveyed by them, or such portions as in their discretion they may find it necessary, to make the payments thereafter provided in the agreement, and to make the sale in the manner therein fully and with particularity described. Suffice it to say that the procedure for making these sales is similar to, if not exactly like that provided in the various forms of trust deeds, so universally used, and so long upheld by the courts of last resort of this and other states, as being a legal method for the sale of property conveyed to trustees as security for the payment of an existing indebtedness. *Sacramento Bank v. Alcorn*, 121 Cal. 879, 53 Pac. 813; *Balfour-Guthrie Co. v. Woodworth*, 124 Cal. 169-174, 56 Pac. 891; *Younger v. Moore*, 155 Cal. 767-771, 103 Pac. 221.

[1, 2] The grant, bargain and sale deed of Brook-Wood Acres, executed by plaintiff and wife to Burpee and Walter, and the triparty agreement, executed by plaintiff as first party, the corporation, Brook-Wood Acres, Incorporated, the second party, and Burpee and Walter as the third parties, were intended to be effective, and must be considered and regarded, as parts of one contract. *Younger v. Moore*, supra; *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325. So construed, the transaction between the parties loses its complexity, and amounts to nothing more nor less than the execution by the corporation to plaintiff of an ordinary deed of trust, to secure the payment of the note for \$150,000, given as the purchase price of Brook-Wood Acres, the payment of the note being further secured to the extent of their limited liability, by the contract of guaranty executed by the guarantors, who are the defendants in this action. While Burpee and Walter are not referred to in the transaction as trustees they were in fact such.

[3] Because the trust agreement provides that upon payment to plaintiff of the entire selling price, with interest, and all other indebtedness of the maker of the note, connected with the sale of the tract—in short, upon full performance of the terms of the agreement—the trustees shall convey to Brook-Wood Acres, Incorporated, all unsold portions of Brook-Wood Acres, and all portions sold but for which deeds have not issued, and, likewise, were, in the event of a failure of title at the inception of the deal, to reconvey the property to plaintiff, the appellants contend that the trust is void, under sections 847 and 857 of the Civil Code. They rely upon *Estate of Fair*, 132 Cal. 525, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Id.*, 136 Cal. 79, 68 Pac. 306, as authority to the effect

that a trust to convey is void, and that the statute concerning trusts was a legislative pronouncement of the public policy of the state. Invoking the rule that courts will not directly enforce any obligation arising out of a contract illegal by reason of being against public policy, by carrying it into effect, or indirectly by awarding damages, or compensation, for a breach of it, appellants first seek to avoid the liability of their contract of guaranty by an assertion of the infirmity of the trust. We fail to see any right resting in the appellants to attack the trust, if any of the alleged weaknesses therein exist. The guarantors became liable, on default of the corporation to pay its note, to the extent of their independent contract of guaranty. They were not parties to the trust in any manner. *Kinsel v. Ballou*, 151 Cal. 754, 761, 91 Pac. 620. They had no interest in the real property involved in, or in the outcome of, that transaction, other than to expect that whatever sums were realized from the sales of the property, either to purchasers or at trustees' sales, on default made by the maker of the note, would be applied in reduction of the amount due on the note.

[4] Assuming, however, but not deciding under the facts of this particular case, that the conveyance in trust is invalid, in so far as it purports to authorize the trustees to convey the property to the corporation, on fulfillment of the terms of the contract of sale, the invalidity should not be held to affect the valid provisions of the trust. The main and ultimate purpose of the trust created by these instruments was to convert the trust property by sale, so far as necessary, into money wherewith to discharge the indebtedness secured thereby. *Younger v. Moore*, supra. The power to convey on completion of the trust, the occasion for which might never, and in the present case did not, arise was not essential thereto. If the trustees could not be legally authorized to convey the property to the corporation, the provisions in that behalf can be disregarded without interfering with and changing the main scheme of plaintiff and Brook-Wood Acres, Incorporated. *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138. In other words, as was said in that case, we see no such inseparable scheme, that the said power to convey cannot be disregarded without affecting, or interfering with, the main purpose of the parties. If the trustees were attempting to so convey the property, the question of the validity of such provision would become material if made an issue by parties properly interested in the subject-matter, but we do not consider it material here. No attempt to convey was ever made, for, as will later appear, the property was sold by a trustee, substituted and acting under the terms of the trust agreement. *Younger v. Moore*, supra.

[5] For another reason appellants' attack on the transaction resulting in the trust should not be allowed to prevail. As before pointed out, the deed of February 21, 1913, from plaintiff and wife to Burpee and Walter, and the trust agreement of the same date between the same parties, and accepted by Burpee and Walter, must be considered as parts of a single transaction, and so construed. Primarily, the trust expressed was intended solely by way of security for the indebtedness of Brook-Wood Acres, Incorporated, with interest, expenses of protecting the property, and compensation of the trustees. If, as is urged, the resulting trust was invalid, as being for some purpose not authorized by section 857 of the Civil Code, defining the purposes for which express trusts in relation to real property may be created, and we were thereby compelled to hold it was not a valid deed of trust, the rights of the parties could be preserved by holding the instruments to constitute an equitable mortgage (*Younger v. Moore*, supra), with power of sale as part of the security and an incident or appurtenance of the mortgage lien (*Faxon v. All Persons*, 166 Cal. 707, 716, 137 Pac. 919, L. R. A. 1916B, 1209). "No policy of the law is violated by treating this instrument as creating a lien in the nature of a mortgage, if it cannot be upheld as a deed of trust." *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 228, 88 Pac. 920, 925.

[6] Appellants urge a further objection that the trust in the present case is but a dry and passive trust. They are mistaken. The agreement declares that it is intended to secure, and shall secure, the payment by the purchaser to the seller of his selling price of the property, with interest, and all other moneys which may become due or payable under the contract. The trustees are given various active duties to perform in the execution of the trust. These are: Upon failure of title of Brook-Wood Acres to reconvey the premises to plaintiff; upon demand of the corporation (provided it was not in default) to enter into contracts for the sale of, or sell for cash, various portions of the tract at the prices, and upon the terms in the contract specified; to receive the selling price therefor and apply the same on the purchase price of the entire tract; to approve the form of sales contracts agreed to by the other parties to the agreement; upon performance by any purchaser of his contract to convey to him the subdivision so purchased by him; to execute upon request of Brook-Wood Acres, Incorporated, such maps for recordation as might be from time to time approved by the other parties to the contract; in the event of any default by Brook-Wood Acres, Incorporated, to deliver the note of the corporation to Withers, after having indorsed as payments thereon all moneys received by them on the purchase price of the tract; at any

time after delivery of the note, or any default of the corporation, upon demand of Withers to sell all unsold portions of the tract, at public auction, in the manner set forth in the agreement, and apply the proceeds of such sale, as directed therein; to assign to Brook-Wood Acres, Incorporated, any unsold outstanding contracts of sale upon payment to Withers, or themselves, of all moneys due; and upon payment of all the purchase price of the tract, and all moneys due under the agreement, to convey the remaining portions of Brook-Wood Acres to the corporation.¹

[7] Another contention of the appellants is that the trust, if otherwise valid, provided for a suspension of the absolute power of alienation beyond the period of lives in being. Section 715, Civ. Code. "The power of alienation is not suspended when all the parties in interest, including the trustee and the beneficiary, can join in a conveyance and transfer a legal title."

In the present case there was no suspension of the power of alienation, since Brook-Wood Acres, Incorporated, "could at any time, by paying the indebtedness to the plaintiff, receive a reconveyance of the property, or, by uniting with the trustees and" plaintiff execute a conveyance to a purchaser. *Balfour, Guthrie Co. v. Woodworth*, supra; *Blakeman v. Miller*, 136 Cal. 138, 141, 68 Pac. 587, 89 Am. St. Rep. 120; *Toland v. Toland*, 123 Cal. 140, 141, 142, 55 Pac. 681.

Respondent makes a timely suggestion in opposition to the right of appellants to assert the alleged invalidity of the trust. Section 857 of the Civil Code was amended at the session of the Legislature in 1913 (St. 1913, p. 438) by including, among authorized trusts in real property, a trust to convey. Long after this amendment became effective, to wit, on December 15, 1914, in connection with certain extensions of time and other modifications of the contract, plaintiff and Brook-Wood Acres, Incorporated, executed a document in which they re-executed the original contract of February 21, 1913, as modified in the documents of later date, and each respectively agreed to perform the provisions of the original instrument.

This agreement, after rectifying the due execution of the original contract of February 21, 1913, the modification thereof under dates of July 15, 1913, and December 30, 1913, and the taking of contracts, under the provisions of the main contract for the purchase of various portions of Brook-Wood Acres, contains the following clause: "Now, therefore, this agreement, witnesseth: That the said main contract and the terms and provisions thereof shall be and are hereby modified as hereinafter set forth, but not otherwise, and

¹ This sentence added by amendment dated August 8, 1919.

each party hereto upon his part agrees to perform the terms and provisions of this agreement and of said main contract and modifying agreements as modified by this agreement, and in that behalf, it is hereby by the parties hereto agreed as follows, to wit." Then follow the modifications referred to, which, among others, constitute an extension of time of the making of various payments and which constitute a change in regard to acreage required to be sold to subdivision purchasers. The agreement, in addition to many apt references to the "main contract," contains this clause, "except as herein expressly stipulated all of the provisions of said main contract and said modifying agreements shall stand and that any and all terms and provisions thereof not in conflict with the terms of this agreement shall continue in force; to the end that the said main contract and modifying agreements shall continue in force as written, except as expressly modified by the terms of this agreement, and that all and singular the terms and provisions of said main contract shall apply and continue in force as if the modifying terms herein set forth had been originally contained in said main contract and modifying agreements."³

[8] At the same time, and as a part of the same transaction, six of the guarantors, including the present appellants, signed a waiver of the \$25,000 limitation upon their liability as guarantors, and jointly and severally guaranteed full payment of the note for \$150,000. Whether the original trust agreement was valid or invalid by reason of the prohibition of the statute, the later contract re-executing the original transaction was valid and enforceable (*Burleson v. Burleson*, 11 Tex. 2), and the appellants guaranteed the payment of the note which it provided for.

After the making of the contract of sale, on July 15, 1913, the Brook-Wood Acres, Incorporated, being in default in the aggregate amount of its sales, as required by the agreement, Withers, by separate agreement, executed by himself and the corporation, waived the default and extended the time until January 1, 1914, for procuring selling contracts aggregating \$50,000, making sales aggregating 200 acres of land and paying the aggregate sum of \$2,500. The new agreement was conditioned that no other condition of the contract of sale should be waived, and that the time for performance of any other provision of the contract should not be extended or affected; also, that this new agreement should only become effective when consent to the execution thereof was executed by all the guarantors of the note executed and referred to in the first agreement. Pursuant to this requirement, each of the defend-

ants signed an instrument, which was annexed to and made part of the new agreement, whereby each of them jointly and severally requested and consented to the execution of the agreement and the modifications therein provided, and stipulated that neither the execution of the new agreement nor said modifications should modify or release the liability of any of them under their guaranty of said note; such guaranty being thereby ratified, approved, and confirmed.

Thereafter, on July 29, 1913, another agreement was made and signed by plaintiff Withers as the first party, Brook-Wood Acres, Incorporated, the second party, and all of the defendants as third parties, wherein, after reciting the agreement of sale, February 21, 1913, and the extension agreement of July 15, 1913, the corporation and the defendants agreed that plaintiff might at any time waive or modify all or any of the provisions of the agreement of sale of February 21, 1913, and that any departure from said agreement by Withers should not in any way waive, release, or modify the liability of the corporation or of the defendants under the promissory note executed and referred to in the agreement of February 21, 1913, or under the guaranty of said note by the defendants.

On December 15, 1914, plaintiff and Brook-Wood Acres, Incorporated, entered into an agreement in writing, modifying the agreement of the main contract of February 21, 1913, and requiring a balance to be struck as of January 1, 1915, which said balance should constitute the unpaid portion of the purchase price of the land, and providing for the payment thereof. This agreement provided that it should not be binding until the written consent to and request for its execution, annexed thereto, was executed by the guarantors of the note referred to in the main contract. It further provided that the limitation of personal liability of \$25,000 of the corporation was waived by it to the end that it became obligated the full amount of the unpaid purchase price. Concurrent with the execution of this agreement, and as part of the same transaction, each of the guarantors, including the defendants, in writing consented to and requested the execution thereof and in consideration of the agreement they each waived the statute of limitations upon the guaranty of the note to the end that the statute should not begin to run on said guaranty prior to the first of January, 1918.

On the same day, December 15, 1914, each of the defendants other than E. C. Mills and Mabel Corse Mills signed an instrument in writing, by which, after reciting the contract of February 21, 1913, and the guaranty of the note by them, together with the recital of the various extensions, they jointly and severally guaranteed the full payment of the note for \$150,000, waiving presentment, de-

³ This sentence and the one preceding it were added by amendment made August 8, 1919.

mand for payment, notice of nonpayment and protest, it being the declared intention thereof, according to the document, among other things, to guarantee said note unqualifiedly and to waive the \$25,000 limitation upon the liability of the guarantors and each of them.

Various contracts had from time to time been made by the parties under the provisions of the agreement of sale, and on the 26th day of January, 1915, plaintiff and Brook-Wood Acres, Incorporated, agreed that there was due and unpaid from the company to plaintiff, under the agreement and the various contracts, the sum of \$130,000.54, together with interest thereon at the rate of 6 per cent. from and beginning with the 15th day of January, 1915, and provided for designated credits upon the happening of certain contingencies.

On February 25, 1915, the Berkeley Bank of Savings & Trust Company was designated by Withers and the Brook-Wood Acres, Incorporated, as third party to the agreement in place of Burpee and Walter. The latter, by deed, joined in by the wife of each, conveyed the property to the Berkeley Bank of Savings & Trust Company, and delivered the promissory note to the bank.

Further defaults being made by Brook-Wood Acres, Incorporated, plaintiff brought this action against defendants on April 5, 1915, on their guaranty. No demand was made upon defendants before bringing the action; neither was the property sold by the trustee prior to that time. Pending trial, however, the Berkeley Bank of Savings & Trust Company duly sold the property upon the demand of the plaintiff, under the terms of the agreement of sale. The net proceeds of said sale were the sum of \$45,112.35, which sum said plaintiff credited on the note set forth in plaintiff's complaint herein.

Upon the filing of the complaint, the defendants Bousfield, Ver Mehr, and Dodge filed their answers denying any liability under the guaranty, and alleging that there was no consideration for the same. The cross-complaint admitted the execution of the instrument of the 15th day of December, 1914, waiving provisions of the guaranty, limiting their liability thereunder to \$25,000, but alleging that the defendants never agreed that said guaranty should be an unrestricted guarantee of the full payment of the note, but that said waiver only guaranteed the deficiency, if any, up to \$150,000, which should remain to satisfy the balance of the purchase price of the real property, which was the subject of the agreement of sale, after the same had been sold, and the proceeds divided according to that contract.

By way of cross-complaint, which defendants Bousfield subsequently filed, it was alleged that the instrument of December 15, 1914, by which defendants Bousfield, Dodge, and Ver Mehr, jointly and severally guaran-

teed the full payment of the note for \$150,000, waiving presentment, and unqualifiedly waiving the \$25,000 limitation upon the liability of the parties (already referred to) was intended to mean, and its legal consequences were intended to be, that said defendants waived the limitation of \$25,000, contained in the guaranty for said note, and that they were to be liable for the deficiency, if any, up to \$150,000, which should remain of the said purchase price after the real property, described in the agreement of sale, had been sold, and the proceeds applied according to the terms thereof, but through the mutual mistake of the defendants and the plaintiff, and the Brook-Wood Acres corporation, said instrument failed to express that intention in so many words, and prayed that the instrument be reformed accordingly.

The court found in favor of plaintiff and against the defendants on all points, and, after crediting the net proceeds of the sale of the property made by the substituted trustee, the Berkeley Bank of Savings and Trust Company, of \$45,112.35, gave judgment against defendants Mills in the sum of \$25,000, and against defendants Bousfield, Ver Mehr, and Dodge in the sum of \$58,554.86, together with the sum of \$5,000 attorney's fees.

[9] Appellants contend that the main agreement, the contract of February 21, 1913, was not a contract of purchase and sale of real property, and that the note for \$150,000 was not a note for the purchase price of the land, but that in reality it was executed and deposited with the trustees as a penalty; that the recital in the preamble of the contract "that the said first party (plaintiff) has sold to the said second party (Brook-Wood Acres Company, Incorporated), and the said second party has bought from the said first party, all upon the terms and conditions, and in the manner herein-after set forth, and purchase price thereof to be payable as hereinafter set forth, that certain real property," etc., is palpably untrue. This contention cannot be supported by a logical analysis of the note, the deed and the agreement, when read together. In view of the plain and unambiguous statement in the agreement we are satisfied, as a matter of fact, that the note represented the purchase price paid for Brook-Wood Acres.

[10] We prefer to accept the view of respondent that the parties to the contract intended to be, and were, bound by its recitals. Section 1962, subd. 2, Code Civ. Proc. From all the surrounding circumstances attending the transaction, we are led to conclude that no other contract relative to the sale of the land was contemplated, and that the note for the \$150,000, was executed by the corporation, and delivered to the trustees, as the evidence of and for the purchase price of

the tract. The main agreement of February 21, 1913, in paragraph 29 thereof, refers to the note "for the principal sum of one hundred and fifty thousand dollars (\$150,000.00), representing the purchase price to be paid for said Brook-Wood Acres; the payment of which note has been guaranteed, jointly and severally by" the defendants. Concurrently with the execution of the ratification agreement, of December 15, 1914, and as part of the same transaction, the appellants, and the other guarantors, consented to and requested the execution of the said ratification agreement which by its terms specifically refers to and deals with the note for the \$150,000. Appellants, by their own acts, therefore, are estopped from claiming the note to be a penalty, and not evidence of the purchase price for the land. The note is a demand note. Appellant contends that as there is no allegation in the complaint that a previous demand was made on the maker of the note, or that suit had been instituted against it (which would have taken the place of a formal demand), and as there was no proof in support of any such demand or suit, the maker of the note never became liable, and the action against the guarantors was premature.

[11-13] A guaranty is a promise to answer for the debt of another person, and it may be enforced, upon default of the principal, without any previous demand or notice. By its various transitions the contract of guaranty in this case became an absolute undertaking to pay the whole debt of Brook-Wood Acres, Incorporated, if the company did not, and no mere delay of plaintiff to proceed against the maker of the note, or to enforce any other remedy, can be availed of by the guarantors as a defense. *First National Bank v. Babcock*, 94 Cal. 96, 104, 29 Pac. 415, 28 Am. St. Rep. 94; *Carver v. Steele*, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156. This is not an action for the collection of the Brook-Wood Acres, Incorporated, debt as such. It is an action upon an independent contract of the defendants. There is no privity, or mutuality, or joint liability between the principal debtor and its guarantors. *Adams v. Wallace*, 119 Cal. 67, 71, 51 Pac. 14. Moreover, the defendants, including appellants, made an independent contract upon which they became liable without regard to the sale of the property, under the terms of the trust, as against the principal debtor. *Kinsel v. Ballou*, 151 Cal. 754, 762, 91 Pac. 620; *Adams v. Wallace*, supra.

This case presents no different aspect from the foregoing, and numerous other cases, decided by the courts of last resort of this state, in which it has been held that, regardless of the necessity for exhausting the security given, before resorting to the personal liability of the maker of a note, neverthe-

less an indorser, or guarantor, may be sued upon his personal liability before, and without, such action having been taken.

It was proper for the court to allow the attorney fee included in the judgment.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

LISENBEE v. LISENBEE. (Civ. 1933.)

(District Court of Appeal, Third District, California. Aug. 6, 1919.)

1. DIVORCE \Leftrightarrow 286—IN ABSENCE OF APPEAL FROM DECREE POWER OF COURT OVER HUSBAND'S PROPERTY NOT REVIEWABLE.

In the absence of appeal from the decree in a divorce action, the appellate court, on the husband's appeal from an order appointing receiver of the proceeds of his realty after failure to comply with the terms of the decree in the divorce suit, cannot review the question whether the superior court in a divorce proceeding has jurisdiction to deal with the separate property of the spouses.

2. DIVORCE \Leftrightarrow 267—COURT CAN SELL HUSBAND'S PROPERTY TO MAINTAIN WIFE AFTER DECREE FOR MAINTENANCE.

Under Civ. Code, §§ 136, 140, and in view of Code Civ. Proc. § 671, the court which in her divorce suit had granted a wife a decree for maintenance, did not exceed its jurisdiction, in appointing receiver to take custody of and sell the husband's property to satisfy such decree for maintenance, on any ground that the judgment upon either the community property or the separate property of the husband created a lien which must be foreclosed to become effective.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action for divorce by Maud Irene Lisenbee against Charles Samuel Lisenbee, wherein plaintiff was awarded a community interest in certain realty, and defendant was ordered to pay a sum per month for her maintenance. From an order appointing receiver to take over and receive from the sheriff all money derived from the sale of the realty of the husband, he appeals. Affirmed.

See, also, 181 Pac. 804.

A. H. Carpenter and J. D. Hinkle, both of Stockton, for appellant.

Charles De Legh, of Stockton, for respondent.

HART, J. On the 22d day of May, 1915, the complaint in this action was filed, in which plaintiff prayed for a divorce from defendant, and, among other things, asked that certain property, mentioned in the complaint

be declared to be community property. The action went to trial, and the court found that plaintiff was not entitled to a divorce for the reason that there was not sufficient corroboration of the alleged acts of cruelty set forth in the complaint; that the real property mentioned in the complaint was the separate property of defendant, but that plaintiff, having with money earned by her from her work and labor contributed toward the purchase of said property, was entitled to a community interest therein to the value of \$1,500; and defendant was ordered to pay for her maintenance the sum of \$25 per month, which payments were made a lien on the community interest of the parties.

On the 24th day of November, 1917, the court made a formal order for the issuance of a writ of execution, directed to the sheriff of San Joaquin county, "reciting said judgment and directing the said sheriff to levy upon and sell according to law in such cases the following described real property, or so much thereof as may be necessary to satisfy said judgment" for maintenance and costs, the real property described in the complaint, and in which, it was found, the plaintiff had a community interest to the extent of \$1,500.

The defendant having failed to comply with the terms of the decree requiring him to pay to plaintiff \$25 per month, the court on the 14th day of January, 1918, after due proceedings, made an order appointing one R. B. Teefy a receiver in the premises, said order reciting that he "is authorized and empowered to take over and receive from the sheriff of this county any and all money derived from the sale of the real property upon execution in this action in excess of the sum of \$500 (now due this plaintiff), and the said R. B. Teefy is also authorized and empowered to take over and hold possession of any real property described in said writ of execution remaining unsold after the satisfaction of such writ."

This appeal is by the defendant from said order appointing receiver.

It is contended: (1) That "the superior court in a divorce proceeding has no jurisdiction to deal with the separate property of the spouses"; (2) that the court exceeded its jurisdiction by appointing a receiver to take custody of and sell the property described in the order appointing the receiver for the purpose of satisfying the judgment for maintenance, costs, etc.

[1] The point first above stated we cannot review on this appeal, since there is here no appeal from the judgment in the divorce action. Indeed, all that the record here contains as to the divorce action itself is the judgment roll therein. The record does not show the evidence upon which the court based its findings in said action. We must therefore presume that there was sufficient evidence to

support the findings. While the order from which this appeal is prosecuted grew out of the divorce action and, indeed, involves the granting of an ancillary remedy in aid of the execution of the judgment in said action, this is, nevertheless, so far as the right to attack said judgment is concerned, under the record before us, a collateral proceeding—that is to say, the attack on said judgment on this appeal is in effect collateral, and consequently all intendments and presumptions in support of the judgment must be indulged just the same as though the present proceeding were an entirely new and independent action having such relation to the divorce action as to make the question of the validity of the judgment in the latter action a material and important issue in the former. It may be observed that the finding that the property described in the complaint "is the separate property of the defendant, save and except the sum of \$1,500 in value thereof, which the court finds is the community interest of plaintiff and defendant," seems on its face to be somewhat contradictory or, at least, not clear in its meaning, still it is a matter of little consequence whether the property which the receiver was authorized to take charge of and sell to satisfy the judgment is community or the separate property of the defendant. Civ. Code, § 141. That section, in effect, provides that, where there is community property of the spouses, such property must be resorted to for satisfaction of an allowance for maintenance or alimony, but, if there be no community property, then the separate property of the husband may be resorted to for that purpose.

[2] As to the second point, viz. that the court exceeded its jurisdiction by appointing a receiver to take custody of and sell the property, the contention of the appellant is that the effect of the judgment upon either the community property or the separate property of the defendant was to create a lien thereon, and, therefore, to make the lien effective, it was necessary to foreclose the same in a proceeding for that purpose. There is no force to the proposition.

Under the terms of section 671 of the Code of Civil Procedure a judgment, from the time it is docketed, becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The effect of such lien is to preserve whatever efficacy the judgment has from the time it is docketed, and it is, in effect, merely a remedy in aid of the execution. In other words, the object of the lien is manifestly to render the judgment capable of enforcement, even though the judgment debtor should sell or mortgage his real property after the judgment was docketed. No contention has ever

been made that a judgment cannot be satisfied by an execution issued in the usual manner of such a process. It would, indeed, amount to a procedural circumvolution wholly unnecessary and antagonistic to the genius of the reformed procedure if the law contemplated and it was necessary to hold that, to secure the benefit of the lien provided in section 671, a proceeding to foreclose such lien was required. The judgment in a divorce action, in so far as it awards maintenance to the wife, is the same as any money judgment, the wife's position being assimilated to that of a creditor of her husband (*Murray v. Murray*, 115 Cal. 268, 275, 47 Pac. 87, 37 L. R. A. 626, 58 Am. St. Rep. 97); and, while the effect of the docketing of such a judgment is to create a lien upon the property, community or separate, of the husband, the satisfaction of such judgment, in the absence of a provision awarding any other remedy for that purpose, could undoubtedly be secured by the usual method of executing judgments or without resorting to a proceeding to foreclose the lien following from the docketing of such judgment.

But the Code sections conclusively answer the contention of appellant with respect to the remedy to be invoked to secure the payment of money due under an order or judgment awarding, in a divorce action, maintenance to the wife.

Section 136 of the Civil Code provides:

"Though judgment of divorce be denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and the children of the marriage, or any of them."

Section 140 of the same Code reads:

"The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

Thus the remedy for the enforcement of an order or a judgment for maintenance through the instrumentality of a receiver appointed by the court for that purpose is expressly authorized by the Code, and in this case the court has done no more or gone no further than the law authorizes.

It is, of course, true that the general power in the courts to appoint receivers to take charge and control of and, for the purposes of the receivership, title to property in litigation is an extraordinary power, and should be exercised with great care and circumspection and only upon the imperative necessities of the case in which it is sought to be invoked. The Legislature, however, seems to have deemed the appointment of a receiver as peculiarly adapted to the enforcement of a judgment for maintenance in an action

for divorce and, indeed, the only efficacious remedy in cases like this where other remedies applicable thereto have failed in their purpose, and it is probable, therefore, that it was intended that it should be allowed upon a mere showing that other remedies had proved to be ineffectual for that purpose. This view is sustained by the consideration that, generally, such cases do not involve complicated matters or numerous conflicting interests, the sole object being merely to satisfy a judgment as to a single claim growing out of the relationship of marriage between the parties, and therefore primarily based upon considerations antedating the time of separation or divorce and inhering in the contract of marriage itself.

Section 140 of the Civil Code does not, it is true, specifically point out the duties and powers of a receiver appointed by virtue of its provisions; but the section has been construed in several cases and the authority and duties of such a receiver defined. We may refer herein to one of those cases only—*Petaluma S. Bank v. Superior Court*, 111 Cal. 488, 44 Pac. 177, in which at page 495, (44 Pac. 179), the court thus explained the powers and duties of a receiver appointed under said section 140:

"So far as I am advised, this section has not been the subject of a judicial construction, and the powers and duties of a receiver appointed in pursuance of its provisions have not been defined; but it would not seem difficult to determine in what cases and for what purposes he is to be appointed. The whole object of his appointment is to provide security for the payment of such allowance as is made for the maintenance of the divorced wife, and this would be accomplished by vesting him with the title and control of some productive property of the husband, out of the income of which he could pay such allowance, or by authorizing the sale of property to create a fund, the income of which would be applied to the same purpose."

It is not improper to say that counsel for the respondent filed no brief in this case, nor did they orally argue the cause when it was called for hearing. Whether respondent thus intended to manifest an abandonment of the case on appeal or regarded her position so obviously sound as to require no argument, either oral or written, we are, of course, unable positively to say. We are constrained to say, however, that, if it was her intention for any reason to abandon the case on appeal, it was her duty to have joined in an authorization for a dismissal of the appeal, and thus have saved this court, already burdened with work which must be disposed of within a limited time, of a considerable amount of extra labor. On the other hand, if it was her desire to secure a decision by this court of the legal issues submitted by the appeal, she should have supported her position upon the points involved either by oral argument or

a printed or typewritten brief, and thus have taken from this court that labor which rightfully belongs to the lawyers. We have, however, notwithstanding the extra labor entailed upon us by the neglect of respondent to present her side of the case, examined the points with the same care that we always try to give to those cases which are fully argued and presented, assuming that, if respondent desired to abandon the case on appeal, she would have apprised us of the fact, and the examination thus given the case has convinced us that there is, upon the record as it stands before us, no merit in the appeal.

The order is affirmed.

We concur: CHIPMAN, P. J., BURNETT, J.

PEOPLE v. MILLS SING. (Cr. 656.)

(District Court of Appeal, Second District, Division 2, California. July 25, 1919. Rehearing Denied by Supreme Court Sept. 22, 1919.)

1. SALES \S 202(1), 316(1)—ON CASH SALE, DELIVERY AND PAYMENT CONCURRENT ACTS.

Where a sale is a cash sale, delivery of the goods and payment of the price are concurrent acts, and the vendor, though he has delivered, supposing he would immediately receive the price, may reclaim the property, if the purchase money is not paid according to terms, provided he has not waived payment, or been guilty of laches or estopping conduct.

2. SALES \S 199—ON CASH SALE, WAIVER OF CONDITION OF CONCURRENT PAYMENT QUESTION OF INTENT.

In case of a cash sale, where delivery and payment are concurrent conditions, whether or not the seller has waived the condition of payment is a question of intention.

3. SALES \S 218½ — ABSOLUTE DELIVERY WITHOUT DEMAND OF PRICE PRESUMPTIVE EVIDENCE OF WAIVER OF CONCURRENT PAYMENT.

An absolute delivery of property to the buyer without demand for the price is presumptive evidence of a waiver of the condition of present payment and of a willingness to give credit, which presumption may be rebutted by the acts and declarations of the parties, or the circumstances.

4. SALES \S 218½—WHETHER DELIVERY ON CASH SALE WITHOUT PAYMENT PASSES TITLE FOR JURY.

Whether delivery of goods on a cash sale without payment is absolute, so as to pass title, or conditional, so that title does not pass, depending, as it does, on the intention of the parties, the intent that the delivery before payment shall be conditional may be inferred from the acts of the parties and the circumstances, and is a question for the jury; an express declaration of intention to insist on immediate payment not being necessary.

5. LARCENY \S 60—EVIDENCE THAT ON CASH SALE IMMEDIATE PAYMENT WAS WAIVED.

In a prosecution for larceny of potatoes, possession of which was obtained by defendant on the pretense of buying for cash, evidence held to warrant the jury in inferring that the seller did not intend to waive payment as a condition to the passing of title to the potatoes.

6. LARCENY \S 8—POTATOES SOLD FOR CASH WITH RETENTION OF TITLE BY SELLERS SUBJECT OF LARCENY BY BUYER.

Where title to potatoes remained in the persons who grew them, the potatoes were subject to larceny by defendant, though he had obtained their possession by representing himself as a buyer for cash, and so obtained delivery conditional on payment.

7. FALSE PRETENSES \S 12—LARCENY \S 14 (1)—BUYER FOR CASH OBTAINING POSSESSION WITHOUT PAYMENT GUILTY OF LARCENY.

Where defendant represented to the owner of potatoes that he was a buyer for cash, and so obtained possession of the potatoes conditional on immediate payment, and stole them, he was not guilty of obtaining goods under false pretenses, rather than larceny, in which the owner has no intent to part with his title, though he may intend to part with possession, while in false pretenses the owner does intend to part with title.

8. EMBEZZLEMENT \S 5 — LARCENY \S 3(2) — DISTINCTION AS TO TIME OF FORMATION OF INTENT.

In embezzlement, there is no intent at the time of taking to steal or wrongfully appropriate the property, but accused, having rightfully come into possession, thereafter forms the intent fraudulently to convert the property to his own use, while in larceny the person taking it has at the time an intent to steal or feloniously appropriate.

9. CRIMINAL LAW \S 112(7) — TRANSPORTATION OF STOLEN GOODS INTO A SECOND COUNTY, CRIME IN EACH COUNTY.

Where, after defendant had first stolen the potatoes, larceny of which is charged, he carried them away into another county for sale, his possession was a larceny in each county into which he carried the goods, every moment's continuation of the trespass and felony amounting in legal contemplation to a new caption and asportation, and he could be prosecuted in the second county, into which he carried the goods, as for a larceny committed therein, apart from Pen. Code, \S 786.

10. LARCENY \S 28(3), 40(5)—PROOF OF TAKING ADMISSIBLE IN COUNTY TO WHICH GOODS WERE CONVEYED.

An information for larceny may charge its commission in the county into which the goods were taken, and the first larceny in another county, though not alleged in the information, may be given in evidence.

11. LARCENY \S 32(1)—NAME OF OWNER OF PROPERTY NOT MATERIAL IN INFORMATION.

In larceny, the name of the owner of the stolen property is not a material part of the of-

fense charged, being required only to identify the transaction, so that defendant by proper plea may protect himself against another prosecution, as he could do on a charge of feloniously stealing sacks of sweet potatoes, the property of three named Japanese.

12. INDICTMENT AND INFORMATION §132(2)—THREE DAYS' HAULING OF POTATOES STOLEN, ONE OFFENSE.

Where defendant planned to steal 252 sacks of potatoes, by representing that he was buying for cash and so getting possession, and it took three days to haul the potatoes away from the sellers' ranch, there was nevertheless but one larceny, not a distinct offense at the time of each of the three haulings requiring an election by the prosecutor.

13. CRIMINAL LAW §829(18)—REFUSAL OF INSTRUCTION, REPETITION OF ONE GIVEN, NOT ERROR.

In prosecution for larceny, where defendant pleaded not guilty, but offered no evidence, and the court instructed on reasonable doubt, and on the duty of the jury to acquit if such a doubt existed, etc., refusal of an instruction that, if there was any reasonable theory deducible from the evidence consistent with defendant's innocence, there must be an acquittal, held not prejudicial; the matter having been adequately covered.

14. CRIMINAL LAW §465—EVIDENCE OF PRICE ACCUSED HAD AGREED TO PAY NOT INADMISSIBLE AS A CONCLUSION.

In a prosecution for larceny of potatoes, defendant representing that he was a buyer for cash, testimony of a witness as to the price defendant and his confederate had "agreed" to pay for the potatoes held not inadmissible as a conclusion; the witness having testified to the particulars of the negotiations.

15. CRIMINAL LAW §423(1)—DECLARATIONS AND ACTS OF CONSPIRATORS ADMISSIBLE AGAINST COCONSPIRATOR.

What one conspirator to commit larceny said or did in furtherance of the common purpose during the life of the conspiracy was admissible against his coconspirator, prosecuted for the larceny.

16. CRIMINAL LAW §427(3)—MANNER OF INTRODUCTION OF EVIDENCE TO ESTABLISH CONSPIRACY.

Where the facts from which a conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime conspired to be committed that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that the evidence should first be introduced to establish prima facie the fact of the conspiracy.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Mills Sing was convicted of grand larceny, and from the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was convicted of the crime of grand larceny. He appeals from the judgment of conviction, and from an order denying his motion for a new trial.

The information was filed in, and the action tried by, the superior court of Los Angeles county. It is charged in the information that defendant and one St. Clair, "on or about the first day of September, 1918, at and in the county of Los Angeles, * * * did * * * feloniously steal, take, and haul away 252 sacks of sweet potatoes, * * * the personal property of N. Namekawa, Y. Takahaihi, and K. Yasunaga." Briefly, the evidence discloses the following facts:

The three persons whose property defendant is alleged to have stolen are Japanese. These three Japanese were partners, farming on a ranch near Anaheim, in Orange county. On August 31, 1918, defendant, who is a Chinaman, and St. Clair, went to the ranch of the Japanese, introduced themselves, and told one of the Japanese that they wanted to buy some sweet potatoes, for which they would pay \$3.50 a hundred pounds. The Japanese told them he would sell them the potatoes if they would pay cash, and asked them if they were ready to pay the cash that day telling them it would take about three days to dig the potatoes. In reply, defendant and St. Clair told the Japanese that they did not have the cash with them that day, but to dig the potatoes nevertheless, and they would bring the cash the next day. That day defendant and St. Clair agreed to take 150 sacks of a hundred pounds each, at \$3.50 per hundred pounds, agreeing to make a cash payment. The next day, September 1st, defendant returned to the ranch with a truck and driver. The Japanese who, the day before, had made the agreement for the sale of the potatoes, asked defendant if he had brought the cash. Defendant replied that he had not, but that his company was a "big company," and that he would bring the cash the next day. That day, September 1st, defendant took away in the truck and hauled to the White Express Garage in Los Angeles a little more than 100 sacks. The next day, September 2d, defendant again visited the ranch with a truck, and hauled away, to the same garage in Los Angeles, about 70 sacks of potatoes. The following day, September 3d, St. Clair came to the ranch, with a truck and driver, and hauled away, to the same garage in Los Angeles, 76 sacks. Upon this occasion the Japanese asked St. Clair if he had brought the money. St. Clair said that he had not, whereupon the Japanese asked him

why he had not. St. Clair replied, as defendant previously had, that his company was a "very big company." He then asked the Japanese to accompany him to Los Angeles, saying: "I will pay right away." Altogether, 252 sacks of potatoes were hauled away from the ranch near Anaheim to the garage in Los Angeles. On the third trip, the occasion when St. Clair caused the 76 sacks to be hauled away, the Japanese who had conducted the negotiations accompanied St. Clair to Los Angeles, arriving at the garage about 1 o'clock on the morning of September 4th. The Japanese remained outside the door of the garage until after daylight, watching the potatoes. Defendant previously had given this Japanese a card on which was written, "Henry St. Clair Produce Co., 1807 East Seventh Street," and under this, "112 West Ninth Street. Main Office, room 235, telephone 10175." When St. Clair and the Japanese arrived at the garage early in the morning of September 4th, the former told the Japanese to go to the office of the company in the morning and he would receive his money. About 8 o'clock in the morning of September 4th, the Japanese went to the office of the supposed "big company," as described on the card given him by defendant, but there was no office there. About an hour and a half later he returned to the garage, only to discover that, in the meantime, the potatoes had been taken away. Two days later some of the potatoes were found in the stall of a produce man in a market in Los Angeles. This produce man testified that he had bought two truck loads of potatoes from defendant at \$3.25 a hundred pounds. At this time the market value in Los Angeles was \$4 per hundred pounds. There is evidence to justify the inference that defendant and St. Clair sold the balance of the potatoes to other produce men, after they had caused them to be hauled to Los Angeles.

[1-3] That the evidence shows the case to be, not larceny, but some other crime, such as false pretenses, or embezzlement, is a proposition seriously urged upon us by appellant. With this contention we cannot agree. That the crime was larceny, and none other, is clearly established by the evidence. Throughout all the dealings, the Japanese who carried on the negotiations with defendant and St. Clair was particular to emphasize the fact that the sale was to be strictly a cash transaction. Where a sale is a cash sale, delivery of the goods and payment of the purchase money are concurrent acts, and the vendor, though he has made delivery, supposing that he would immediately receive the purchase price, may reclaim the property from the purchaser, if the purchase money be not paid according to the terms of the sale, provided he has not waived the cash payment, or been guilty of laches or such conduct as would estop him. If the condition of cash

payment is not waived, the title does not pass until the price is paid. *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 234, 9 Am. St. Rep. 199; 24 R. C. L. p. 23. It frequently happens that the seller will deliver the goods, notwithstanding the failure to fulfill the condition of payment. In such cases, the question whether the delivery is to be considered a waiver of the condition that payment shall be made before the title passes may depend upon the attendant circumstances; for whether the condition has been waived or not is a question of intention. An absolute delivery of property to the buyer without a demand of the purchase price is presumptive evidence of a waiver of the condition of present payment and of a willingness to give credit to the buyer. This presumption, however, may be rebutted by the acts and declarations of the parties, or by the circumstances of the case.

[4-6] Whether the delivery without payment is absolute, so as to pass the title, or conditional, so that the title does not pass, depending as it does upon the intention of the parties, the intent that the delivery before payment shall be conditional, and not absolute, may be inferred from the acts of the parties and the circumstances of the case, and is a question of fact for the jury. An express declaration of an intention to insist upon the performance of the condition is not necessary, but such intention may be inferred from acts and the attendant circumstances. *Osborn v. Gantz*, 60 N. Y. 542; *Parker v. Baxter*, 86 N. Y. 593. In the present case the jury was warranted in inferring that the Japanese did not intend to waive payment as a condition to the passing of title to the potatoes. All his acts, coupled with the evident purpose of defendant and St. Clair to obtain possession of the potatoes by fraud and deceit—leading the Japanese to believe at each successive step in the transaction that a cash payment would be made immediately—clearly indicate that it was not the intention of the vendors to pass the title to the potatoes, or to permit their resale by defendant or St. Clair prior to the payment of the cash price agreed upon. The title remaining in the three Japanese partners, the potatoes were subject to larceny. If a person, with a preconceived design to appropriate the property to his own use, obtains possession of it by means of fraud or trickery, the taking is larceny. 17 R. C. L. p. 13; *People v. Rae*, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102.

[7] There is no foundation for the claim that the crime was that of obtaining goods under false pretenses. In larceny, the owner of the thing has no intention to part with his title to the person taking the thing, although he may intend to part with possession. In false pretenses, the owner does intend to part with his title to the thing, but it is obtained from him by fraud. *People v. Delbos*, 146

Cal. 734, 81 Pac. 131; *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661. Here there was evidence justifying the inference that the Japanese had no intention to part with title until the cash payment should be made; also that defendant and St. Clair, by fraud and deception inducing the Japanese to believe that an immediate cash payment would be made, and harboring the preconceived intention feloniously to appropriate the potatoes to their own use, obtained the possession fraudulently.

[8] Nor was the crime that of embezzlement; for, the title remaining in the Japanese, defendant and St. Clair, as the evidence shows, not only obtained possession by fraud and deceit, thereby inducing the owners to make delivery, but, before delivery was made to them, they had formed the preconceived design to appropriate the potatoes to their own use after they should have succeeded in inducing the Japanese to part with the manual possession. In embezzlement, there is no intent, at the time of the taking, to steal or wrongfully appropriate the property; but the accused, having rightfully come into possession, thereafter forms the intent to fraudulently convert it to his own use. In larceny, the person taking the property has, at the time of the taking, an intent to steal the property or to feloniously appropriate it to his own use. *People v. Bojorquez*, 35 Cal. App. 350, 169 Pac. 922; *People v. Smith*, 23 Cal. 286.

[9, 10] It is claimed that the superior court of Los Angeles county did not have jurisdiction to try the case. Appellant contends that the crime was wholly begun, ended, and consummated in Orange county, and hence argues that section 781 of the Penal Code, which gives jurisdiction to either court where the crime is committed partly in one county and partly in another, is inapplicable. It is also urged by appellant that the court did not acquire jurisdiction under section 786 of the Penal Code, because the information charges the crime to have been committed in Los Angeles county, instead of charging that it was committed in Orange county, and the potatoes then brought into Los Angeles county. Section 786 of the Penal Code provides that—

"When property taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another, the jurisdiction of the offense is in either county."

It doubtless is true that the crime of larceny was committed when defendant, with intent feloniously to appropriate the potatoes to his own use after he should have obtained their possession, secured the possession in Orange county through the fraud and deceit then and there used to induce the Japanese to make a delivery to defendant or to his confederate St. Clair, or to the truck driver who was employed by them to haul the potatoes

to Los Angeles. But even so a new larceny was committed in Los Angeles county—the larceny with which the defendant was charged in the information. If, after one has done what completes the theft, he continues traveling away with the goods, still intending to appropriate them to his own use, each step is a new trespass and a fresh larceny. So that the possession of goods stolen by the thief is a larceny in each county into which he carries them. The legal possession still remaining in the true owner, every moment's continuation of the trespass and felony amounts, in legal contemplation, to a new caption and asportation. *Bishop's New Crim. Proc.* vol. 1, § 59; 17 R. C. L. pp. 45, 46; *People v. Staples*, 91 Cal. 27, 27 Pac. 523. In legal contemplation, the crime of larceny is committed in both counties, and the thief may be prosecuted and punished in either. *People v. Mellon*, 40 Cal. 648, 654; *People v. Scott*, 74 Cal. 94, 96, 15 Pac. 384; *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784. This principle of law is elementary; and the information may, as here, charge the commission of the larceny in the county into which the goods have been taken, and the first larceny, though it is not alleged in the information, may be given in evidence.

Appellant, with much confidence, asserts that *People v. Prather*, 134 Cal. 386, 66 Pac. 483, 724, is in irreconcilable conflict with these views. That case, recognizing that the crime of larceny is committed in both counties, when a thief, having taken property by larceny in one county, brings it into another, the intent to steal continuing, simply holds that the prosecutor for the county into which the goods are brought may pursue either one of two courses: (1) He may lay the venue in the county into which the property is brought, charging the crime to have been committed in that county, thus relying upon the larceny that, in legal contemplation, is committed therein; or (2) he may charge the larceny that was committed in the county where the first felonious taking occurred and then allege that the stolen property was brought into the county in which the crime is prosecuted. It was the second of these two possible courses that was pursued by the prosecutor in the *Prather* Case. Where the intent still to steal the property does not continue when the property is brought into the county where the prosecution is had the information must charge the larceny that was committed in the county where the property was originally stolen and then allege that the property was brought into the county where the prosecution is had. In such a case, jurisdiction in the county into which the goods are brought can only be by reason of the provision contained in section 786 of the Penal Code. But where, as here, the intent to steal continues after the goods are brought into the second county, the larceny may be charged to have been committed in that county.

That this view of the law is fully recognized by the court in the Prather Case is established by the fact that there the court, after quoting from Bishop, says:

"This principle of law is elementary, and involves the proposition that a new larceny is committed in every county to which the thief takes the property; *and the correct information in such a case should charge the commission of the crime of larceny in the county where the person is to be prosecuted.* Under such circumstances, the first larceny is a mere matter of evidence, and should not be alleged." 134 Cal. 388, 66 Pac. 484. (*Italics ours.*)

In the Prather Case the prosecution was based upon the original larceny committed in Yolo county, and the jurisdiction of the court in Sacramento county was based upon section 786. Here the prosecution is not based upon the original larceny committed in Orange county, but upon that which in legal contemplation, was subsequently committed in Los Angeles county, and jurisdiction of the Los Angeles court is in no wise dependent upon section 786, but exists because, in the eyes of the law, a larcenous taking was had in the latter county.

[11] The information charges that defendant did feloniously steal and take away 252 sacks of potatoes, "of the personal property of N. Namekawa, T. Takahashi and K. Yasunaga." Appellant claims that there is no evidence that these three owned the potatoes. N. Namekawa, one of the three Japanese named in the information as the owners of the potatoes, testified that he and the other two were partners, that he was engaged in farming on a ranch near Anaheim, that his two partners were farming with him, that they were raising sweet potatoes, and that he carried on all the negotiations with defendant and St. Clair for the sale of the potatoes. This was sufficient evidence of the ownership as alleged, even though the witness, as might be expected of an ignorant person, frequently referred to the potatoes as "my potatoes," and to the ranch as "my ranch." Moreover, the variance, if any there was, was not fatal. It would have been fatal at common law; but in this state it is provided by statute (section 956 of the Penal Code) that—

"When an offense involves the commission of, * * * a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured * * * is not material."

In larceny the name of the owner of the stolen property is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The essential thing is an averment which shall show conclusively that the property does not belong to the defendant. *People v. Nunley*, 142

Cal. 105, 75 Pac. 876. Defendant and St. Clair having been charged with feloniously stealing and taking away 252 sacks of sweet potatoes, the property of the three Japanese named in the information the larceny was identified with sufficient certainty to enable defendant, by proper plea, to protect himself against another prosecution for the same offense, even though it should appear that the potatoes were owned by but one of the three.

[12] Because part of the potatoes were taken and hauled away from the ranch of the Japanese on September 1st, and part on September 2d, and the balance on September 3d, appellant claims that there were three separate and distinct offenses, and that the court should have granted his motion to compel the prosecution to elect one of the three offenses as that upon which it would rely for a conviction. The transaction in which the potatoes were taken was a continuous one. Appellant and his confederate, St. Clair, when they first went to the ranch of the Japanese and negotiated for the potatoes, evidently designed to obtain possession of the 252 sacks by fraud and deceit; i. e., by fraudulently pretending that the sale was a bona fide cash sale, and by leading the Japanese to believe that the potatoes notwithstanding their delivery, would be immediately paid for, and would not be resold until cash payment should be made as represented by them. It is evident that, from the beginning, defendant and St. Clair intended to appropriate the potatoes to their own use after having obtained the possession fraudulently. Although the deliveries to defendant and St. Clair and the hauling away were distinct acts, still they were continuous. The whole transaction was one continuous proceeding, instigated by one impulse and one purpose. Appellant and his confederate having embarked upon a scheme to appropriate the potatoes to their own use, after they should have induced the Japanese to deliver possession under the impression that they would immediately receive cash payment, and having pursued this scheme until it was effectuated, it is immaterial that it required a number of days to consummate it. All the potatoes having been taken in pursuance of one purpose, they were, legally speaking, taken at the same time. The law is that, if the different asportations from the same owner are prompted by one design, one purpose, one impulse, they are a single act, without regard to time. *Carl v. State*, 125 Ala. 89, 28 South. 505; *Flynn v. State*, 47 Tex. Cr. R. 26, '83 S. W. 206; *Ex parte Jones*, 46 Mont. 122, 126 Pac. 929; *Wilson v. State*, 70 Tex. Cr. R. 631, 158 S. W. 512; *State v. Gibson*, 37 Utah, 330, 108 Pac. 349; *State v. Mandich*, 24 Nev. 330, 54 Pac. 516; 25 Cyc. 61.

[13] Complaint is made that the court refused to give an instruction as follows:

"If there be any reasonable theory or hypothesis deducible from the evidence consistent with

the innocence of the accused, your sworn duty compels you to accept such theory or hypothesis and acquit him."

This instruction might well have been given, but its refusal was not prejudicial error. Defendant offered no evidence. He neither developed, by evidence on his behalf, nor, so far as the record before us shows, put forth or suggested, any particular or special theory or hypothesis. In every criminal case, where the defendant has interposed the plea of "not guilty," the general theory of innocence is, of course, adopted by him. But as to this general theory the court's instructions covered all that appellant was entitled to ask. The court defined larceny, grand and petit; instructed the jury that, to justify a conviction, the prosecution must establish, beyond a reasonable doubt, the crime as charged in the information; and defined "reasonable doubt" by giving the oft-approved language of Chief Justice Shaw in the Webster Case, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. The jurors were told that "a defendant in a criminal action is presumed to be innocent until the contrary is proven"; that "in case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an acquittal"; that "if, after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror entertaining such doubt not to vote for a verdict of guilty"; that "the burden of proof is upon the prosecution"; that "every person is presumed to be innocent until he is proven guilty"; and that "if, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal." For these reasons we are satisfied, after an examination of the entire case, including the evidence, that the refusal to give the requested instruction did not result in a miscarriage of justice.

[14-16] We find no prejudicial error in the admission or rejection of evidence. Appellant bases several of his objections upon theories of the law that we already have disposed of contrary to his contentions. A number of objections to questions were made upon the ground that they called for the conclusion of the witness; as, for example, a question asked of the Japanese witness as to the price the defendant and St. Clair had "agreed" to pay for the potatoes. This, like other similar questions, was unobjectionable, for the witness had previously testified to the particulars of the negotiations between himself and appellant and St. Clair. Appellant objects that evidence of certain declarations made by and acts of St. Clair was hearsay. But the entire record warrants the inference that appellant and St. Clair were conspirators from the moment when they first visited the Japanese ranch to the time when the last potatoes were sold or otherwise disposed

of by them. What St. Clair said or did in furtherance of the common purpose during the life of this conspiracy, was, of course, admissible. Where, as here, the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish prima facie, in the opinion of the court, the fact of conspiracy. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

What we have said thus far disposes of every point made in support of the appeal, that is worthy of discussion.

Judgment and order affirmed.

We concur: SLOANE, J.; THOMAS, J.

McAULIFF v. McFADDEN et al.
(Civ. 2159.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1919.)

1. APPEAL AND ERROR §757(1)—ONLY PORTION OF RECORD NECESSARY TO BE PRESENTED ON APPEAL UNDER ALTERNATIVE METHOD

On an appeal under the alternative method, where a lengthy typewritten reporter's and clerk's transcript is presented as the record, appellant is only required to print in his brief such portions of the record as are needed to fairly and lucidly present the points upon which he relies.

2. APPEAL AND ERROR §757(2)—ADMISSION IN ANSWER NOT CONSIDERED WHERE PLEADING NOT IN FULL IN BRIEF.

Appellant's claim that material facts are admitted by the answer cannot be determined, where the pleadings are not printed in full in the briefs, since a careful comparison of the entire complaint with the entire answer is required.

3. VENDOR AND PURCHASER §50—WRITTEN INSTRUMENT AND ONE MADE IN CONSIDERATION THEREOF FORM SINGLE CONTRACT.

Where a written contract for the sale of a lot upon installment payments and a contemporaneous written contract, expressly referring thereto and reciting that it was made in consideration thereof providing that vendors should not look to purchaser for payments of amounts beyond a certain portion of what purchaser earned painting signs for vendors, the two instruments evidence but a single contract, under Civ. Code, § 1642, and must be so construed as to give effect to each under section 1641.

4. REFORMATION OF INSTRUMENTS §47 — PLAINTIFF ENTITLED AT LEAST TO PORTION OF PRICE PAID BY HIM.

Where sign painter contracted with real estate firm to purchase a lot owned one-half by the firm and one-half by undisclosed co-owners,

and collaterally contracted that he might pay the purchase price installments by one-third of his monthly bills for sign painting, in his suit against the firm and undisclosed co-owners for reformation of the contract and for recovery of sums paid thereon, judgment for defendants, foreclosing plaintiff's interest in the lot unless balance of purchase price was paid, cannot be supported on theory that firm had no authority to find the co-owners by the collateral agreement as well as the land sale, for in such case, the contracts being inseparable, there would be no contract at all binding plaintiff, and he should have had judgment for at least the portion of the purchase price paid.

5. EQUITY ⇨39(1)—CAN ADJUST ALL MATTERS BETWEEN PARTIES WITHIN ISSUES AND EVIDENCE.

In an equity suit to reform a land sale contract and for recovery of amount paid thereon, the court can retain jurisdiction to adjust all the rights and equities of the respective parties that are within the issues and disclosed by the evidence.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by H. B. McAuliff against Joseph E. McFadden and others. Judgment for defendants, and plaintiff appeals. Reversed, and new trial ordered.

Herbert N. Ellis, of San Diego, and C. B. Ellis, for appellant.

Riley & Heskett, of San Diego, for respondents.

FINLAYSON, P. J. This is an action for reformation of a contract, for the recovery of \$421.07 alleged to have been paid by plaintiff on the contract, and for the further sum of \$2,000 damages alleged to have been suffered by reason of the defendants' breach of the contract. From a judgment in favor of defendants, plaintiff appeals. The contract was one for the sale to plaintiff of certain real property.

[1] The appeal is prosecuted under the "alternative method," and a lengthy typewritten reporter's and clerk's transcript is presented to us as the record on appeal. No part of the record is printed in respondents' brief, or in any supplement thereto. In appellant's brief there is printed the findings, in full, fragments of the pleadings, and a few excerpts from the testimony of the witnesses. As appellant is only required to print in his brief such portions of the record as may be necessary to present to this court, fairly and lucidly, the points upon which he relies (*De Bock v. De Bock*, 28 Cal. App. Dec. 10291), we think enough is printed in appellant's brief to necessitate a consideration by us of the principal question presented by his appeal.

[2] We cannot, however, consider appel-

lant's claim that certain facts, material to the question mainly relied upon by him, are admitted by the answer. Whether such facts are so admitted could be determined only from a careful comparison of the entire complaint with the entire answer. As neither pleading is printed in full in the briefs, we are unable to say that the answer makes any of the admissions claimed by appellant.

From the findings—printed in full in appellant's brief—and from such of the evidence as is therein printed, we are able to glean the following:

Prior to January 27, 1913, plaintiff had been furnishing to defendants McFadden & Buxton, copartners, sign paintings in considerable quantities, for which he was entitled to receive pay at certain rates. On the date last mentioned, defendants McFadden, Buxton, Strahlmann, and Mayer, as vendors, but through and "in the name of the defendants McFadden & Buxton," entered into a written contract with plaintiff—hereafter referred to as the formal written contract of sale—whereby plaintiff, as vendee, agreed to purchase from the vendors, and the latter agreed to sell, lots 32 and 33 in block G of McFadden & Buxton's North Park, in the city of San Diego. Strahlmann and Mayer are not mentioned in the contract as parties thereto. This particular written contract provided that the purchase price, \$1,350, should be paid as follows: \$50 cash, and the remainder in monthly installments of \$50 each on the first day of each and every month thereafter, until the total balance of \$1,800 should be paid, deferred payments to bear interest at 7 per cent., and plaintiff to pay all taxes and assessments. According to the terms of this contract, plaintiff was obligated to pay at least \$50 per month on the first day of each and every month, commencing February 1, 1913, and ending March 1, 1915. The action appears to have been commenced after the last-mentioned date. So that if this was the only contract relative to the sale of the lots and the payment of the purchase price—that is, if this document contained the whole agreement respecting the sale—then plaintiff was in default, for he had not paid more than \$421.07 when the action was commenced, and, consequently, he is not entitled to any relief, unless, as he claims, another writing, signed by McFadden & Buxton, was not only a part of the entire contract, but introduced a new element respecting the manner of paying the purchase price.

At the time when the formal written contract of sale was entered into, it was contemplated by plaintiff and by McFadden & Buxton that the former would continue to furnish sign paintings as theretofore. Pursuant to such expectation, and at the same time when the formal contract of sale was executed, plaintiff and McFadden & Buxton

¹ Opinion superseded by decision on rehearing, 133 Pac. —.

made another contract—a contract which hereafter will be referred to as the collateral agreement. This collateral agreement was evidenced by a writing signed by McFadden & Buxton, and, though not signed by plaintiff, was unquestionably acted upon by him. This document is as follows:

"San Diego, California, Jan. 27, 1913. Mr. H. B. McAuliff, City—Dear Sir: In consideration of the contract entered into this date whereby you have agreed to purchase lots 32 and 33, block G, North Park, for the sum of thirteen hundred fifty dollars, it is agreed and understood that all payments to be made on this property shall be one-third the monthly bills for sign painting rendered from you, and in no case will we ask for more. Said payments to be credited on the first of each month. Yours very truly, McFadden & Buxton, by G. E. Buxton."

Buxton, who was the only witness for defendants, testified that the two contracts "were made at the same time; * * * it was the mutual understanding between us [plaintiff and McFadden & Buxton] that the deal [the contract for the sale of the two lots] wouldn't have been made without having this agreement"—the collateral agreement. Buxton, in his testimony, also said that it was not contemplated that there should be any other method of paying for the lots than the sign painting that plaintiff was to do. McFadden & Buxton were the record owners of the lots and had the handling of the property, though it is a fair inference from the facts appearing in the court's findings together with those disclosed by the brief excerpts from the evidence printed in appellant's brief, that, at the date of the contract of sale, the two lots were owned by the four defendants—McFadden, Buxton, Strahlmann, and Mayer. Plaintiff testified as follows:

"He [Buxton] * * * says: 'You have been doing a lot of work for us people [referring to a time immediately preceding the contract of purchase and sale]; we think you ought to reciprocate by buying a lot.' I told Buxton that I didn't want a lot; that I didn't think I could afford to buy a lot. 'Well,' he says, 'We can make this so easy that it won't cost you a cent.' * * * Mr. Buxton told me, and I understood him fully, that they would have enough work so that I could pay \$50 a month towards the lot, being two-thirds of the amount of work they were likely to have, and the two-thirds would be paid in cash."

This testimony is not contradicted by any evidence printed in the briefs. Plaintiff paid his vendors a total of \$421.07. From the findings and the parts of evidence printed in the briefs, it is clear that this aggregate sum of \$421.07 was made up of payments made in the manner provided for in the contemporaneous collateral agreement. Plaintiff made all the signs and did all the sign painting that he was asked to do after the execution of the formal contract of sale and

the contemporaneous collateral agreement. He was eager to do anything the defendants had for him to do, and never refused a job for them. It is a reasonable inference from such of Buxton's testimony as is printed in appellant's brief that the real estate business fell off shortly after the contract of sale, that for this reason McFadden & Buxton had no property for sale upon which to paint advertising signs, and that for this reason the work which they had contemplated having for plaintiff, when the contract of sale was made, fell off, and hence the amount thereafter earned by plaintiff from his sign painting was not sufficient to enable him to make the payments on the lots in the manner provided by the contemporaneous collateral agreement.

The court found that there was no agreement between plaintiff and any of the defendants that the latter, or any of them, would purchase from plaintiff signs or sign paintings subsequent to the contract of sale; that the formal written contract of sale, executed by plaintiff and the record owners, McFadden & Buxton, was complete within itself and contained all the conditions of the agreement of sale; that the contract of sale was voluntarily entered into by plaintiff; that no fraud, misrepresentation, deceit, or bad faith was practiced upon him by defendants, or any of them; and that no provision or condition of the formal written contract of sale was omitted through error, mistake, fraud, deceit, or oversight. The court also found that defendants have performed all of the conditions of the contract of sale to be by them performed, but that plaintiff has failed to perform the terms and conditions of the contract of sale on his part to be performed.

[3] In its conclusions of law, presumably followed by and incorporated in the judgment—though the latter document is not printed in any of the briefs—the court finds that defendants Strahlmann and Mayer, to whom McFadden & Buxton had assigned their interests before the action was commenced, are entitled to recover from plaintiff \$1,182, as the unpaid balance of the purchase price, and that, if plaintiff fails to pay the same within 30 days from the entry of judgment, all his right and title to the lots shall be foreclosed.

The finding that the formal written contract of sale was complete within itself and contains all the conditions of the agreement of sale, and the finding that plaintiff has failed to perform the terms and conditions of the contract of sale on his part to be performed, can be sustained only upon the theory that the two instruments were not parts of one transaction and did not evidence one single contract. But this, we think, is an erroneous theory. The two instruments, the formal written contract of sale and the contemporaneous collateral agreement, signed

by the vendors, McFadden & Buxton, and acted upon by plaintiff, relate to the same subject-matter and were executed as parts of one transaction; the latter expressly referring to the former, and reciting that it was made in consideration of the execution of the formal contract of sale. The language of the collateral agreement is:

"It is agreed * * * that all payments [on the contract of sale] * * * shall be one-third of the monthly bills for sign painting rendered from you [plaintiff], and in no case will we ask for more."

This language, read in the light of the attendant circumstances, as disclosed by the evidence printed in appellant's brief, and taken in connection with the provision of the formal written contract of sale calling for the payment of \$50 per month until the full amount of \$1,300 shall have been paid, means that each monthly installment of \$50, together with interest and the sums due from plaintiff for taxes and assessments, shall be paid out of moneys to be earned by plaintiff from sign painting to be done by him for the record owners, McFadden & Buxton, and implies that plaintiff shall be given enough sign painting to enable him to earn thereby such amounts, that he could receive at least two-thirds of the amount earned in cash, and allow the remaining one-third to be credited on the monthly installments of the purchase price of the lots, as such installments fell due. It is a familiar rule, recognized by all courts, that where several papers covering the same subject-matter are executed by or between the same parties at the same time, all are to be considered together, and with the same effect as if all had been incorporated in one document. Civ. Code, § 1642; *Ingoldsby v. Juan*, 12 Cal. 504, 577. The several contracts must be so construed as to give effect, as far as practicable, to every part of each instrument. Civ. Code, § 1641; *Filinn v. Mowry*, 131 Cal. 481, 484, 63 Pac. 724, 1006.

[4, 5] The judgment of the lower court cannot successfully be defended upon the theory that McFadden & Buxton, the sole record owners, had no authority to bind their undisclosed co-owners, Strahlmann and Mayer, by the collateral agreement. Strahlmann and Mayer are not mentioned in the formal written contract of sale. As the court finds, that contract "was made by defendants [i. e., the four defendants Strahlmann, Mayer, McFadden and Buxton] through and in the name of McFadden & Buxton," the owners of record. Plaintiff dealt with the record owners and no one else. If these record owners had no authority to bind their undisclosed co-owners by the collateral agreement, or if the collateral agreement was not ratified by the latter, then there was no contract binding on appellant. For appellant unquestionably contracted for, and supposed he

would receive, the entire fee-simple title to the lots, not merely an undivided one-half, or such undivided part of the whole title as might be owned by but two of the four co-owners. It was for the complete fee-simple title that he agreed to pay. And he agreed to pay for it in the manner provided by the contemporaneous collateral agreement that was signed by and given to him by the only owners of record—the persons, and the only persons, with whom he dealt. That is what he bargained for—that and nothing else. He, and those with whom he had all his dealings, the two record owners, understood that he was to pay for the lots as provided in the contemporaneous collateral agreement, and not otherwise, and that thus he was to become entitled to own the two lots in severalty. If, therefore McFadden & Buxton had no authority to bind their undisclosed co-owners, then the contract did not give appellant what he bargained for, and in that event it would not be binding upon him, he would not be in default, and the court should have given him judgment against McFadden & Buxton, at least for the sum of \$421.07, which the latter, withholding from plaintiff out of his earnings for sign painting, had applied on the purchase price of the lots.

The action was a suit in equity, and the court could have retained jurisdiction to adjust all the rights and equities of the respective parties that were within the issues and disclosed by the evidence. If, on the other hand, McFadden & Buxton were authorized to contract with plaintiff in their own name, but on behalf of themselves and their co-owners, Strahlmann and Mayer, then there was but one contract, and the collateral agreement, without any reformation of the formal written contract of sale, must be taken to be a part of the whole contract—a contract which, as already shown, permitted appellant to make his payments on the lots out of such future earnings as he might make in painting signs for the record owners, McFadden & Buxton.

We have not undertaken to determine the precise nature of all the rights of the respective parties to the action, nor what judgment should be entered herein. That would involve a consideration of facts and questions not presented by or argued in the briefs on file. For this reason we content ourselves with saying that, for reasons already given, certain of the findings are contrary to the evidence and inconsistent with other facts found by the court, and, upon the record before us, the judgment as entered is clearly erroneous.

For these reasons, the judgment should be reversed, and the case retried. It is so ordered.

We concur: SLOANE, J.; THOMAS, J.

PEOPLE v. ROSE. (Cr. 476.)

(District Court of Appeal, Third District, California. Aug. 4, 1919.)

1. FALSE PRETENSES §4 — ELEMENTS OF OFFENSE DEFINED.

To constitute the offense of obtaining money by false pretenses, there must be an intent to defraud, actual fraud must be committed, false pretenses must be used to perpetrate the fraud, and it must be accomplished by means of false pretenses, which are the cause of inducing the owner to part with his money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

2. FALSE PRETENSES §49(1)—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.

Evidence held to sustain conviction of having obtained money by false pretenses from the innocent indorser of a forged check.

3. CRIMINAL LAW §1144(16) — PRESUMPTION ON APPEAL THAT VERDICT WAS BASED ON ANY THEORY SHOWN BY EVIDENCE.

In support of conviction, the appellate court is authorized to presume that the verdict was predicated on any theory deducible from the evidence which will support the charge and the verdict.

4. CRIMINAL LAW §511(2) — CORROBORATION OF ACCOMPLICE SUFFICIENT IF IT TENDS TO CONNECT DEFENDANT WITH CRIME.

Corroboration of an accomplice need not be by evidence of itself sufficient to support the charge, being sufficient, though slight, if it tends to connect defendant with the commission of the crime charged.

5. FALSE PRETENSES §7(1)—REPRESENTATION THAT CHECK WAS GOOD MEANT GOOD FOR ITS FACE.

The representation of defendant, subsequently charged with obtaining money by false pretenses on a check, that the check was good, made when he presented it for indorsement to the party defrauded, necessarily carried with it the representation that the check was good for its face, or \$200.

6. CRIMINAL LAW §1159(4) — CREDIBILITY OF WITNESSES FOR THE JURY.

The appellate court, even with the added powers vested in it with respect to review of questions of fact by Const. art. 6, § 4½, cannot consider the evidence to determine whether the witnesses on whose testimony the jury presumptively predicated a verdict of guilty testified to the truth or not.

7. CRIMINAL LAW §1173(2) — FAILURE TO INSTRUCT ON ACCOMPLICE TESTIMONY HARMLESS WHERE OTHER EVIDENCE SUSTAINS CONVICTION.

In a prosecution for obtaining money by false pretenses on a forged check, in view of the circumstances, failure of the trial court to explain to the jury the status of an accomplice as a witness, and how his testimony should be viewed and considered, as required by Code Civ. Proc. § 2061, held harmless to defendant.

8. CRIMINAL LAW §824(7) — FAILURE TO CHARGE ON ACCOMPLICE TESTIMONY NOT ERROR WHERE NO REQUEST MADE.

Failure to instruct on accomplice testimony was not erroneous; defendant not having requested such charge and refusing assistance of attorney.

9. CRIMINAL LAW §641(1) — RIGHT OF REPRESENTATION BY COUNSEL NOT DENIED.

A professional court interpreter, familiar with the methods of criminal jury trials, who, on his trial for obtaining money by false pretenses, himself managed and presented his defense, having announced ready for trial, was not deprived of his right, under Const. art. 1, § 13, to be represented by counsel, if he desired, having voluntarily failed to procure such assistance.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

William Rose was convicted of having obtained money by false pretenses. From the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Martin I. Welsh, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. By an information filed in the superior court of the county of Sacramento on the 31st day of March, 1919, defendant, William Rose, and one Nicholas Kinominas (whose name appeared later to be Kintominas) were charged with having obtained money by false pretenses from one Peter Hassouras (whose name also appears in the record as Hassouras). The defendant, Rose, had a separate trial, was convicted by a jury, and was sentenced to imprisonment in the state prison. He prosecutes this appeal from the judgment of conviction and from an order denying his motion for a new trial.

The prosecuting witness, Peter Hassouras, was in the restaurant business at 126 J street in the city of Sacramento. He testified that he first met the defendant about the 11th day of January, 1919, and got to know him fairly well. On the 31st day of January, 1919, Rose asked him to indorse a check, which he presented to him, and which was in the words and figures following, to wit:

"Garden City Fruit & Produce Co., Packers and Shippers.

"11 No. 198.

"(M) El Paso, Texas, Jan. 23rd, 1919.

"Pay to the order of George Pappas \$200 00/xx two hundred and no/100 dollars. "\$203.77

"Not over two hundred \$200\$

"For

"J. A. Sackler.

"To the El Paso Bank and Trust Company, El Paso, Texas."

Said check was indorsed: "George Pappas." Hassouras went with defendant to the California National Bank, both parties indorsed the check, the bank paid to Hassouras \$200, and he handed the same to defendant. The check afterward came back unpaid.

1. It is first contended by appellant that the evidence was insufficient to establish: (1) An intent to defraud; (2) that an actual fraud was committed; (3) that false pretenses were used for the purpose of perpetrating the fraud; and (4) that those false pretenses were the cause which induced the owner to part with his money. We may also consider in this connection appellant's second point, which is stated to be:

"That the prosecuting witness was not induced by representations of the defendant, Rose, to part with his money, but, on the contrary, relied upon the faith which he had in his own friends."

Peter Hassouras, a witness for the people, testified on direct examination:

That, on the day he indorsed the check, Rose said to him: "I have a check, \$200, and the bank here don't know me. Won't you indorse the check for me, to go and cash it?" Hassouras replied: "I don't think I will, because I don't know you."

The witness continued:

"There was two other fellows, Greeks, friends of Rose, they introduced me to him—they know Rose for a long time—he was a good man; they said, 'We are responsible for it, if the check is not good; and that is how I went to the bank and cashed the check, on account of these two other friends of mine. I didn't have to indorse the check on account of Rose, because I don't know him before—just met him in the restaurant. * * * Q. Why did he want you to cash it, and not the bank? What did he say? A. He said because he didn't have any money here—he isn't acquainted here in this town. Q. And did he tell you the check was good? A. Well, he said—yes."

The defendant, who was not represented by counsel at the trial, objected to the question as leading and the objection was sustained. The district attorney then asked:

"What did he say about the check, when he asked you to cash it? A. He said: 'Mr. Hassouras, won't you indorse a check, \$200, for me, because I am not known here in this—in Sacramento, and no bank will cash this check for me.' I said: 'I will, but I don't know you.' Mr. Rose, he said, there is two other parties, two or three other boys—they said: 'If the check is not good, Mr. Hassouras, we are responsible for it.' I know these other people—they was friends of mine for ten years, and honest people, and that is the reason I indorsed the check."

On cross-examination by the defendant, the witness testified:

That defendant ate his meals in witness' restaurant nearly every day; that he was accom-

panied by his "partner," Kintominas, the co-defendant, and some other men. He repeated that he said he could not indorse the check for William Rose because he did not know him, and that he also said, "But I will indorse the check for you boys." The witness testified that, at the preliminary hearing of the case, he had testified that on the day before he indorsed the check Kintominas told him "that William Rose has a check of \$200 in his own possession, and the check is good to his own knowledge, and William Rose looking for you to indorse the check."

On redirect examination the witness said:

That the first one who asked him to cash the check was a man by the name of Jim Ledgeropoulos. * * * "Q. Mr. Hassouras, at the time that you spoke about the check was first called to your attention in the place that morning, when the defendant, Rose, and those other men were there. I will ask you if, at that time and place, the defendant Rose at any time told you that the check was good? A. Yes."

In answer to a question by the defendant, he said:

"At the time before we left the restaurant (to go to the bank), you and the two other fellows told me the check was so good."

Nick Kintominas, the codefendant, was called as a witness on behalf of the people and testified: That, from April 18 to August 14, 1918, he, his brother, George Morgan, and John Gust Constantine Sackler were doing a wholesale fruit and produce business in El Paso, Tex., under the name of the Garden City Fruit & Produce Company, with a branch store in Los Angeles; that J. A. Sackler was authorized to draw checks on behalf of the firm against its account in the El Paso Bank & Trust Company; that he last saw Sackler in Tulsa, Okl., in September, 1918; that Sackler had taken the balance of the firm's money, which caused it to cease business; that witness kept possession of the check book and other books of the firm.

The check book referred to was produced at the trial. In the body of the book are stubs numbered from 100 to 197, both inclusive, upon which are enumerated sundry amounts for which checks had been drawn. The stub of the check corresponding to No. 198 (the check in question) had been removed from the book. Checks 199, 200, and 201 had been removed from the book, and there are no entries upon the corresponding stubs. Checks 202 to 396, both inclusive, remain in said check book intact.

The witness testified that he met defendant, Rose, about two weeks before November 1, 1918, in Salt Lake, and that he met him after that time in Los Angeles; that he (witness) paid the railroad fares of himself and defendant to Sacramento; that they came to Sacramento on January 13, 1919, and were living together at a hotel, where witness paid the room rent; that the check book above

mentioned was in witness' suit case in their room, and that defendant saw it about January 22d or 23d and asked what it was, to which witness replied, "This is book I have of El Paso, for our business;" that at that time checks numbered 198, 199, 200, and 201 were in the book. He said that Rose knew all about the members of the firm of the Garden City Fruit & Produce Company, and knew that Sackler signed checks for the firm. The witness testified that he was well acquainted with Sackler's handwriting, and that the signature, "J. A. Sackler," on the check in question, was not that of Sackler. He said that he first learned, on February 8 or 4, 1919, that a check had been taken from the check book and cashed. He testified:

"Mr. William Rose came to me one night in the room, and he was walking in the room; he couldn't sleep. I say: 'Rose, why couldn't you sleep?' He say: 'I couldn't sleep. * * * I am in a hell of a fix. That check I cashed last week, Mr. Hassouras, is no good, so I can't sleep good.' Mr. Rose, he said: 'I take out from your own book the checks, too, and I wanted to cash it, because I needed the money.' I told him: 'I didn't know what you were doing, and what you are doing since; I didn't need no money; I have money.'"

The information, in substance, charges that the defendants, Rose and Kintominas, for the purpose of cheating and defrauding one Peter Hassouras, and thereby obtaining the money upon the check in question, did, at the time and place therein named, "willfully and unlawfully, knowingly and designedly, falsely and fraudulently pretend and represent to the said Peter Hassouras that a certain check and draft, in words and figures as follows, to wit: [following which is a copy of said check]—was worth the sum of \$200; whereas, in truth and in fact the said check and draft was worth nothing, as they the said defendants then and there well knew," that said Hassouras, believing said false and fraudulent representations to be true, was induced thereby to deliver and did deliver to said defendants the sum of \$200, etc. The information was embraced in the court's charge to the jury and was first read to them, and then followed full and clear instructions as to the nature of the crime charged, the vital elements of which it consists, and a statement that it was incumbent upon the prosecution to prove each of the essential elements of the crime to a moral certainty and beyond a reasonable doubt. Among the instructions so given was the following:

"To constitute the offense charged, four things must concur and four distinct averments must be proved: (1) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of false pretenses made use of for the purpose, viz.:

They must be the cause which induced the owner to part with his property."

[1, 2] The foregoing instruction, with sufficient clearness, states the facts necessary to be established to prove the commission of the crime here charged, and we think that a careful examination of the testimony, as taken at the trial and as disclosed by the record before us, will show that the jury were warranted in finding, as their verdict implies that they did find, that the facts essential to the consummation of the crime charged existed in this case.

[3] It may be conceded that Hassouras, in indorsing the check in question and thereby becoming responsible and liable to the bank for the integrity of that instrument, acted upon two considerations, viz.: (1) The fact that the defendant represented to him that the "check was good"; (2) that the friends of Rose, referred to by Hassouras, assured the latter that Rose was a reliable person and that, if the check proved to be spurious or worthless, or, as they put it, "not good," they would indemnify and reimburse him for any loss suffered by him from his indorsement thereof. But, even with this concession, it does not follow that, the jury was not warranted in finding that the inducing cause for his indorsement of the check was the representation made to him by Rose that the check was all that it purported to be upon its face. Indeed, we hold it to be our duty to assume from the evidence that the jury concluded that but for the representation by Rose to Hassouras that "the check was good," thereby conveying to the latter's mind the belief that the instrument was in all respects what upon its face it appeared to be, Hassouras would not have indorsed the check; for it is not reasonable to suppose (and the jury may be assumed to have taken the same view of the situation) that an honest and responsible person, in his right mind, would deliberately, by his act of indorsing a check for accommodation, impart to such instrument the force of his unqualified approval, if he believed, or even suspected, at the time of doing so, that it was fictitious or worthless, even though he received assurances from third parties that the holder of the check was an honest and reliable person and that they would make good the loss if any occurred from such indorsement. Therefore, we say that, while it might be true that Hassouras was to some extent influenced to indorse the check by the friends of Rose and their statement that Rose was a reliable and trustworthy person, the jury could have found, and it is our duty to assume that that was the theory upon which they predicated their verdict, that the cause inducing Hassouras to indorse the check was the representation by Rose that the check was good, or what it purported to be. In other words, there is evidence to justify the

theory that Hassouras acted upon the representation by Rose that the check was good for the sum of \$200 and, in support of the verdict of conviction, we are authorized to presume that the verdict was predicated upon any theory deducible from the evidence, which will support the charge and the verdict.

The case of *People v. Weir*, 120 Cal. 279, 52 Pac. 656, is to some extent an authority sustaining the foregoing considerations. There the defendant became engaged to marry the prosecuting witness, and after the engagement he falsely represented to her that he had an opportunity of receiving employment with a prominent real estate firm, and that as a condition to such employment it was necessary that he should deposit with the firm the sum of \$1,000. He further stated to her that he required the sum of \$200 to make up the sum so required. His representation as to the employment and his representation as to the need of the \$1,000, were false and untrue. He obtained the \$200 from his fiancée upon those representations, and thereafter disappeared and was seen no more by her until his arrest and prosecution for obtaining from her the \$200 by the false pretenses mentioned. He was convicted of said crime, and on appeal it was claimed in his behalf that the woman loaned him the money because of their engagement to marry, and not because of his representation as to his alleged employment and the necessity for a cash deposit. The Supreme Court thus disposed of the contention:

"The engagement simply acted as a leaven in placing her mind in that plastic condition in which it would the more readily absorb the false representations made by defendant. Defendant also stated to the prosecuting witness that, if she would advance the \$200, 'they then could be married right away.' It is now insisted that such statement was the superinducing cause which actuated the girl's mind in parting with the money. Again, we deem this a technicality of small dimensions, and the suggestions already made meet the contention. *Under any circumstances these questions were matters of fact for the jury to decide.*"

In *People v. Gibbs*, 98 Cal. 661, 664, 33 Pac. 630, it is in effect held that where, in a case of obtaining money or property by false pretenses, several different false representations are alleged, a verdict of guilty will stand if one only of the false representations be proved; and in 19 Cyc. p. 407, it is stated, upon the authority of the cases cited in the footnotes, that—

"Although the pretense must be an inducing cause of the owner's parting with his property, it need not be the sole inducing cause. It is sufficient, if it had a material influence in inducing the owner to part with his property, although he was influenced in part by other causes."

In the present case well may it be said that the jury were warranted in finding that the assurances of Rose's friends to Hassouras that he (Rose) was a reliable man, and that they would stand good for the loss to him if the check proved to be worthless, merely had the effect of so influencing his mind as to have induced him the more readily to act upon the representation of Rose that the check was what he claimed it to be and what it appeared upon its face to be.

[4] That Rose knew, or at least that the jury were warranted in finding that he knew, that the check was worthless when he represented to Hassouras that it was good, is shown by the testimony of Kintominas, the substance of which is hereinabove produced. That witness, as seen, stated the circumstances under which Rose procured the check book of the Texas firm of which Kintominas was a member, and then told of Rose's confession to him that he had filled out the check in question and had procured it to be cashed, and explained, as he was worrying over his act, that he was "in a hell of a fix." It is, however, contended that Kintominas was an accomplice of Rose, and that his testimony was not corroborated. Whether Kintominas was such an accomplice was a question of fact for the jury. We may assume that they accepted his testimony as verity, so far as the facts detailed by him were concerned, and concluded that he had nothing to do with the transaction. But, conceding that Kintominas was an accomplice, there is ample corroboration of that portion of his testimony tending to show that Rose knew that the check was fraudulent and worthless, or not what it purported to be, in the general surrounding circumstances of the transaction. The fact that he brought acquaintances to Hassouras to assure the latter that he was an honest and reliable man, the fact that he insisted that the check was "good," and the fact that it proved to be worthless constituted circumstances corroborative of the testimony of Kintominas tending to show that the defendant at all times knew that the check was worthless or of no value. The corroboration in such a case need not be by evidence of itself sufficient to support the charge. If slight, and tending to connect the defendant with the commission of the crime charged, it is enough.

[5] In this connection we may consider the contention that there is no testimony that the defendant represented to Hassouras that the check was worth or of the value of \$200. It appears from the record to be true that Rose did not, in so many words, or in express language, specifically represent that the check was worth or was of the value of \$200; but he did represent it to be good when he presented it to Hassouras for his indorsement, and this statement necessarily carried with it the representation that the

check was good for what it appeared upon its face to be worth, viz. \$200. Indeed, how could the check be good, within the natural meaning of the word "good," as so applied, unless it was good for the amount it purported to be for? The question answers itself. The officers of the bank, which honored and paid the check upon the indorsement thereof by Hassouras, testified that the check was fictitious and wholly without value, and that Hassouras, upon being notified of that fact, repaid the bank the amount it had given Rose on the check.

From the foregoing considerations, it appears with sufficient clearness that the jury, having accepted as correctly revealing the facts of the transaction relative to the check the testimony presented by the people, the salient portions of which are above considered, were justified in finding: (1) That the check was fictitious and worthless; (2) that Rose knew it to be so when he asked and induced Hassouras, by false and fraudulent pretences as to the integrity of said check, to indorse it and thus become liable as an indorser upon it; (3) that, acting upon Rose's false representation that "the check was good," or that it was what it appeared upon its face to be, Hassouras indorsed the check; (4) that Rose's representations to Hassouras as to the check were false and untrue, and were so made with the intent and the design fraudulently to obtain from and defraud Hassouras of the sum of \$200, the face value of the check; (5) that, upon such false and fraudulent representations, he did defraud Hassouras of said sum, and thereby actual fraud was committed. Thus it is clear that all the elements constituting the crime charged were, upon what appears to be sufficient evidence, found by the jury to exist in the transaction out of which the charge alleged in the information grew.

[8] Of course, this court, even with the added powers vested in it with respect to the review of questions of fact by section 4½ of article 6 of the Constitution, cannot consider the evidence for the purpose of determining whether the witnesses upon whose testimony the jury presumptively predicated their verdict testified to the truth or not. In other words, the question as to the credibility of the witnesses is one which does not and cannot in the nature of the case come within the powers of a court of review, and the constitutional provision referred to cannot vest in such courts or clothe them with any such remarkable power. Indeed, no claim has ever been made, so far as we know, that the said section of the Constitution was intended to authorize a court of review to attempt so obviously an impossible act, and if any such claim should be made it could not and would not be sustained. Therefore, where the testimony from which a certain result *à priori* has been reach-

ed is not inherently improbable, and is sufficient to support the conclusion arrived at, then, so far as is concerned the question whether the evidence supports the verdict or the findings, a reviewing court is powerless to interfere with the result arrived at below. In this case the testimony upon which the jury evidently founded their verdict is not inherently improbable, and, as above stated, it is upon its face sufficient to uphold the verdict arrived at. We cannot, consequently, interfere with the verdict on the ground that it does not derive from the evidence sufficient support.

It is next contended that the court erred to the prejudice of defendant's rights by its omission to instruct the jury with respect to the status under the law of an accomplice of the accused on trial, when such accomplice becomes a witness against the accused and the peculiar consideration which the law says must be given an accomplice's testimony. Section 2061 of the Code of Civil Procedure provides (among other things) that the jury are—

"to be instructed on all proper occasions: * * * (4) That the testimony of an accomplice ought to be viewed with distrust," etc.

There was, in this case some evidence from which it might be inferred that Kintominas was implicated in the crime charged against Rose. In fact Kintominas was jointly charged in the information with Rose with the commission of the crime of which the latter was convicted. The court gave no instruction based upon subdivision 4 of section 2061 of the Code of Civil Procedure, above adverted to. No such instruction was proposed by the defendant; but it is the contention that it was the court's duty to have given such instruction upon its own motion, and that its failure to do so was error.

[7, 8] It would have been well for the court, upon its own volition or initiative, to give an instruction explaining to the jury the status of an accomplice as a witness and how his testimony should be viewed and considered; but, under the circumstances of this case, its failure to do so cannot be held to have been prejudicial to the defendant. There is, as has already been shown, plenty of evidence, without that of Kintominas, the alleged accomplice, to sustain the verdict. As seen, the testimony of Kintominas was particularly important, in that it tended to show that Rose knew that the check was without any value whatever when he asked Hassouras to indorse it. But it will also be borne in mind Rose represented to Hassouras, without any qualifying language, that "the check was good." He was the holder and pretended owner of the check, and knew the circumstances under which he received it into his possession. He knew more about the check than did Hassouras or the other parties who attested to his (defend-

ant's) honesty before and to Hassouras. The fact that the check proved worthless is a strong circumstance tending to show that he knew the check was fictitious and worthless when he induced Hassouras to indorse it, and the jury were authorized from that fact to find that he at all times was aware of the worthlessness of the check and that his design in securing the indorsement of the instrument by Hassouras was to obtain from the latter in that fraudulent way the amount of money the check purported to be for. Thus it is plain that with the testimony of Kintomnas eliminated from the record, or wholly disregarded, the verdict would still have ample support. It follows that the failure to give the instruction under the circumstances of this case can hardly be said to be error, inasmuch as the defendant did not request the court to give it; but, if erroneous, it cannot be held to have operated prejudicially against the defendant or to have produced a miscarriage of justice. Article 6, § 4½, Const.

In *People v. Lawlor*, 21 Cal. App. 63, 181 Pac. 63, the defendant himself requested the court to give a like instruction, and the court there held that, while the request should have been granted and the instruction given, in view of the quantity and convincing character of the evidence tending to show the guilt of the defendant, the error was without prejudice, and consequently could not justly be held to have produced a miscarriage of justice. In view of this conclusion, the cases cited by the appellant in support of his contention that the court erred by failure to instruct the jury upon the law relative to accomplices are of no consequence here. It may be suggested, however, that in the following of those cases the instructions were proposed by the accused, but, although pertinent to the cases as made by the evidence, were disallowed by the court: *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *People v. Silva*, 121 Cal. 668, 54 Pac. 146. In the other cases cited, which were decided long before section 4½ was incorporated into article 6 of the Constitution, the peculiar circumstances thereof were such as to require it to be held that the refusal or the failure of the trial court to instruct upon accomplices constituted prejudicial error.

[8] It is lastly contended that the cause should be reversed for the reason that the defendant was without counsel to assist him in his defense. The argument on this proposition seems to be that a legal trial of a person charged with a public offense cannot be had, unless, at such trial, the accused has the assistance of an attorney at law in his defense; but, obviously, this is not so. The argument is based upon article 1, section 13, of the Constitution, which declares that—

"In criminal prosecutions, in any court, the party accused shall have the right to a speedy and public trial; to have the process of the

court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel."

That provision of the Constitution, in so far as it relates to the right of an accused to be represented at his trial by counsel, only declares and guarantees that right, and does and can do no more than that; for it still remains with the accused to determine for himself whether he will exercise the right and so be attended at his trial and defended therein by counsel. Of course, if he desires to be so represented and assisted in his defense by counsel, there cannot be a denial to him of that right, even though he be without the necessary means to employ and compensate the attorney. If, on the other hand, he does not desire an attorney to assist him in his defense, there is no law which can compel him either to employ one for that purpose or to accept the services of one assigned to him by the court, should the court adopt that course.

In this case the defendant, upon being arraigned upon the information, was asked by the court if he had or wanted counsel to conduct his defense, and he replied that he would himself attend to that matter. It does not appear that he thereafter asked or requested the court to appoint an attorney to defend him, and he appeared at the trial without an attorney, announced himself ready when the case was called for trial, and himself managed and presented at the trial his own defense. If, therefore, he thinks he now has reason to believe that he suffered by reason of having no lawyer to assist him in his defense, he, and not the court nor the law, is to blame. He testified that he was a professional court interpreter, and from this fact we may assume that he is a man of intelligence and had from his experience as such an interpreter become more or less familiar with the general rights of an accused on trial in the courts and with the methods of conducting jury trials. We can, therefore, see no ground for excusing his neglect to secure, either by employment or by appointment by the court, if he was unable to pay for the services of one, a lawyer to represent him at the trial and conduct his defense. It certainly, under the circumstances of this case, cannot be held a ground for a reversal of the cause because the defendant, for reasons best known to himself, elected to waive the assistance of a lawyer and to manage his own defense.

It may be added, in this connection, that the defendant appeared to understand the situation presented at the trial remarkably well, for he seems to have cross-examined the witnesses testifying against him with no little degree of cleverness. Moreover, we can justly say that the case was tried by the court fairly and impartially and with a just recognition of the rights of the accused.

We conclude that there has been presented here no legal reason for sending the case back, and therefore the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

BLANLOT v. CARBON COAL CO.
(No. 9960.)

(Supreme Court of Oklahoma. Sept. 16, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773(2)—APPEAL DISMISSED ON FAILURE TO FILE BRIEF.

Where no briefs are filed, as required by rule 7 (47 Okl. vi, 165 Pac. vii) of this court, the appeal will be dismissed for want of prosecution.

Appeal from Industrial Commission.

Original suit in the Supreme Court by Amel Blanlot, appealing from an award of the State Industrial Commission denying compensation against Carbon Coal Company for an alleged injury. Dismissed.

Jackman A. Gill, of McAlester, for petitioner.

PER CURIAM. From an award of the Industrial Commission denying the petitioner compensation for an alleged injury petitioner brought this action filing same in this court on May 22, 1918. The cause was submitted on October 15, 1918, and petitioner given 30 days' time in which to file briefs. No briefs having been filed and no reason given for failure to file same, the appeal is dismissed under rule 7 of this court (47 Okl. vi, 165 Pac. vii).

RAULERSON v. STATE INDUSTRIAL COMMISSION OF OKLAHOMA et al.

(No. 10496.)

(Supreme Court of Oklahoma. Sept. 16, 1919.)

(Syllabus by the Court.)

MASTER AND SERVANT \S 417(7)—INDUSTRIAL COMMISSION'S DECISION ON FACTS NOT REVIEWABLE.

In a suit instituted in this court to review an award of the state Industrial Commission, the suit must be to review an error of law, and not an error of fact. Their decision as to all matters of fact is final.

Original suit in the Supreme Court by John Raulerson appealing from an award of the State Industrial Commission of Oklahoma on the theory that it erred in not allowing adequate compensation for personal injury against the Tulsa Boiler & Sheet Iron Works and the Kansas Employees Inter-insurance Exchange. Dismissed.

Wilson, Tomerlin & Buckholtz, of Oklahoma City, for plaintiff.

S. P. Freeling, Atty. Gen., R. E. Wood, Asst. Atty. Gen., and Twyford & Smith, of Oklahoma City, for respondents.

HIGGINS, J. Suit was instituted in this court by plaintiff, wherein he complains of an award of the state Industrial Commission, for the reason that the award is inadequate to compensate him for the injuries received by him.

He states that he was employed by the Tulsa Boiler & Sheet Iron Works, and while in its employ sustained an injury to his foot; that after his injury a settlement was had with him, but, owing to his immaturity of age, he being a minor, the settlement was inadequate; that the settlement was confirmed by the commission; that thereafter he discovered that he was more or less permanently injured, made application to the commission to have the award set aside, whereupon, by order of the commission, the case was reopened, and upon further hearing the commission made an order, denying the application to set aside the award previously made, whereupon this suit was commenced.

The defendant contends that the award by the commission, in passing upon matters of fact is final and not subject to a suit of this kind. In section 10, art. 2, of chapter 246, Session Laws 1915, in defining the powers of the state Industrial Commission, it is provided:

"The decision of the commission shall be final as to all questions of fact, and except as provided in section 13 of this article, as to questions of law."

In Board of Commissioners v. Barr, 173 Pac. 206, it is held:

"Under the provisions of section 10, art. 2, of the Workmen's Compensation Act, * * * the decision of the state Industrial Commission is final as to all questions of fact."

This suit is instituted upon the theory that the commission has erred in not allowing adequate compensation; that the wounds inflicted justify a greater compensation. This is a question of fact, and the law as laid down in Board of Commissioners v. Barr, supra, is controlling.

Therefore this suit is hereby dismissed.

TURBEN et al. v. DOUGLASS et al.
(No. 10164.)

- (Supreme Court of Oklahoma. May 13, 1919.
Rehearing Denied Sept. 30, 1919.)

(Syllabus by the Court.)

1. PLEADING \S 48—PETITION SUFFICIENT IF IT STATES FACTS AUTHORIZING RELIEF.

Under the provisions of the Code, it is not necessary that a pleading state facts to bring the cause under any particular form of action at common law, but the petition is sufficient if it states facts in a plain and concise manner which entitle the plaintiff to some legal or equitable relief.

2. APPEAL AND ERROR \S 987(4)—JUDGMENT OF TRIAL COURT NOT AGAINST WEIGHT OF EVIDENCE SUSTAINED.

In a civil action, where the parties are not entitled to a trial by jury as a matter of right and where the sufficiency of the evidence is challenged, it is the duty of this court to consider and weigh all the evidence, and if the judgment of the trial court is not clearly against the weight of the evidence it will be sustained.

3. JOINT ADVENTURES \S 5(2)—JUDGMENT FOR PLAINTIFF ESTABLISHING INTEREST IN OIL LEASE SUSTAINED.

Evidence in this case examined, and the judgment held not to be clearly against the weight thereof.

4. LIS PENDENS \S 24(1)—PURCHASER PENDING ACTION INVOLVING OIL LEASE ACQUIRES ONLY INTEREST OF SELLER.

One who purchases an oil and gas lease from a party to an action involving the title thereto, after the institution and during the pendency of such action, acquires no greater rights in the lease than his assignor had at the time of the assignment.

Error from District Court, Cotton County; Cham Jones, Judge.

Action by C. E. Douglass against I. E. Turben, John C. Keys, and H. L. Thompson. Judgment for plaintiff against defendants Turben and Keys, and they bring error. Affirmed.

John M. Young and Charles Mitschrich, both of Lawton, for plaintiffs in error.

S. I. McElhoes, of Lawton, and Bridges & Vertrees, of Waurika, for defendants in error.

RAINEY, J. On March 24, 1916, Chas. E. Douglass, as plaintiff, filed his petition in the district court of Cotton county against I. E. Turben, John C. Keys, and H. L. Thompson, defendants, the principal allegations therein being as follows:

"That in 1915 plaintiff and defendant I. E. Turben entered into an agreement to promote an oil and gas prospect in Cotton county, Okl., each to share equally in the enterprise, that in

pursuance of said agreement leases were to be obtained in said county which leases were to be the joint property of this plaintiff and the defendant I. E. Turben; that all the leases so taken were taken in the name of I. E. Turben, and still remain in the name of the defendant I. E. Turben.

"Plaintiff has requested and demanded of the said defendant Turben that he convey or assign an undivided one-half interest in and to all of said leases to this plaintiff, but the defendant Turben refuses to do so.

"The leases referred to above are as follows, and all are located in Cotton county, Okl., and are made to the defendant I. E. Turben, to wit: [Then follows a description of each lease.]

"Plaintiff is entitled, under the terms of the agreement hereinbefore referred to, to an undivided one-half interest in and to each and all of the above-described oil and gas leases and the defendant I. E. Turben holds the same in trust for the use and benefit of this plaintiff.

"The defendant I. E. Turben has executed an assignment of a portion of the above-described leases to the defendant H. L. Thompson, which assignment is recorded in Book 12, at page 438 of the records in the office of the county clerk of Cotton county, Okl., and is for the leases on the following lands: [Description of certain leases.]

"The said defendant H. L. Thompson, at and before the time he took said assignment, had actual knowledge that this plaintiff owned and was entitled to an undivided one-half interest in and to all of the leases to which he took the above assignment.

"Wherefore plaintiff prays that the court decree and order that the plaintiff herein is entitled to and does own an undivided one-half interest in and to all of the leases herein described, and that the defendants be required to execute to this plaintiff an assignment of such interest, and that in lieu of said assignment the court make an order assigning such interest to this plaintiff, and that plaintiff recover his costs herein expended, and for such other and further relief as to the court shall seem equitable."

Issue was joined by the respective defendants, and the cause tried to the court, resulting in a judgment decreeing the plaintiff to be the owner of an undivided one-half interest in the leases remaining in the name of the defendant Turben on the date of the institution of the action, and ordering said defendant to execute and deliver to the plaintiff a good and sufficient assignment thereof. The judgment also awarded the plaintiff an undivided one-half interest in a lease conveyed by the defendant Turben to the defendant Keys after the institution of the suit, and provided that in the event defendants failed to make the assignments to the plaintiff the judgment of the court should have that effect. No judgment was entered against defendant Thompson. From the judgment aforesaid Turben and Keys have appealed to this court, assigning numerous errors.

Hereinafter the parties, for convenience,

will be referred to as plaintiffs and defendants, respectively.

It is first asserted that the petition did not state facts sufficient to constitute a cause of action. If we accurately comprehend the objections to the sufficiency of the petition, they are that it is impossible to deduce therefrom whether plaintiff's claim is on an express trust, a resulting trust, an implied trust, or a constructive trust, and it is earnestly insisted that it is impossible to conclude from the allegations therein whether plaintiff ever contributed any money, time, or anything of value whatever to the project. It is also insisted that the petition does not disclose whether by the terms of the alleged agreement the leases in contemplation were to be taken in the name of the defendant Turben, or whether Turben, in subsequently taking them in his own name, did so either with or without plaintiff's knowledge, and whether the contract had been fully performed, or what, if anything, was to be done by either or both of said parties thereunder. Another criticism of this pleading is that it does not appear therefrom what either party had contributed in money, property, or services to the project, what consideration was given for the leases, what was necessary for the lessees to do in order to render the same valid, and in what manner the alleged agreement had been violated by either of the parties thereto.

[1] In this jurisdiction, where the forms of action theretofore existing were abolished by the adoption of the Code and there was thereby substituted only one form of action known as a civil action, it is not necessary that the petition should contain averments of all the facts necessary to be proved to entitle the plaintiff to recover under any particular form of action that existed at common law. *R. J. Hawkins v. T. J. Overstreet*, 7 Okl. 277, 54 Pac. 472; *Joseph Gabriel v. Kildare Elevator Co.*, 18 Okl. 318, 90 Pac. 10, 10 L. R. A. (N. S.) 638, 11 Ann. Cas. 517; *Kee v. Satterfield*, 46 Okl. 660, 149 Pac. 243.

Under section 4737, Rev. Laws of 1910, a petition is sufficient where it contains a statement of facts constituting a cause of action in ordinary and concise language and the demand for relief to which the party supposes himself entitled.

Although plaintiff's petition is somewhat indefinite and uncertain in many of the respects complained of, in that it fails to allege with precision the exact terms of the alleged contract, it does allege the making of an enforceable contract by the plaintiff and defendant Turben, and it is fairly inferable from the averments in the petition that under the terms of said contract the leases taken pursuant thereto, whether by the plaintiff or the defendant, were to become the joint property of the contracting parties, that said leases were taken in the name of the defendant Turben, and that he had breached the

agreement by refusing to recognize the plaintiff's claim to an undivided one-half interest in the leases so taken. It sets forth the particular leases to which the plaintiff claims title, and very clearly demands the relief to which the plaintiff thinks he is entitled. The proper way to have taken advantage of the defects in the petition was by motion to make the petition more definite and certain; and, although a motion to make the petition more definite and certain, by requiring the plaintiff to allege whether his alleged contract was oral or in writing, was filed, such motion did not direct the attention of the court to the alleged defects in the petition now so vigorously urged, and no error is assigned as to the court's action on this motion. We, therefore, hold that plaintiff's petition was good as against both the motion for judgment on the pleadings and the general demurrer, for it is well settled that where a pleading states any facts upon which the pleader is entitled to any relief, under the law, a general demurrer should not be sustained thereto. *Bishop-Babcock-Becker Co. v. Estes Drug Co.*, 163 Pac. 276.

[2] Under the provisions of section 4993 of our Code (Rev. Laws 1910) the issues of fact in this case were properly triable to the court, and, invoking the rule announced by this court in *Schock v. Fish*, 45 Okl. 12, 144 Pac. 584, *Wimberly v. Winstock et al.*, 46 Okl. 645, 149 Pac. 238, and *Mendenhall et al. v. Walters et al.*, 53 Okl. 598, 157 Pac. 732, counsel assert that the judgment of the trial court is clearly against the weight of the evidence. Therefore it is the duty of this court to consider the whole record, to weigh the evidence; and, if after weighing the same the judgment is found to be clearly against the weight thereof, it is our duty to render, or cause to be rendered, such judgment as should have been rendered by the trial court, otherwise to sustain the judgment.

[3] We do not deem it necessary in this opinion to make a detailed statement of all the evidence adduced at the trial, and we will not attempt to do so, but we will briefly allude to some of the undisputed facts and to the plaintiff's and defendant's testimony introduced in support of their respective theories of the case.

At the commencement of the transactions, which we shall presently relate, the plaintiff, Chas. E. Douglass, was an experienced oil man, having been engaged in that vocation since 1904, principally in drilling wildcat wells. In August, 1914, he became interested in Southwestern Oklahoma, and from his investigation and studies of the United States government geological survey had ascertained that Cotton county was considered favorable for prospective oil and gas development, and was of the opinion that territory near Lawton, in Comanche county, and Walters, in Cotton county, might produce oil and gas, and for the purpose of better informing him-

self as to the prospects, employed a geologist, who, after investigating for 12 or 15 days in the vicinity of Lawton, recommended as favorable for drilling several locations, including the one where the leases in controversy were afterwards acquired. While in Lawton, Douglass became acquainted with a Mr. Anderson and a Mr. Bellamy, who directed his attention to the territory where the leases in controversy were later taken. Douglass also learned from them that operations had been commenced in that vicinity, and that a rig had been built on Anderson's land, but, owing to financial difficulties, the proposition could not be further financed, and the leases had lapsed. Douglass, who at that time was engaged in drilling elsewhere, promised to take up the proposition as soon as he could get to it. He continued, however, to spend some time in this vicinity in prospecting in Comanche and Cotton counties, and was still so engaged when he received a letter at his home address in Okmulgee, Okla., from the defendant Turben, who was then residing in Cleveland, Ohio, in which Turben informed Douglass that he (Turben) was interested with a Mr. Manchester, of Maysville, Ky., in drilling a well, and that Mr. Manchester, being advised of Turben's desire to engage in the oil business in Oklahoma, had advised him to write Douglass in order to get in touch with him when he arrived in Oklahoma. In this letter Turben advised Douglass that he would be ready to come to Oklahoma within a short time, that he had had about 18 years' experience in the oil business, had a large string of tools, and would like to get started in Oklahoma with some one who had acreage and would carry an interest with him, as he did not have much money, but had a small income, and that he would advise Douglass before starting to Oklahoma. In his reply to this letter Douglass suggested to Turben that he come to Oklahoma and view the future prospects, advising him that he had a well to drill on a 3,000-acre tract of leases which seemed to be nicely located for an oil and gas prospect, and that if Turben would come to Okmulgee they might make some arrangements to drill some wells and for Turben to take an interest in the leases. The parties then had some further correspondence relative to the advisability of shipping the tools before coming to Oklahoma; Douglass advising Turben not to ship the tools until he had looked the country over, as he might conclude to ship to some other point than Okmulgee. In one of the letters, among other things, Douglass said:

"I will be glad to give you any information I can after you get here. Also if my wildcat propositions look good to you I will make you some propositions to join me."

Turben arrived in Okmulgee some time in November, 1915, and, according to Douglass' testimony, he advised Turben that they

could get a certain block of acreage described on a plat furnished him by Anderson and Bellamy, which Douglass exhibited during the conversation, provided that they would drill a well on it, the acreage so exhibited being that involved in this case. Douglass informed Turben of his intention to visit Lawton within a few days, and invited Turben to go with him and look the proposition over, informing Turben that if the acreage looked good to him and he wanted to join him in the proposition they would get busy, secure the leases shown on the plat, and that they would jointly promote the proposition and get a well drilled on it for a part of the acreage, reserving as much of the acreage as possible. Turben acceded to this and a few days later they went to Lawton and, according to Douglass' testimony, discussed the proposition practically all the time on the way over. When they arrived at Lawton, Douglass called Mr. Anderson over the telephone and notified him that he was there with a man who would go with him to look over the situation the next morning with a view of taking the leases, and at Anderson's suggestion they met at the office of Mr. Cassin, a real estate man in Lawton, where Douglass introduced the parties and informed Anderson that Turben was the man he had brought down to look over the leases with a view of renewing the same and drilling a well. According to plaintiff's testimony, at his suggestion, Anderson got a car and took Turben out to see what could be done with reference to obtaining the leases. Douglass did not accompany them on this trip, but before they started he said to Turben:

"Go down there and see what you can do, see if you can get these leases; if I can be of any assistance to you call me over the telephone or come after me, and I will see you through with the deal."

Douglass then returned to Okmulgee, and within a few days received the following letter from Turben:

"As I did not see you Saturday took it for granted you went home on the morning train. I can get the casing furnished for the well near Hulen and think it possible that I can get a man here to drill it. I am going down Wednesday or Thursday. If there is anything you want me to see to let me know and I will do my best."

This letter was sent from Lawton, November 22, 1915, and about a week thereafter Turben wrote Douglass another letter, postmarked "Tulsa, Oklahoma," which is as follows:

"I am going to Lawton at 11:40 and think I shall be over there for a couple of weeks."

"I have arranged for the casing to drill the well and am going to take some more acreage and will try to make a deal with Hall for oil and fuel."

"Drop me a line and let me know if you are coming over."

On December 10th following, Turben again wrote Douglass, the material parts of the letter being as, follows:

"I have gotten this block in pretty fair shape, but it has been a hard job, although it has not cost much actual money.

"I am inclosing a plat as I have it leased; that marked in black is the first block taken; that in red is the second block taken; the ones in blue I have in my possession; and the ones marked with a cross I am getting as well as about 6 other quarter sections.

"We have to be started by the 17th of January on the first block; the other I have till the 8th of June, 1916, and can take them down by paying a quarterly rental of \$40.00 to the quarter section.

"I am ready for your men and hope to see you over here with them very soon. I think we can make arrangements to get oil for fuel that will not cost over one dollar or one dollar and a quarter."

According to the plaintiff's testimony, when the contract was made to enter upon the venture, it was understood and agreed that all of the leases that did not have to be assigned or sold for the purpose of drilling the test well were to become the joint property of the contracting parties and after the leases were acquired he made efforts to have a test well drilled and immediately took the matter up with some Kansas City people, who had promised to go down and look over the proposition, and with reference thereto on January 3d, addressed the following letter to Turben:

"I am expecting to get out to Lawton with my Kansas City people Thursday or Friday of this week. I will leave here Tuesday for Limestone Gap where I am drilling my well and be there for a couple of days and come from there to Lawton. I hope you have everything in shape, and that we can get the well started at once"

—and on January 7th addressed the following letter to Turben:

"I mailed you letter a few days ago, telling you I would be at Lawton the last of this week, but my K. C. people have disappointed me in getting down here and I don't know just what to say to you. I know you have got to get started on that block of leases by the 17th. I have not got my well finished yet and can't tell just when I will but within a week or ten days. I just can't leave here at this time. You do whatever you think best about that proposition out there. I will come out and join you just as soon as I can get finished here. Write me here at Limestone Gap. Tell Mr. Cassin I can't get out there for a few days."

On January 6, 1916, Turben telegraphed from Strawn, Tex., to Douglass at Okmulgee, Okla., as follows:

"Time on leases are getting short. Have financed deal and will be drilling by the time set forth in lease. Sorry I did not hear from you sooner."

Besides the above letters, which were introduced in evidence, plaintiff said he remembered writing a letter addressed to the defendant in Texas, in which he told the defendant to go ahead and do the best he could with the proposition, to obtain the leases and get things started and to draw on him for his part of the deal. During the times covered by the correspondence Douglass was engaged in drilling a wildcat well near Limestone Gap, Okla., and after Turben advised him that he had financed the deal and would be drilling within the time specified in the leases he did not pay any particular attention to the proposition until March, 1916, when he returned to Lawton and first discovered that the leases had not been taken in their names jointly, but were in Turben's name only. He testified that on discovering this fact he inquired of Turben why the leases had been taken in this manner, and Turben replied it was in order to make assignments promptly in the event he made arrangements for a test well for part of the leases. About two days after this conversation Turben refused to assign any of the leases to Douglass, stating that Douglass was not entitled to any interest in the leases, since he had not put anything into the deal. Douglass also testified that, in addition to about 15 months' time spent in the vicinity of Lawton in investigating the prospects of the territory and his own expenses, he paid the geologist \$25 a day for his services and his expenses, which included \$20 a day for a car and his hotel bill at the rate of \$2 per day. Douglass further testified that Turben had never asked him for any money or expenses, and that he was at all times ready, willing, and able to pay whatever his part was and to carry out his part of the agreement.

Turben corroborated the plaintiff with reference to the correspondence, their meeting at Okmulgee, and their trip to Lawton for the purpose of looking over the territory with a view of securing leases, but denied that the particular leases in controversy were specially mentioned or in contemplation by the parties before they reached Lawton, and said the acreage which they had discussed was northeast of Lawton, in a different location. Turben testified that the morning after they arrived in Lawton they went to Mr. Cassin's office, and from there he and Douglass, Cassin, and a geologist named Fisher, went out east of Lawton and spent two days in looking over the acreage in that locality, but that Douglass declined to drill a well at that place, assigning as his reason that the geologist did not make a favorable report; that the first time defendant heard anything about the acreage involved herein was when Cassin spoke to him about it three days after they arrived in Lawton; that at that time Mr. Cassin called Anderson over the telephone and advised him that he had a man (Turben) who might be interested in leases in the

locality where the leases in controversy were subsequently acquired; that witness went out with Anderson, and with his assistance had a meeting of the farmers of the community, which resulted in the taking of 14 leases in what defendant denominated the first block; that later they took other leases in that vicinity, and that, in addition to his time, defendant paid a man \$5 a day to drive him over the country while he was engaged in acquiring the leases. The first leases acquired by Turben in his own name were put up in escrow with an agreement that he was to commence drilling a well on or before January 17th. According to Turben's testimony, he saw Douglass at Lawton the afternoon of the first day after he went to the Anderson community, and informed him that he could get the leases, and inquired of Douglass whether he could get the money to drill with after the leases were secured, and that Douglass replied that he would, and that he then agreed to give Douglass an interest in the leases if he would procure some one to drill them. Continuing, the defendant testified that Douglass did not procure any one to drill the test well, and that after he had vainly endeavored to get other parties to drill he finally got a man named Rogers to assist him, who gave him two checks, one for \$225 and one for \$100, to be used for this purpose. Turben had some previous acquaintance with a Mr. Thompson, who lived and was at that time in Pennsylvania, and, after securing the checks from Rogers, he began negotiations by telegraph with Thompson, which resulted in Thompson agreeing to let Turben have some tools, which were then at Strawn, Tex., in consideration of Turben assigning to him some of the leases. Turben went to Strawn, Tex., and shipped the tools to Walters, Okla., where they arrived about January 11th, but when he started to unload them he received notice from the bank that Rogers' checks had gone to protest, and as he had deposited the checks to his own account and checked thereon for \$177 for freight, his check also went to protest, which necessitated his making other arrangements for the payment of the freight. Turben says that it was when he had perfected arrangements for the tools that he sent Douglass the telegram from Texas and advised Douglass that he had financed the deal and could commence drilling on time. Turben commenced the well on the 15th of January and testified that about the 17th of January, being unable to finance the proposition any further, he procured Cassin to call Douglass over the telephone informing him of the situation and asking his advice about going ahead with the deal, and requesting that he get money to continue drilling; that he did not get any help from Douglass, but obtained about \$2,000 in cash from Thompson, in addition to the tools, which enabled him to drill about 260 feet by March. Being unable to finance the proposition further, he stopped

drilling operations some time in March, and subsequent thereto, through a Mr. Shaw, who represented John C. Keys, one of the defendants herein, Turben negotiated a deal with Keys by which, in consideration of an assignment of a large part of the acreage to him, Keys agreed to and did complete the well. It produced gas in paying quantities.

Cassin testified to having had the conversation with Douglass over the telephone, and stated that Douglass declined to put up any money, and, although Douglass admitted having had some conversation with reference to the leases, denied that he refused to put up any money.

It is apparent that there is a sharp conflict in the testimony of Douglass and Turben as to a material part of their agreement; the gist of Turben's testimony being to the effect that they were to be joint owners of the leases in controversy only on the condition that the plaintiff should drill or procure the drilling of a test well, and the gist of Douglass' testimony being that the agreement was to secure the wildcat acreage in the locality where it was acquired, and that, after selling or assigning sufficient acreage to procure the drilling of the leases, the contracting parties were to be jointly interested in the remainder. The facts which are not disputed, including the letters and telegrams in the record, in our opinion, clearly support plaintiff's theory of the case, and the judgment of the trial court is not only not clearly against the weight of the evidence, but is in accord therewith. We have not overlooked the fact that the defendant endeavored to explain the letters, and particularly the language therein that indicates they were both interested in the proposition, but since the trial court, after hearing this explanation and all the other evidence relating to and surrounding the transaction, found for the plaintiff, we would not be justified in holding that such finding is clearly against the weight of the evidence.

We are impressed with the earnestness of counsel's argument that the plaintiff, Douglass, if permitted to prevail in this case, will reap a bountiful harvest where he has not sown, but we are unable to view the case in this light. It would be impossible to demonstrate with mathematical precision in just what proportion each party contributed to the success of the venture they voluntarily entered into, for, while neither contributed much in money, Douglass contributed his experience as an oil man, what he had paid the geologist in investigating the possibilities of the territory, and his knowledge of the conditions in that locality, and Turben, after he was made acquainted with the conditions in the prospective field through the efforts of Douglass, pursued the project with commendable zeal, overcoming many difficulties which in all probability would have deterred a less resolute man. However, at the same time Douglass was also working on the propo-

sition and was endeavoring to secure the Kansas City people to drill the test well. Without Douglass' experience and knowledge Turben's attention would never have been directed to the project which was carried on to such a successful conclusion. It was through Douglass' efforts that Turben came to Oklahoma and became interested in the project, without which he might still be laboring in less profitable fields. As is disclosed by Douglass' testimony in this case, the pathway of the wildcatter is not always strewn with flowers nor his efforts crowned with success, and we think it is nothing but right, as the trial court found, that the plaintiff and defendant should share equally according to their contract in the successful venture.

[4] Complaint is also made of that part of the court's judgment which decreed that the plaintiff was the owner of an undivided one-half interest in a 40-acre lease held by the defendant Keys. The record reveals that this lease was first assigned prior to the institution of the suit by the defendant Turben to one Anderson as collateral security for a loan made to the defendant, the proceeds of which were used to pay freight on machinery, and about 9 months after the institution of the suit defendant Turben sold the lease to Keys for \$125. Such sale and assignment having been made pendente lite, the defendant Keys acquired no greater rights therein than Turben had at the time of the assignment, and there was no error in the court's judgment in this respect. *Baker v. Leavitt et al.*, 54 Okl. 70, 153 Pac. 1099; *Guaranty State Bank of Okmulgee v. Pratt et al.* (No. 9167) 180 Pac. 376, handed down April 15, 1919, but not yet officially reported.

We do not hold that the plaintiff is not liable for his proportionate share of the expenses incurred by the defendant in promoting the venture, but the defendant in his pleadings did not ask that the plaintiff reimburse him for any part of this expense, although the plaintiff had offered to do equity and to pay whatever sum that was justly chargeable against him.

The judgment is affirmed.

SHARP, HARRISON, McNEILL and PITCHFORD, JJ., concur.

PROBST et al. v. BEARMAN. (No. 10456.)
(Supreme Court of Oklahoma. June 24, 1919.
Rehearing Denied Sept. 23, 1919.)

(Syllabus by the Court.)

1. JURY §14(6) — TRIAL BY JURY UNAUTHORIZED IN SUIT TO CANCEL OIL LEASE AND FOR ACCOUNTING.

In an action for cancellation of an oil and gas lease, where an accounting for the oil and

gas produced during the litigation is ancillary to the main cause of action, parties brought into the action by supplemental bill for the purpose of the accounting are not entitled to trial by jury.

2. EQUITY §39(2) — WHEN ACCOUNTING NECESSARY WILL SETTLE ENTIRE CONTROVERSY.

Where a court of equity assumes jurisdiction of the controversy on some ground other than the accounting involved, it will, as a general rule, where an accounting is necessary for full settlement of the controversy, proceed to decree it, and will settle the whole controversy, even to the extent of adjudicating matters of purely legal cognizance.

3. LIMITATION OF ACTIONS §65(2) — LIS PENDENS §26(2) — LIMITATIONS DO NOT RUN IN FAVOR OF BUYER OF OIL PENDING SUIT TO CANCEL LEASE.

Where oil and gas is purchased pending a suit to cancel the lease under which same is produced, by parties having knowledge of such litigation and of the purpose of the adverse party to insist upon his rights, the statute of limitations does not begin to run against the right to compel such purchasers to account for the oil and gas until the final determination of the suit-canceling the lease.

4. ACTION §50(7) — IN SUIT TO CANCEL OIL LEASE PARTIES PURCHASING OIL KNOWING OF SUIT MAY BE JOINED FOR ACCOUNTING.

In an action for cancellation of an oil and gas lease, and where an accounting of oil and gas produced pending the litigation is ancillary, all parties producing and purchasing such oil and gas with notice may be joined in a supplemental bill for accounting.

5. TROVER AND CONVERSION §1 — "CONVERSION" DEFINED.

"Conversion" is any distinct act or dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion.]

6. TROVER AND CONVERSION §30 — WHEN ONE CONVERTING PROPERTY SELLS TO ONE WITH KNOWLEDGE, BOTH JOINTLY LIABLE.

Where one who converts property sells it to another who has knowledge of the conversion, the buyer and seller may be sued jointly for the conversion.

7. LIS PENDENS §26(3) — COST OF IMPROVEMENTS TO PURCHASER PENDING SUIT TO CANCEL LEASE NOT ALLOWED.

The cost of improvements and operations incurred by the holder of an oil and gas lease, purchased pendente lite and with actual knowledge of the adverse claim, and of the purpose of such party to insist upon his rights and to obtain redress for the invasion of such rights, will not be deducted, when requiring such holder to account to the successful adverse party for oil and gas produced and sold from the premises.

Error from District Court, Tulsa County; Owen Owen, Judge.

Suit for injunction by the Dux Oil & Gas Company against one Wilson, with intervention by J. A. Bearman, and judgment for the Dux Oil & Gas Company, which on Bearman's appeal was reversed and remanded, with direction to enter judgment for Bearman and for an accounting, whereupon he filed a supplemental petition, bringing in George C. Probst and others for an accounting, etc. Judgment for Bearman, and Probst and others bring error. Affirmed.

Ralph E. Campbell, of Tulsa, for plaintiffs in error Cosden & Co. and Cosden Pipe Line Co.

O. R. Thurwell, of Tulsa, for plaintiff in error Misener.

Blake & Rosenstein, of Tulsa, for plaintiffs in error Probst, Morrison, and Ernsberger.

W. A. Sipe and J. P. O'Meara, both of Tulsa, for defendant in error.

OWEN, C. J. This action was commenced by the Dux Oil & Gas Company against Wilson, praying an injunction to restrain interference with its exploring and developing certain oil lands under an oil and gas lease executed by Wilson. Bearman intervened in the action, praying a cancellation of the lease under which the oil company claimed, and for injunction restraining interference with his development of the premises under a subsequent lease executed by Wilson. From a judgment in favor of the Oil Company, Bearman appealed to this court, and secured a reversal of the judgment. The cause was remanded, with directions to enter judgment for Bearman for the oil and gas produced on the premises pending litigation, and for an accounting for that purpose. 166 Pac. 190. Bearman then filed a supplemental petition, bringing the plaintiffs in error into the action, demanding an accounting of the oil and gas taken from the premises, and for judgment for the value of same. From a judgment in his favor, plaintiffs in error prosecute this appeal.

To reverse the judgment it is urged the court erred: (1) In denying a trial to a jury; (2) in denying the plea of limitations; (3) in overruling demurrers for misjoinder of causes of action; (4) in rendering judgment for the highest market value of the oil at any time between the taking and the time of trial; (5) in denying plaintiff in error Misener the right to remove improvements made on the premises in the development and operation pending the litigation.

[1] Plaintiffs in error claim as assignees and purchasers from the Dux Oil & Gas Company, and contend, in so far as the action concerns them, it is one for the recovery of money, and they were entitled to a trial by jury under the provisions of section 4993, R. L. 1910.

The purpose of the action was the cancellation of an oil and gas lease and for injunc-

tional relief, of purely equitable cognizance. Accounting for the oil and gas produced during the litigation is ancillary to the main cause of action. To succeed it was necessary for Bearman to cancel the lease under which the Dux Oil & Gas Company was developing the premises. When he succeeded in cancelling that lease, his right to the oil and gas produced on the premises during the litigation followed as a natural sequence. It was not an action for the recovery of money within the meaning of the statute, and the parties required to account for the oil and gas taken from the premises were not entitled to a trial by jury. Hogan et al. v. Leeper, 37 Okl. 655, 133 Pac. 190, 47 L. R. A. (N. S.) 475; Success Realty Co. v. Trowbridge, 50 Okl. 402, 150 Pac. 898; Brush v. Boyer, 104 Kan. 168, 178 Pac. 445.

[2] Where a court of equity assumes jurisdiction of an controversy on some ground other than the accounting involved, it will, as a general rule, where an accounting is necessary to a full settlement of the controversy, proceed to decree it, and will settle the whole controversy, even to the extent of adjudicating matters of purely legal cognizance. Guaranteed St. Bank v. D'Yarnett, 169 Pac. 639; 1 C. J. 616; Murray v. Speed, 54 Okl. 31, 153 Pac. 181.

[3] Pending the litigation, the Cosden Companies and the Arrow Gasoline Company purchased oil and gas from the Dux Oil & Gas Company and its assignees, the other plaintiffs in error. When these parties were brought into the action by the supplemental bill, more than two years had elapsed since the oil had been purchased by them. The contention is made that the action was not begun against them until the supplemental petition was filed, and the cause of action was therefore barred by the statute requiring civil actions, other than for the recovery of real property, to be brought within two years. It appears these parties had both actual and constructive notice of the litigation, and that Bearman claimed under the subsequent lease from Wilson. Having purchased with such notice, they had no greater rights than the Dux Oil & Gas Company, their vendor. The statute of limitation did not begin to run against Bearman until the final determination of his action to cancel the lease under which the oil company was in possession of the premises. His right to an accounting followed the cancellation of that lease. In the case of Walden et al. v. Bodley's Heirs et al., 9 How. 35, 13 L. Ed. 36, it was said:

"Where a defendant in ejectment alien the property in dispute whilst the proceedings are pending, a possession by the vendee will not justify a plea of the statute of limitations."

In the case of City of Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263, it was urged the action to recover

damages for taking land was barred by the statute of limitations, for the reason that such action was not brought within the statutory period from the time of the taking. There had been condemnation proceedings, and it was held an independent action to recover damages for the taking could not be brought, where an appeal from condemnation proceedings was pending, and for that reason the statute did not run. In the case of *Less v. English*, 75 Ark. 288, 87 S. W. 447, in a suit to foreclose a trust deed, it was held the intervenor's subsequently acquired title could not affect the right of foreclosure under the mortgage, and the statute of limitation could not be pleaded in support of same. In the case of *Hovey v. Elliott*, 118 N. Y. 124, 23 N. E. 475, it was said:

"Where the purchasers of bonds, pending a suit to establish a lien upon them, sell the same again, the statute of limitations does not begin to run against the lien claimant's right to compel such purchasers to account for his interest in the bonds until the final determination of the suit establishing his lien."

"[4-6] It is contended that, as against the plaintiffs in error who were, as they claim, merely purchasers of the oil, and their co-plaintiffs claiming an interest in the premises as assignees of the Dux Oil & Gas Company, Bearman had two entirely separate and distinct causes of action; one being for the conversion of the oil after it was produced, the other for injunction and cancellation of the lease. Bearman's cause of action against the Dux Oil & Gas Company was for cancellation of the lease and for injunction. When he prevailed in that cause of action, it was necessary to have an accounting of the oil and gas produced on the premises during the litigation in order that he have complete equitable relief. In such circumstances it is not necessary that the claim against each party must affect every other party to the action. It is not separate causes of action, but one cause of action against all parties who participate in the conversion. In the original action the Dux Oil & Gas Company was held to have no interest in the premises and no right to produce or appropriate the oil or gas. Such an appropriation amounted to conversion. Conversion has been held to be any distinct act or dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. *McClintock v. Parish*, 180 Pac. 689; *Sivils v. Aldridge*, 162 Pac. 198. When the one who converts property sells it to another, who had knowledge of the conversion, the buyer and seller may

be sued jointly for the conversion. *Ex parte Railroad Co.*, 95 U. S. 221, 24 L. Ed. 355; *United Shoe Machinery Co. v. Holt*, 185 Mass. 97, 69 N. E. 1056.

[7] Counsel for the Cosden Companies urge that judgment should not have been for the highest market value of the oil and gas purchased, for the reason the cause of action against these companies was not prosecuted with reasonable diligence, taking the position that Bearman's cause of action arose when the oil was purchased. Under the provisions of section 2875, R. L. 1910, the damage caused by wrongful conversion of personal property is presumed to be, when the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the trial. When brought into the action as defendants, having purchased pendente lite and with actual notice, the purchasers must be treated as defendants from the time of commencement of the action. *Hovey v. Elliott*, supra.

Misener, claiming under the Dux Oil & Gas Company, having notice of the litigation and of Bearman's claim and his purpose to insist upon the rights conferred by his lease, and to obtain redress for the invasion of those rights, cannot recover for improvements made on the premises pending litigation. In the case of *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, it was held the cost of improvements and operation incurred by the holders of an oil and gas lease could not be deducted in an accounting to the holders of a prior lease, where such improvements were made after notice of the prior lease, and of the purpose of the holders to insist upon the rights conferred by it. In the case of *Central Coal & Coke Co. v. Penny*, 173 Fed. 340, 97 C. C. A. 600, it was held that one who willfully, or with reckless disregard of the rights of another, takes his property and appropriates it to his own use, must respond to the owner for the value of the property without deducting for labor bestowed or the expenses incurred in removing or preparing it for market. In 25 Cyc. 1484, it was said:

"A purchaser pendente lite from a party of property in litigation is not entitled to improvements made by him upon the property as against the successful adverse party."

The judgment of the lower court is affirmed.

KANE, RAINEY, HARRISON, and JOHNSON, JJ., concur.

WICHITA FALLS & N. W. RY. CO. v. J. J. BROWN CO. (No. 9327.)

(Supreme Court of Oklahoma. May 27, 1919.
Rehearing Denied Sept. 30, 1919.)

(Syllabus by the Court.)

1. CARRIERS —86—MUST DELIVER FREIGHT TO CONSIGNEE AT HIS ADDRESS.

Under section 821, Rev. Laws of 1910, in order for a railway company to absolve itself from liability as an insurer of goods transported by it, it must deliver the property to the consignee at the place to which it is addressed, in the manner usual at that place.

2. CARRIERS —88, 114 — ON DELIVERY OF COTTON TO COMPRESS COMPANY AND RETENTION OF TICKETS THERE WAS NO DELIVERY TO CONSIGNEE.

In an action for cotton destroyed by fire after delivery to an independent compress company, with which consignee had made arrangements to receive the goods from the railway company, and where it is shown that the customary way of making delivery was for the railway company to unload the cotton at the compress, to receive from the compress company cotton tickets identifying each bale by weight, number, etc., and to take said tickets to plaintiff's agent, who, upon surrender of the tickets, would pay the freight charges and surrender the bill of lading for said cotton to the railway company, and where it is shown that the consignments of cotton in controversy were promptly unloaded by the railway company, the compress tickets delivered to the railway company on the same day, and plaintiff's agent had been advised by the railway company that the cotton had been unloaded and that the company had the tickets, and upon his request the agent of the railway company promised to bring the tickets to the bank and turn them over to plaintiff's agent, but neglected to do so, held, since the railway company retained the tickets for its own convenience and benefit, and that since the plaintiff could not secure the cotton, as a matter of right, without the tickets which represented the actual cotton, the railway company had not made delivery of the cotton in the manner usual at that place, and delivery not having been completed at the time of the fire, the relation of carrier and shipper still existed, and the railway company was liable to the plaintiff, as insurer, for the loss of said cotton.

Harrison, J., dissenting.

Error from District Court, Cotton County; Cham Jones, Judge.

Action by the J. J. Brown Company against the Wichita Falls & Northwestern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. C. Huff, of Dallas, Tex., Robinson & Whiteside, of Altus, Mounts & Davis, of Frederick, and Locke & Locke, of Dallas, Tex., for plaintiff in error.

John M. Young and Johnson & Stevens, all of Lawton, for defendant in error.

RAINEY, J. The J. J. Brown Company, as plaintiff, recovered judgment in the district court of Cotton county, Okl., against the Wichita Falls & Northwestern Railway Company, in the sum of \$14,742.73, to reverse which the railway company has commenced this proceeding in error. For convenience, the parties to the action will be designated plaintiff and defendant, respectively, as they appeared in the trial court.

The material facts of the case as developed at the trial are substantially as follows:

The plaintiff company, at the time of the transactions hereinafter mentioned, was engaged in buying, selling, and shipping cotton, and had its principal place of business at Lawton, Okl. Through its agents it frequently purchased cotton in small towns in lots from ginner, merchants, and others, and on November 5, 1915, it bought 242 bales of cotton from the Simmons Gin Company, said cotton consisting of three lots; 27 bales were transported over the defendant company's line of railway from Loveland, 115 bales from Hollister, and 100 bales from Grandfield, all of said stations being in Oklahoma; and all of said cotton was consigned to Altus, Okl. The seller delivered the cotton to the railway company for shipment to Altus, and received from said company a shipper's order bill of lading with a notation thereon "Notify J. J. Brown Company." This bill of lading was indorsed by the Simmons Gin Company to the plaintiff and was sent to the First National Bank of Altus, Okl., with draft attached for the purchase price of said cotton; the plaintiff having made arrangements with said bank to handle its account. The plaintiff had theretofore given general directions to the railway company to deliver all cotton consigned to it to the Interstate Compress Company at Altus, which was the only compress at said place, and where it was concentrated, weighed, and sampled preparatory to reshipment, according to a custom which had been in existence for several seasons.

The undisputed evidence is that this customary way of handling cotton shipments at Altus was as follows: Immediately upon the arrival of the cotton the railway company would make out its expense bills and from these unloading slips would be made to the compress. The car of cotton would thereupon be placed at the compress by the railway company for unloading; the railway company's cotton clerk would present the unloading slips to the compress company for signature; the compress company would then issue compress tickets identifying each bale by weight, number, etc., which it would hand to the cotton clerk for transmission to the local office of the railway company. These tickets would be turned over to Mr. T. D. Utt, cashier of the defendant railway company at Altus. The compress tickets would then

be placed with the expense bills and would be ready for delivery upon surrender of the original bill of lading and the payment of the freight charges. According to arrangements previously made, the bills of lading would be at the First National Bank as plaintiff's agent; said bank being authorized by plaintiff to deliver the same and pay the freight charges. The railway company's cashier, soon after receiving the cotton tickets from the compress company, would take them to the bank, where the cotton tickets would be counted, and if they corresponded with the number of bales on the bill of lading the bank would surrender the bill of lading and pay the freight charges upon receipt of said tickets. On several occasions the compress tickets would not be ready for the cotton at the time it was unloaded, and sometimes the party handling the cotton for the railway company, on account of other duties to perform, would not wait at the compress for the tickets, but the compress would notify the party as soon as they were made out and then some employé of the railroad company would go to the compress for the tickets. Sometimes on account of the heavy volume of business this person would delay going to the compress for the tickets. The compress tickets were usually taken to the bank on the day the cotton arrived, but on a few occasions they were not delivered to the company's local agent until after his customary time of going to the bank, which was shortly before 4 o'clock of each day; from 4 p. m. to 6 p. m. he was busy selling tickets for two trains which kept him at the ticket window practically all the time until after 6 o'clock p. m. If Mr. Henry, the cashier, was at the bank after this time the agent would take the tickets to him then, but frequently he was not at the bank after 6 p. m. and the tickets would not be delivered to him until the following day.

It was customary for the compress company, after receipt of the cotton stored with it, to sample and weigh and re-mark the same; and the samples and weight sheets were immediately transmitted to the plaintiff at Lawton. The compress company would not deliver the cotton to the plaintiff nor to its order, except upon surrender of the compress tickets, but would deliver the cotton to any one in possession of the tickets after the freight and other charges had been paid. In the instant case the draft drawn by the Simmons Gin Company on the plaintiff for the 242 bales of cotton was paid by the First National Bank of Altus for the plaintiff on November 13, 1915. Of the three consignments of cotton, the one shipped from Grandfield and the one shipped from Hollister reached Altus about 5 p. m., November 12, 1915, and immediately upon arrival were delivered by the railway company to the Interstate Compress Company, and the compress receipts and tickets were delivered by the compress

company to the railway company on the same day. The consignment from Loveland reached Altus on November 15, 1915, and was delivered by the railway company to the compress company about 11 o'clock a. m., and the compress receipts and tickets were delivered by the compress company to the railway company at the time the cotton was unloaded. The compress company immediately tagged, weighed, and sampled each bale in the three consignments and transmitted the samples and weight sheets to the plaintiff at Lawton, 200 of which were received by the plaintiff on November 14th, and the remainder on November 16th.

On the same day the plaintiff purchased the cotton from the Simmons Gin Company it contracted to sell 500 bales of cotton to the Japan Cotton Trading Company, of Ft. Worth, Tex., and agreed to deliver as a part of said contract the identical 242 bales herein involved. This transaction was carried on through oral negotiations between Mr. Brown and one Hardin, as agent for the Japan Cotton Trading Company, and the contract was confirmed a few days later in writing by both principals. On November 15th, the plaintiff and the agent for the Japan Cotton Trading Company examined the samples and weight sheets received from the compress company and agreed upon the grades of the cotton, invoices describing each bale were made out, and the invoices and samples were delivered by the plaintiff to the agent of the Japan Cotton Trading Company; the samples being sent by express to said company's office at Ft. Worth, Tex. The purchaser issued two drafts to the plaintiff in payment of said cotton; it being agreed and the drafts specifying that the compress tickets should be attached to the drafts. The plaintiff forwarded these drafts to the First National Bank of Altus, Okla., with instructions to the bank to surrender the bills of lading to the railway company, pay the freight charges, secure the compress tickets from the railway company, attach same to the drafts given plaintiff by the Japan Cotton Trading Company, and to forward the same to Ft. Worth, Tex., to be presented to said company for payment. On November 16, 1915, upon receipt of these drafts, Mr. Henry, cashier of the bank, called Mr. Utt, the cashier of the defendant railway company at Altus, over the telephone, and upon inquiry was advised by him that the railway company had delivered the cotton to the compress company on November 12th and 15th, respectively, and had the compress tickets. Mr. Henry then requested said cashier to bring the tickets to the bank and notified him that the bank was ready to surrender the bills of lading and to pay the freight charges for the plaintiff. Mr. Utt promised to do this, but he had neglected so to do up to 7 o'clock of the evening of that day, at which time the Interstate Compress Company was destroyed by fire; the fire

consuming a large quantity of cotton, including the 242 bales herein involved. On the morning next after the fire the plaintiff and Mr. Hardin, as agent for the Japan Cotton Trading Company, classified the remaining 42 bales of cotton. On the 18th, following, J. J. Brown, the manager of the plaintiff company, went to Altus and, upon ascertaining that the bank had not received the compress tickets for the 200 bales of cotton and had not surrendered the bills of lading and paid the freight charges, went to the defendant company's local agent, a Mr. Post, tendered said bills of lading and payment of the freight charges, and demanded the compress receipts and tickets, whereupon said agent refused to surrender the same, assigning as his reason therefor that he had already made his report of the loss to the insurance company with which the railway company carried insurance, and had also received instructions from Mr. C. L. Fontaine, the defendant company's general freight agent, not to deliver any more compress tickets. Mr. Brown at once called Mr. Fontaine over long distance telephone at Wichita Falls, Tex., and offered to pay the freight charges, surrender the bills of lading, and to release the company from liability if it would surrender the compress tickets, explaining that it was necessary to have the cotton tickets in order to make delivery and to receive payment from the Japan Cotton Trading Company. Mr. Fontaine declined to surrender the tickets and advised Mr. Brown that the defendant company had reported the cotton consumed by the fire to the defendant's insurance company as the defendant company's loss, and stated that he was afraid the surrender of the tickets would complicate the situation and might jeopardize the defendant company's entire claim against the insurance company (the claim included a large quantity of cotton consumed in the same fire), but that the railway company would push the claim to a prompt settlement with the insurance company. In the same conversation Mr. Fontaine promised to pay plaintiff for the cotton within a short time—not more than two or three weeks—at the same time assuring Mr. Brown that the defendant's money was as good as the Japan Cotton Trading Company's money. For some time thereafter the defendant continued to treat the loss as its own and endeavored to secure a settlement with the insurance company. The evidence further shows that thereafter the Japan Cotton Trading Company undertook without success, to collect the value of said cotton from its insurance company, and later filed a claim with the defendant railway company for the value of said cotton, which claim was rejected on the ground that the shipment had been completed and delivery made to the plaintiff prior to the fire, and that therefore the defendant company's liability as a common carrier had ceased. The

railway company finally denied liability, whereupon plaintiff instituted this action.

[1, 2] We are confronted, first, with the proposition whether under the foregoing state of facts the railway company is liable as an absolute insurer of the cotton. In this state the liability of a common carrier for loss of freight that it undertakes to transport for a shipper is governed by sections 815, 820, 821, 822, 823, and 824, which read as follows:

"815. Unless the consignor accompanies the freight and retains exclusive control thereof, a common carrier of property is liable, from the time he accepts until he relieves himself from liability as hereinafter provided, for the loss or injury thereof from any cause whatever, except: First, an inherent defect, vice or weakness, or a spontaneous action of the property itself; second, the act of a public enemy of the United States, or of this state; third, the act of the law; or, fourth, any irresistible superhuman cause."

"820. When the directions of a consignor and consignee are conflicting, the carrier must comply with those of the consignor in respect to all matters except the delivery of the freight, as to which he must comply with the directions of the consignee, unless the consignor has specially forbidden the carrier to receive orders from the consignee, inconsistent with his own."

"821. A carrier of property must deliver it to the consignee at the place to which it is addressed in the manner usual at that place."

"822. If there is no usage to the contrary at the place of delivery, freight must be delivered as follows: First. If carried upon a railway owned and managed by the carrier, it may be delivered at the station nearest the place to which it is addressed. Second. In other cases, it must be delivered to the consignee or his agent personally, if either can, with reasonable diligence, be found."

"823. If, for any reason, a carrier does not deliver freight to the consignee or his agent, personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest post office."

"824. If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, on account of the consignee, and giving notice thereof to him."

It is admitted that the fire which consumed the cotton in controversy was not in any way attributable to the negligence of the railway company, so whether the defendant is liable as an insurer for the loss of the cotton depends upon whether it had made delivery to the plaintiff; and since the undisputed evidence shows that there was a well-established custom at Altus known to and practiced by the parties relative to the

delivery of consignments of cotton, we must determine whether delivery was made by the carrier to the consignee at Altus "in the manner usual at that place." According to the evidence, the Interstate Compress Company performed certain services for the plaintiff with reference to weighing, sampling, and marking the cotton, for which the plaintiff paid it a fixed compensation of 15 cents per bale, and said compress company was therefore plaintiff's agent in performing such services. The plaintiff had also given instructions to the railway company to deliver the cotton to the compress company, and this would constitute the compress company plaintiff's agent for the purpose of receiving the cotton. The compress company, however, was an independent concern and performed different services for various parties. For convenience in reshipping, when desired by the owner, the railway company would have the cotton compressed and would pay the compression charges, but would add this expense to the outgoing freight bills. It is also conceded that the railway company had made delivery of the actual physical cotton to the compress company, but it had not delivered the compress tickets to plaintiff, or plaintiff's agent, the First National Bank. The precise question for determination, then, is: Was delivery complete while the railway company still retained the cotton tickets, or was the delivery of said tickets requisite in order to complete delivery?

There are many cases cited in the brief filed by the defendant to the effect that a carrier absolves itself from liability when it makes physical delivery of freightage, and, although we have read these cases and carefully considered the facts of each case and the application made of the principles of law therein announced, we do not deem it necessary to fully distinguish the cases so cited from the case at bar. The conclusion we have reached, both upon principle and authority, is that the mere physical transfer of the cotton from the railway company to the compress company did not constitute such completed delivery as would relieve the railway from its stringent liability as an insurer. One of the important circumstances we have taken into consideration is that the railway company in unloading the cotton at the compress did not divest itself of all power and dominion over it, and the possession thereof, together with the right of control, did not immediately pass to the consignee. With reference to the delivery of personal property, it has been generally held that to constitute a good delivery, whether actual or constructive, the seller must divest himself of all power and dominion over the property sold, and in order to do this it is necessary for him to part with possession of it and to surrender all right and authority to control it; and it has been held that the "mere dis-

charge" of a cargo of goods is not delivery, and unless there is a valid substituted delivery the liability of the carrier does not terminate until actual delivery. *The St. George* (D. C.) 95 Fed. 172.

Now, in the instant case, the railway company retained the cotton tickets, which, according to the evidence in the case, represented the cotton itself, and until the plaintiff, or his agent, secured possession of the tickets it could not complete a sale or clear the cotton, but could exercise only a limited dominion over it through the compress company, which was only plaintiff's agent for specified purposes.

Section 821, *supra*, of our Rev. Laws, does not provide that physical delivery alone is sufficient, but that delivery must be made in the manner usual at the place of delivery. According to the custom proved at the trial the compress tickets should have been promptly delivered to the First National Bank as plaintiff's agent, but the railway company retained the tickets for its own convenience and benefit; and it being its duty to deliver the cotton in the usual or customary manner, it cannot be said that delivery was complete until it had fully complied with such custom or usage. Nor is it a sufficient answer to say that the defendant had delivered the cotton to the compress company as directed by the plaintiff, for, although it is true that the plaintiff had so directed, at the same time, it clearly appears from all the evidence in the case that these directions were given in connection with plaintiff's other directions to the railway company to deliver the tickets to the bank, which should have been done promptly upon delivery of the cotton, so that no considerable period of time should have intervened between said acts. This was not only the long-established custom adopted and acquiesced in by the parties, but was the practical construction placed upon the contract between the carrier and consignee.

We think the principle announced by *Moore on Carriers* (2d Ed.) p. 395, is applicable to the facts of this case. We quote therefrom as follows:

"Where goods, after arrival at their destination, have been applied for or demanded, but are refused or detained by the carrier, except where the goods are properly held for freight charges due, the carrier's liability as an insurer of the goods may be extended beyond what would ordinarily be a reasonable time and be continued until a reasonable time after the goods have been offered for delivery to the consignee. The carrier's liability as a common carrier continues without regard to the time the goods may have actually been ready for delivery, where the consignee is prevented, without fault on his own part, from removing and caring for his goods by reason of the failure of the carrier to have the goods ready for delivery; or so placed that they can be unloaded with reasonable conven-

ience; or because of being wrongfully informed by the carrier or its agent, through mistake, on calling for the goods, that they have not arrived, although they have arrived and are stored in the depot or warehouse; or by any similar conduct or wrongful act on the part of the carrier."

Supporting the conclusion we have reached is the case of *Southern Grocery Co. v. Bush*, 131 Ark. 153, 198 S. W. 136, which is very similar to the case before us. That case involved two consignments of cotton which were delivered on November 16 and 26, 1915, respectively, by the railway company at Pine Bluff, Ark., to the Pine Bluff Compress & Warehouse Company, and were destroyed by fire on November 28, 1915, without any negligence on the part of the defendant company in the destruction of the cotton. One of the shipments had been in the warehouse 12 days, of which the plaintiff had received actual notice. The other shipment was received on Saturday before it was destroyed in the afternoon of the following day, and plaintiff had received no notice of its arrival. Both shipments had been actually delivered to the compress company pursuant to general directions from the plaintiff. In that case, like the one at bar, it was agreed that the compress company was engaged in receiving and storing cotton for its customers, on terms agreed on between them, and it was likewise the practice of the compress company to weigh, sample, and mark the cotton, and to transmit the samples immediately to the consignee, which samples were used by the consignee in selling the cotton. It had been the practice for many years for the railway company to issue clearances for consignments of cotton which it had delivered to the compress company. These clearances were equivalent to, and substantially stood in the same relation to the actual cotton as, the tickets in the instant case. It was customary, after the cotton had been checked up and it had been ascertained that the freight had been paid, for the railway company to promptly issue clearances and to deliver the same to the agent of the compress company, whereupon the compress company would issue warehouse receipts to the consignee showing that it held the bales specified for consignee's account. It was also shown in that case that it was the custom of the consignee to send its representative to the office of the freight agent of the railway company to check up with that officer the cotton which had been received in Pine Bluff for consignee, and for this agent of the consignee to pay the freight charges thereon. This agent, upon being advised of the arrival of one of the shipments of cotton, applied daily thereafter at the office of the railway company for the clearances for the cotton until the Saturday before it was destroyed by fire, and tendered the railway company's

freight agent the freight charges due upon the consignment. It was also in evidence in that case that the freight agent knew that the plaintiff's agent desired the clearances in order to obtain warehouse receipts from the compress company, and that under the rules of the railway company, which were well known to the parties, it was essential to have the clearances in order to obtain the warehouse receipts from the compress company. The railway company at all times refused to issue the clearances on account of a discrepancy in the markings of one of the bales, which resulted in the plaintiff being unable to obtain the warehouse receipts. With reference to the case the Supreme Court of Arkansas said:

"It is true that the cotton had been stored where appellant desired it to be stored, and that samples thereof had been furnished appellant. But it is fairly inferable from this testimony that this was tentatively done upon the assumption that appellant would, pursuant to its usual practice, obtain the necessary clearance from the railway company. We think it is not of controlling importance in this case that the cotton was, in fact, stored where appellant would have stored it if no controversy had arisen over the clearance and no difficulty had been encountered in obtaining the warehouse receipt. We think the test is whether the consignee could have removed the cotton had it desired to do so. In other words, was the clearance essential for the actual delivery of the cotton to appellant? Would the compress company have made such a delivery without the production of the clearance as a matter of right, and not as a mere matter of accommodation upon the assumption that the consignee was entirely solvent and responsible and would hold the compress company harmless from any damage resulting from the failure of the compress company to comply with the railway company's requirement? * * *

"Witnesses for appellant who are large handlers of cotton at Pine Bluff testified that the custom of the railway company to require the clearance from it was adopted by the railway company for its own protection and to insure the payment of its freight charges, and that, so far as their experience went, warehouse receipts from the compress company could not be obtained without the exhibition to the compress company of the clearance. We think, therefore, that the jury might have found that, for its own purposes and protection, the railway had adopted a rule, the enforcement of which by its agent rendered the compress company the agent of the railway company until the rule or custom of the railway company had been complied with. It will be borne in mind that the railway company was not withholding its clearance for the purpose of collecting its freight charges, for a tender had been repeatedly made of these charges, but that the basis of its refusal was that the number on one of the bales of cotton did not correspond with the number on the bill of lading. * * *

"Appellee insists with equal earnestness that it cannot be held liable here, both because it had fully complied with its contract for

the carriage of the goods, and because any control it may have retained over the cotton was for the purpose only of enforcing its claim for the freight due on the cotton. In support of this view, counsel cites and relies upon the case of *Arthur v. St. Paul & Duluth R. R. Co.*, 38 Minn. 95, 35 N. W. 718. It was there held that the carrier was absolved from liability as such upon delivering goods to the warehouseman, notwithstanding the direction of the carrier to the warehouseman not to issue warehouse receipts until paid freight bills were presented. But in that case it was said: "The custody of the property had completely passed from the carrier into that of the public warehouseman. All control over or right to it on the part of defendant had ceased, except the right to resort to it to enforce collection of its freight charges in case plaintiffs, after demand, should refuse to pay them. Defendant's directions to the warehouseman that no warehouse receipts should be issued until the paid freight bills were presented imposed no condition upon their issue which is not imposed by clear implication by the statute itself, which provides for the issue of such receipts only upon application of the consignee, accompanied by proof that all transportation or other charges which may be a lien upon the grain, including charges for inspection and weighing have been paid."

"Under the law of that state, warehouses are public warehouses, and the carrier discharged his contract of carriage when he delivered the commodity carried into the possession of one of them, and the conditions which the carrier there imposed were imposed by the law of that state, and did not affect the question of agency. The warehouseman received the goods under the law of that state for the consignee, and the carrier's direction imposed no condition not provided for by the statute, and the parties could not have contracted against the provisions of the law; while here the relation of the parties was fixed by their own acts."

The principal case relied upon by the railway company to support its contention that it had made delivery of the freight is the case of *Arthur v. St. Paul & Duluth R. R. Co.*, 38 Minn. 95, 35 N. W. 718, alluded to by the Supreme Court of Arkansas in the above excerpt and distinguished in it from the case that court then had under consideration. The instant case is likewise distinguishable from the Minnesota case, and we are of the opinion that the Arkansas case is based upon sound principle and is in accord with right and justice. Even Mr. Chief Justice McCulloch, who was of the opinion that the Minnesota case was directly in point and should be followed, in his dissenting opinion in the Arkansas case said:

"The question of liability would be different if there was any proof that appellee had wrongfully refused a clearance and that appellant had failed to get possession of the cotton by reason of such wrongful act, but there is no such proof in this case. It is not shown either that the refusal to give a clearance was wrongful or that appellant would have removed the cot-

ton from the warehouse before the fire occurred."

And it seems to have been his opinion that if there had been any wrongful or negligent act on the part of the carrier and liability asserted on that ground that plaintiff should have recovered. However, we do not base our conclusion on the ground of liability for wrongful or negligent conduct, but hold, for the reasons above stated, that the relationship of carrier and shipper continued until the freight was delivered according to the usual custom at Altus, and that said delivery was not complete, under the facts of this case, until the cotton tickets were delivered to the plaintiff, or plaintiff's agent.

The facts being practically undisputed, the conclusion we have reached makes it unnecessary to consider the remaining assignments of error.

The judgment is therefore affirmed.

OWEN, C. J., and KANE, PITCHFORD, McNEILL, and HIGGINS, JJ., concur.

HARRISON, J., dissents.

JOHNSON, J., not participating.

FEDERAL OIL & GAS CO. v. CAMPBELL (No. 7797.)

(Supreme Court of Oklahoma. Jan. 9, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \S 471(19) — PROOF OF NEGLIGENCE—FACT OR CONCLUSION.

In the trial of an action for damages by a servant against the master for a failure to furnish a reasonably safe place, reasonably safe appliances in which and with which to work, and for failure to employ reasonably competent employees, it is competent for the servant to show every fact essential to support his allegations of negligence, but the same must be shown by facts and not by the statement of mere conclusion.

2. EVIDENCE \S 472(1), 506—FACT OR CONCLUSION—QUESTION OF SCIENCE OR SKILL.

As a general rule, a witness should not be allowed to give an opinion as to the existence of an ultimate fact, but this rule is subject to the exception that when the matter involves a question of science or peculiar skill to such a degree that when the facts in the case are presented in evidence it is impossible for a person of ordinary understanding and experience to draw a proper conclusion therefrom, then it is permissible for one skilled in that science or art to state his opinion, to be drawn from the facts proven.

3. APPEAL AND ERROR \S 1050(1)—PREJUDICIAL ERROR—OPINION EVIDENCE.

The evidence in this case examined, and held, that the facts and circumstances are not sufficient to justify the court to permit opinion

evidence to be introduced, and witnesses should have stated the facts within their knowledge, and not their opinions.

Commissioners' Opinion, Division No. 3. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by D. C. Campbell against the Federal Oil & Gas Co. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.¹

Sherman, Veasey & O'Meara, of Tulsa, for plaintiff in error.

A. O. Harrison, of Bartlesville, for defendant in error.

HOOKER, C. The defendant in error instituted suit against the plaintiff in error in the lower court to recover judgment for personal injuries alleged to have been received by him while in the employ of the company, and it is claimed that the same was due to or caused by the negligence of the plaintiff in error, in that: First, it failed to furnish a reasonably safe place in which to work; second, that it failed to furnish reasonably safe instrumentalities; third, that it failed to furnish reasonably competent and trustworthy fellow servants. The answer of the company pleaded contributory negligence, assumption of risk, negligence of fellow servants, and general denial. Judgment was had in the lower court against the company, and it has appealed here, assigning as error three propositions: (1) The error of the court in refusing to sustain a demurrer to the evidence and refusing to instruct the jury to find for the defendant; (2) error of the court in giving instructions, and refusing to give instructions requested by the company; (3) error of the court in admitting incompetent, irrelevant, immaterial, and improper evidence over the objection of the defendant company.

We have carefully considered the instructions of the court, and are of the opinion that the same fairly present the law of the case to the jury. While they are voluminous and too wordy, we are of the opinion that the rights of the parties were not prejudiced thereby.

[1, 2] It appears from an examination of the record that the court permitted witnesses for the defendant in error, over the objection of the plaintiff in error, to testify to opinions as to the ultimate facts in this case, which were the facts which the jury were required to find, to wit: (1) The safety of the place; (2) the safety of the instrumentalities with which to perform the work; (3) the competency of the fellow servant, Snell, to perform the work assigned to him. And it is contended by the plaintiff in error that on account of this the province of the jury

was invaded, and that the same constitutes prejudicial error here. This question is by no means a new one in this jurisdiction.

This court in the early case of Bilby v. Thomas, 33 Okl. 258, 124 Pac. 1094, said:

"On the examination of witness Hutchinson, who it appears was the salesman who had sold this machinery to the defendant, and whose testimony was of undoubted consequence and weight because of his familiarity with the same, he was asked and permitted to answer in the affirmative, over the objection and exception of counsel for defendant, this question: 'I will ask you to state whether or not the machinery that you sold Mr. Bilby was exactly as represented in the contract which he signed.'

"It is to be noticed that this was the specific, identical question which was presented to the court by the pleadings for the determination of the jury. It does not call for any fact, but calls for a conclusion made up of a large number of facts, and it is not couched in language which will permit the witness to give his testimony, but presents in the language of the attorney the ultimate fact at issue, and requires a simple assent. Thereafter he was asked this question: 'Mr. Hutchinson, now I will ask you that, with proper management, now this warranty that Mr. Bilby signed at the time you sold him this machinery, that with proper management they are capable of doing good work, and in ginning rough and dirty cotton will make a cleaner sample than any other gin now on the market, running under the same conditions, will they do that?'

"To this question there was the objection that it was leading, and called for a conclusion of the witness. The same was overruled, and the witness again answered, 'Yes.' The witness was thereafter asked, referring to the warranty: 'It says that the materials used in their construction are guaranteed to be of the best stock obtainable and the workmanship A No. 1, is that true?'

"The objection made thereto was that it was leading and called for a conclusion. This likewise was by the court overruled, and the witness answered, 'It is.' The ruling on all of these questions was excepted to, and in this court is assigned as error. The purpose of interrogating witnesses concerning issues in a case is to give information to the jury, to the end that a conclusion may be reached in accordance with the facts. Witnesses and evidence are offered for the purpose of establishing facts, and it is for the jury, and not the witnesses or the counsel who interrogate them, to draw conclusions. Encompassed within the questions and answers asked and secured from this witness was the ultimate fact to be found by the jury of whether the machinery was exactly as represented in the contract, and whether with proper management it was capable of doing good work and making a cleaner sample than any other gin on the market, and whether it was constructed of the best stock obtainable and the workmanship thereon A No. 1. If the jury accepted the testimony of this witness—and it had an absolute right to do so, notwithstanding any evidence which may have conflicted with it—their was no room for controversy as to who should recover in the case, for, by securing from the witness his assent to these bald, bare con-

¹ The cause was dismissed on rehearing without opinion.

clusions which covered the entire issue in the case, there was left no room for deliberation and consideration of the evidence of defendant wherein he sought to show that the machinery had failed to meet the demands of the warranty. To two of these questions complained of counsel for plaintiff offer no argument of extenuation in their brief, and in our judgment they are plainly erroneous, and prejudicially so.

"In the case of *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275, the question at issue was whether there had been for two years last past sufficient water in the ditch to irrigate lands which had been previously irrigated by the ditch. A witness was asked this question: 'From your experience as a farmer, and in irrigation in connection with it, is there enough in that ditch now, or has there been for the last two years, to irrigate the lands which have heretofore been irrigated by that ditch?'

"Discussing the objection which was made to this question, the court says: 'This question was objected to: First, on the ground that it did not appear that the witness had knowledge; and, second, because the matter embraced in the question was the question then at issue and on trial. The objection was overruled. The ruling was excepted to, and is assigned for error. Without noticing the first ground of objection, it is clear that the objection was well taken upon the second ground, and should have been sustained. The question was not merely introductory. It embraced the very substance of the issue which the court was then trying; and a categorical answer, such as the question called for, would, if accepted by the court, have been a complete determination of the issue. It is an elementary rule that such questions are inadmissible. We are aware that direct questions are not always to be regarded as objectionable; there are exceptions to the rule, but certainly the foregoing is not one of them. The answer in this case, though not very direct, was of such a sweeping, general, and argumentative character that it is impossible to say that its effect upon the mind of the court was harmless. Counsel should not have taken the risk of such a question. The objection, having been interposed in apt time and terms, should have been heeded, and the question withdrawn or modified. 2 *Best on Evidence*, § 641; 1 *Wharton on Evidence*, § 499, and notes; 2 *Phillips on Evidence*, § 889, and notes.'

"Other authorities supporting the same general rule as announced therein may be noted as follows: 8 *Ency. Plead. & Prac.* 78, 79, and cases under note 1; *Hall v. Goodson*, 32 Ala. 277; *Walker v. Walker's Ex'r*, 34 Ala. 469; *Conner v. Stanley*, Adm'r, 67 Cal. 315, 7 Pac. 723; *Crawford v. Birkins*, 16 Colo. App. 532, 66 Pac. 687; *Old et al. v. Keener et al.*, 22 Colo. 6, 43 Pac. 127; *Denver & Rio Grande R. Co. v. Vitello*, 34 Colo. 50, 81 Pac. 766; *St. Louis, J. & C. R. Co. v. Trustees, etc.*, 43 Ill. 303; *Campbell v. Russell*, 139 Mass. 278, 1 N. E. 345; *Wiggins v. St. Louis, M. & S. Ry. Co.*, 119 Mo. App. 492, 95 S. W. 311; *National Bank of Chelsea v. Isham*, 48 Vt. 590."

Also in *Hicks v. Davis*, 32 Okl. 195, 120 Pac. 260, it is said:

"The first specification of error relied upon by the defendant is that the court erred in refus-

ing to permit witnesses, Harris and Hicks, to testify, as experts, that the gangplank, or runway, from which plaintiff fell and received his injury, was constructed in the same manner as reasonably prudent men, engaged in similar work, erect and construct such runways and gangplanks. The testimony shows that this runway was a very simple affair and was constructed of timbers laid from the car to the ground. It was neither complicated nor technical, but was so constructed that its every detail could be explained and shown to the jury by witnesses who had knowledge of the facts, and after such statement by the witnesses it became and was then a question for the jury to determine whether or not there was negligence in its construction, and whether it met with the requirements of care and prudence demanded under the circumstances of the case. In our opinion this was not a case where expert testimony was proper or competent. In 17 Cyc. 41, the rule laid down is as follows: 'When material or relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is not admissible. The governing rule deduced from the cases permitting the opinion of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject, so as to possess them with a full understanding of it. * * * The precise point of each individual inquiry must be beyond the intelligence of an average jury, and "so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them." * * * If the jury, although presumably devoid at the beginning of a trial of experience concerning a subject-matter, can be so informed during its progress to reach an accurate conclusion, the subject is not one for inference, conclusion, or judgment, and the evidence may be excluded in the discretion of the court.'

"The court did right in refusing to permit these witnesses to be examined in the manner attempted by counsel for defendant. The subject-matter of the inquiry was not one of science or skill, or one which observation and experience had given the opportunity and means of knowledge, rather than descriptive facts; the result of such testimony would have been to permit the witnesses to usurp the functions of the jury, for there was nothing in or about the case which would prevent the jury from reaching a reasonable conclusion, from a consideration of the plain and simple material and relevant facts which had already been presented by the testimony of other witnesses.

"In *Graham v. Pennsylvania Co. (Pa.)* 12 L. R. A. 294, it is said: 'As a general rule a witness is not allowed to give an opinion. The only exception to that rule is that with reference to matters involving questions of science or peculiar skill to such a degree that when the facts in the case have been given in evidence it is impossible for a person of merely ordinary experience to draw the necessary inference from the facts to reach a conclusion in the case; per-

sons having skill in that art or science may be called to see what would be the proper inference to be drawn from the facts proven.' See, also, *Franklin F. Ins. Co. v. Gruver*, 100 Pa. 273; *Cunnell v. Phoenix Ins. Co.*, 59 Mo. 582; *Gavis v. Pac. R. R. Co.*, 49 Mo. 274. In the case of *Graham v. Pennsylvania Co.*, supra, it was also said: 'Opinions of witnesses, expert or other, are not admissible where the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issues can be estimated by all men without special knowledge or training.'

"The law does not look with favor upon the introduction of opinions in evidence. As a rule, witnesses are expected to testify to facts, and it is for the court or jury to draw conclusions and form opinions from the facts thus brought before them, and the general rule as to the admission of expert evidence is that persons having technical and peculiar knowledge on certain subjects are allowed to give their opinion when the question involved is such that the jurors are incompetent to draw such inference. See, also, 12 Am. & Eng. Ency. Law (2d Ed.) 422. This testimony also called for the opinion of witnesses upon simple facts which were the principal questions at issue in the case, and which it was the sole province of the jury to consider and decide. This was not a case where the conclusion, or inference, was one requiring a peculiar quality of skill or judgment, or where from the general and indefinite nature of the injury was not susceptible of direct and satisfactory proof. On the contrary, it was a matter of and concerning which any person of ordinary intelligence and observation could state all the pertinent facts, and where the jurors were amply able to form their conclusion without the aid of opinion or judgment from others. The question of the negligence of the defendant in the construction of this runway was essentially one for the jury, and therefore all the facts of the case should have been submitted to them, and the matter thus left for their determination without the interference of expert or opinion testimony."

See, also, *C. R. I. & P. R. Co. v. Stibbs*, 17 Okl. 97, 87 Pac. 293. In *Ann. Cas.* 1913C, 1077, it is said:

"The general rule is, as stated in the reported case, that where the ultimate fact for the jury is whether the conduct of a certain person was careless, reckless, or negligent it is not competent for a witness to express an opinion, conclusion, or judgment. * * *

"The reason of the rule is generally said to be that it is the province of the jury to determine the ultimate fact whether the conduct was careless, reckless, or negligent, and this right of the jury is not to be encroached on. The facts are to be stated by the witnesses and from such facts the jury will conclude or decide the ultimate fact. * * *

"The general rule of law is that witnesses must state facts within their knowledge, and not give their opinions or their inferences. To this rule there are some exceptions, among which is expert evidence. Witnesses who are skilled in any science, art, trade, or occupation may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are sup-

posed, from their experience and study, to have peculiar knowledge upon the subject of inquiry which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts, and to base opinions upon them, than jurors generally are presumed to be. Opinions are also allowed in some cases where, from the nature of the matter under investigation, the facts cannot be adequately placed before the jury so as to impress their minds as they impress the minds of a competent, skilled observer. * * * But the opinions of experts cannot be received where the inquiry is into a subject the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eyewitnesses or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them, and comprehend them sufficiently for the ordinary administration of justice. The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts they may be specifically contradicted, and if they testify falsely they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts."

See authorities cited in *Ann. Cas.* 1913C, 1079, 1080, etc.

See, also, *Duncan v. A., T. & S. F. R. Co.*, 86 Kan. 112, 119 Pac. 356, 51 L. R. A. (N. S.) 565, and authorities there cited.

In *Keefe v. Armour Co.*, the Supreme Court of Illinois in *Ann. Cas.* 1914B, 188 (258 Ill. 28, 101 N. E. 252), said:

"While a jury is entitled to the aid of experts in determining the existence or nonexistence of facts not within the common knowledge, an expert witness must not take the place of the

jury and declare his belief as to an ultimate fact, as the right of trial by jury entitles every party to the judgment of the jury as to the ultimate fact upon which liability rests."

"In an action for injuries caused by the explosion of a tank car which was being tested by air pressure for leaks, it is improper to allow an expert to testify that such method was not reasonably safe, for that is the ultimate question of fact for the jury."

Mr. Thompson on Negligence, § 7747, laid down the rule as follows:

"It may be stated as a general rule that, if the facts of any particular inquiry can be so placed before the jury that, as men of ordinary intelligence, they can fully understand the matter and draw the proper inferences and conclusions therefrom, the opinions and conclusions of a witness, whether an expert or a nonexpert, should not be allowed to state his opinion as to whether an act was carefully or negligently done, nor whether the injured party was acting within the right of his duty at the time of receiving an injury, nor as to the safety of a particular appliance or place of work. * * *"

Also in section 7749 the same author says:

"Where a particular matter involved in the trial of a case, and necessary for the jury to understand to reach a conclusion, partakes of the nature of an art, science, or trade, knowledge of which can be acquired only by previous experience or study, and which does not lie within the range of knowledge of men of ordinary understanding, the law necessarily recognizes an exception to the rule against opinion evidence. * * *"

[3] On account of the evidence in this case and the doubtful liability of the plaintiff in error, we must hold that the opinion evidence which the court permitted the defendant in error to introduce in this case was prejudicial to the rights of the plaintiff in error, and the judgment of the lower court must therefore be reversed, and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

OKMULGEE WINDOW GLASS CO. v. BRIGHT. (No. 7881.)

(Supreme Court of Oklahoma. Jan. 9, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §228(2)—INJURY TO SERVANT—DEFENSE—CONTRIBUTORY NEGLIGENCE.

In an action for damages for injuries alleged to have resulted from a violation of a statutory duty imposed upon a master, the contributory negligence of the person injured may be urged as a defense thereto, unless such defense is excluded by the statute. *Jones v. Oklahoma Planing Mill Company*, 147 Pac. 999.

2. MASTER AND SERVANT §262(4)—TRIAL §252(11)—ACTION FOR INJURY—ANSWER—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

The answer here is sufficient to present the defense of contributory negligence, but in the absence of any evidence tending to sustain the same the trial court did not err in refusing to submit that issue to the jury.

3. MASTER AND SERVANT §258(8)—ACTION FOR INJURY—SUFFICIENCY OF PETITION—VIOLATION OF STATUTORY DUTY.

The petition in this case examined, and it is held the same is sufficient to bring the cause of action within the statute imposing certain duties upon the master, although the statute is not referred to expressly or by its terms.

4. MASTER AND SERVANT §204(2)—MASTER'S STATUTORY DUTIES—DEFENSES—ASSUMPTION OF RISK.

For a violation of a statutory duty, the defense of assumed risk is not an available plea, but the same is a valid defense to a violation of a common-law duty.

5-7. APPEAL AND ERROR §1050(1)—EVIDENCE §471(19), 472(1), 506.

5, 6, and 7, same as 1, 2, and 3 in *Federal Oil & Gas Company v. Campbell* (No. 7797) 183 Pac. 894, this day decided by this court.

Commissioners' Opinion, Division No. 3.

Error from District Court, Okmulgee County; Ernest B. Hughes, Judge.

Action by Pete Bright against the Okmulgee Window Glass Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for a new trial.

Sherman & Landon, of Kansas City, Mo., and Twyford & Smith, of Oklahoma City, for plaintiff in error.

Eaton & Cowley and McCrory & Johns, all of Okmulgee, for defendant in error.

HOOKER, C. In the petition filed in this action the defendant in error alleged that, while he was employed by plaintiff in error he was ordered to go inside of its plant and assist in the construction of a floor therein; that said floor was being constructed by the laying of steel plates on brick pillars 12 to 15 feet high and 10 feet apart; that over and across said plates were placed certain other steel or iron plates, or railings, extending about 30 feet long, parallel with each other and about 5 feet apart; that these plates or railings were wedged, and thereupon were placed planks upon which he and the other employes were working; that the company negligently and unnecessarily caused large timbers to be placed upon this floor without any intention of using them, and as a result thereof the weight of said timbers caused the floor and jack supporting the same to give way or kick out, which caused the floor upon which plaintiff was engaged at work to fall to the ground with him some distance of 12

or 15 feet, injuring him, for which he sues to recover damages here.

The answer was a general denial, an attempted plea of contributory negligence and assumption of risk, and upon the trial below the defendant in error recovered judgment, to reverse which an appeal is had to this court.

The company asserts that it is entitled to a reversal here for the following reasons, to wit: (1) Failure of the court to submit the issue of contributory negligence to the jury; (2) failure of the court to submit the issue of assumed risk to the jury; (3) the admission of the opinion testimony of the purported expert witnesses, W. S. Moore and V. L. Hawkins, on the question of negligence; (4) the excessive verdict; (5) error of the court in giving instructions Nos. 2, 3, 5, and 6.

We will now discuss these propositions as they are presented by the plaintiff in error.

[1] This court in the well-considered case of *Jones v. Oklahoma Planing Mill & Mfg. Co.*, 147 Pac. 999, has said:

"In an action for damages for injuries alleged to have resulted from a violation of a statutory duty imposed upon a master, the contributory negligence of the person injured may be urged as a defense thereto, unless such defense is excluded by the statute."

[2, 3] This action is brought to recover damages alleged to have accrued by reason of the violation of section 3772, Revised Laws of 1910, and by reference to that statute we fail to find any provision of law excluding the defense of contributory negligence; hence it follows that the plea of contributory negligence is a proper defense to this action, if the same is properly pleaded and there is any evidence supporting the same. The plea of contributory negligence relied upon by the company here is as follows:

"Defendant, further answering said petition, and as a defense thereto, alleges and avers that if the plaintiff was injured as alleged in said petition the said injuries were received by him by reason of his own fault and negligence, which directly contributed thereto."

No motion was made by the plaintiff below to require the defendant company to make its plea of contributory negligence more definite or certain, and in the absence thereof we are inclined to the opinion that the answer as pleaded was sufficient to raise the question of contributory negligence, if the evidence in the case justifies the same. Upon the examination of the petition here, we are of the opinion that the same is for damages accruing from the violation of a statutory duty, and while the statute itself, which the company so charged with having violated, is not referred to, yet the facts set forth in the petition are sufficient to bring the case within the statute, and this court, in the case of *S. L. & S. F. R. Co. v. Snowden*, 149 Pac. 1083, said:

"A case which, by allegation and proof, is brought within the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149 (U. S. Comp. St. 1913, §§ 8657-8665), is controlled by that act, although its provisions may not have been referred to in express terms in the pleadings or presented at the trial."

And the plea of contributory negligence is permissible under the statute aforesaid, but upon an examination of the record here we are unable to find any evidence which would justify the court in submitting the question of contributory negligence to the jury. While under the Constitution the defense of contributory negligence is a question of fact, always to be decided by the jury, yet, where there is no evidence relative thereto, it cannot be prejudicial error to refuse to submit that issue to the jury.

It is asserted that the court committed error in failing to submit such defense to the jury. To this we cannot agree, for the reason stated above, that there is no evidence here supporting the defendant's theory of contributory negligence.

[4] With reference to the second proposition of the assumption of risk, this court in a number of cases has said that, for a violation of a statutory duty, assumed risk is not available to the defendant as a defense to the cause of action set forth by the injured party. See *Great Western Coal & Coke Co. v. Cunningham*, 43 Okl. 417, 143 Pac. 26. But for the violation of a common-law duty, the assumption of risk is a valid defense.

We do not feel disposed to disturb the verdict on account of the claim of the plaintiff in error that the damages imposed were excessive, for if the testimony of the defendant in error is to be believed and relied upon, then the jury was justified in rendering a verdict for this amount. While we conceive that the evidence as to the extent of the injury is not as accurate or as definite as in other cases, yet, the testimony of the defendant in error in this case was sufficient for the jury to believe that the defendant in error was a physical wreck on account thereof, and might possibly, before life had departed, become a mental wreck. This being true, the verdict of the jury fixing his damages will not be disturbed by this court.

The objection urged by the plaintiff in error as to instructions Nos. 2 and 5 are not tenable. We have examined the instructions here, and the same seem to fairly present the law of the case to the jury.

[5-7] As to the other ground relied upon by the plaintiff in error for a reversal here, a more serious proposition is presented.

When the witness Moore was being examined the following proceedings were had:

"Q. Mr. Moore, I will ask you this question: Assuming that it was necessary to elevate the north end of the floor 6 inches, 5 or 6 inches, which was constructed of railroad irons running north and south 20 to 30 feet long over

railroad irons running east and west 10 or 12 feet long, which were resting directly upon pillars 9 or 10 feet high; and assuming that there were 2x4's so cut and placed as to be 2 feet apart and standing on their edge, upon edge, between the rails running north and south, upon which 2x4's were planks 1x12, placed and fastened; and assuming that there were certain arch forms, weighing from 500 to 600 pounds and from 25 to 30 feet long, resting in a position so as to cause these forms to lie and rest upon a portion of the floor which had already been completed, and which was some 6 inches lower than that portion that you were desirous of raising or had been raised; and assuming that these pieces of timber extended over some 5 or 6 feet and rested upon and were in contact with that portion of the floor that had been jacked up or raised; and assuming that the east rail running north and south had been raised a distance of say some 5 or 6 inches and propped, a 4x4 or 4x6 had been placed on the ground directly under this rail in such a way as to brace it up; and assuming that the west rail running north and south had been raised and certain loose bricks placed upon the pillar and in contact with it; and assuming a jack was placed on a block on the ground directly under the middle rail running north and south, upon the toe of that jack was placed a 4x4 piece of timber long enough to reach from the jack to the middle rail, in such a way as to raise the rail by means of working the jack up; and assuming that that was raised in that manner 5 or 6 inches and elevated in that manner, upon which men were to work, and placed at the north end of that section of the floor upon those pillars was a 10 or 12 foot railroad iron; and assuming two men were standing upon that portion of the floor and hold of a rope which was tied to this railroad iron 10 or 12 feet long—would you, from your experience and knowledge of how to do those things, would you consider that a safe place or prop which this work was being done?

"Mr. Hiatt: Defendant objects to the question as being incompetent, irrelevant, and immaterial, and for the further reason that the facts assumed in the question have not been proven to have existed in the building at the time of the accident.

"By the Court: Overruled.

"Mr. Hiatt: Defendant excepts.

"A. I won't be sure that I understand the condition; as I understand from your statement now, there were long rails placed across other rails, and they had placed a jack under this center rail and raised it up; after them two rails had been raised there was a false floor or temporary floor there that the men was working on, and a piece of timber sitting on the jack, and 8 or 10 feet long, and raising the center rail—is that the idea?

"Q. Yes, sir.

"A. Was there no other props in there under this, except the jack?

"Q. Assuming that there were not any other props.

"A. I would not consider that a safe place to put men in.

"Q. Why?

"A. Well, it is entirely too hazardous a prop-

osition, and to risk a jack, to risk nothing but a jack to hold up a thing of that kind, why in my estimation it takes somewhat the form of a deadfall. I have had quite a lot of experience in raising things of that kind, and have never hurt a man yet, but I always made sure the thing would never go down until I would take it down; I would shore up under it until I would consider it a safe place to put men."

And while the witness Hawkins was upon the stand, the following proceedings were had:

"Q. Mr. Hawkins, I show you a plat here, showing or representing a section of floor, and assuming that that represents the section of the floor that was being built—

"By the Court: To what plat are you referring?

"Mr. Eaton: Plaintiff's Exhibit A in the deposition of John W. Clark.

—and constructed for the Okmulgee Glass Plant Company, window glass company, and assuming that that section of floor is 20 to 30 feet long north and south and 10 or 12 feet wide east and west, and that it consisted of railroad irons and certain pillars, brick pillars, and that these railroad irons were placed in such a position, those running east and west were resting directly upon pillars, and that upon them those running north and south were resting, and that 2x4's were so put and placed as to range about 2 feet apart and running east and west between the rails running north and south; and assuming that upon those 2x4's were placed planks 12 feet long, 1x12, we will say, and probably some of them 12 to 14 or 16 feet long, and that it became necessary to jack up or raise up the north end of these rails running north and south; and assuming that they had jacked up the east rail 5 or 6 inches and placed a shore prop under it consisting of a piece of timber long enough to reach from the ground to the rail, and being a 4x4 or a 4x6; and assuming that the west rail running north and south had been raised to an elevation of 5 or 6 inches and certain loose brick had been placed upon it, upon the pillar, and assuming that a jack had been placed upon a block some 4 or 5 feet south of the north end of the middle rail running north and south, in such a position as to rest directly upon a block on the ground, and that a piece of timber 4x4 or 4x6 was placed upon the toe of this jack and extended up and was in contact with the middle rail, and that this jack had been worked and used, worked up so as to raise or elevate this rail 5 or 6 inches and left in that position, and assuming that men were placed on a portion of this floor at a point near where this jack was or near the north end of it, and were engaged at the time in holding a rope tied around a rail 10 or 12 feet long, which was at the time being placed under the north end of these rails running north and south of these pillars, and assuming that certain pieces of timber or arch forms 25 to 30 feet long, and weighing from 500 to 600 pounds, had been placed in such a position so that a portion of these timbers would rest upon the west part of the floor, rest upon that part of the floor which was directly west of this floor, and to extend over and in contact with a portion of

this floor that was so raised as I have described to you and propped; and assuming that the west part of the floor was some 6 or 8 inches lower than that portion under which these props were so placed as I have described to you; and assuming that these pieces of timber extended over 5 or 6 feet on that portion of the floor and were there at the time the middle rail was being jacked up as I have described to you—I will ask you if, in your opinion, the manner of elevating this jack under this piece of timber and the piece of timber as a prop or means of support for holding up the rail was safe or reasonably safe?

"Mr. Hiatt: To which question the defendant objects for the reason that it is incompetent, irrelevant, and immaterial, and for the further reason that plaintiff has not shown by the evidence that the conditions and facts assumed in the question actually existed at the place or time of the accident.

"By the Court: Overruled.

"Mr. Eaton: Defendant excepts.

"A. I don't believe I could answer without asking a question.

"Q. All right.

"A. You say this was a 4x4 sitting on the toe of the ratchet jack I presume?

"Q. Yes, sir.

"A. And then raised 4 or 5 inches after the 4x4 was set under this rail and then the ratchet jack raised 5 or 6 inches and not shored under?

"Q. Yes, sir; assuming that there was no other props but this, and left in that condition.

"A. No; I would not consider it safe."

It is asserted here that the effect of these questions was to cause the witness to pass upon the ultimate facts in this case, thereby invading the province of the jury.

Opinion evidence, as a rule, should not be given to the jury, but the witness should be required to state the facts, and before a witness can be authorized to give an opinion an exception to the general rule must be made. The evidence here discloses that the injury alleged to have been received by the defendant in error was said to have occurred in the following way:

"The accident occurred in the afternoon, inside the building. I had received instructions from the superintendent to lower a part of the floor. The section, however, we were working on at the time was not to be lowered; it was all completed but one length of rail about 12 feet long, which lay on top of brick piers to support rails which lay the other way and were about 20 feet long. Mr. Bright was out on this section of floor when the supports gave way, and he fell in the basement. Mr. Bright was pulling up this rail with a rope. I was on the brick pier to land the end of the rail, and there were a couple of men to land the other end on the other pier, but all at once the floor gave way, and Mr. Bright fell in the basement. * * * We were finishing the last section at the time of the accident. * * * The fall was caused by a weight, too much weight. * * * I mean more than the supports under it would bear up. * * * We

had raised the rails with jacks; they were placed under one end of the rail for the purpose of raising the rail up to remove it for the purpose of raising (substituting) another. We had raised the floor to sufficient height to allow the removal of the rail. We taken a 4x4 timber sufficient length to reach the jack sitting on the block, and the rail (railroad rail) to be raised, then we worked the jack and raised the rail. The pillars were 8 or 9 feet high, constructed of brick about 10 feet apart, square each way. Upon these brick pillars rested certain rails. The rails directly on these pillars ran east and west. On the rails running east and west were the rails north and south. The rails running east and west were 30 feet; those running north and south were 20 feet. Three rails ran east and west on these two sections, and three north and south. They were secondhand railroad tracks. The middle rails running north and south were supported by rails running east and west. There were 2x4's between the long rails running north and south, placed about 2 feet apart. They were cut in to fit the rail, and stood on edge. This was covered by 1x12 planking. The 2x4's between the long rails running north and south were placed there to support these planking to spread concrete on top of, and also held the rails in position. We raised this section of the floor which fell to remove a long rail, and put in a short one. We had only raised the north end. At the time we raised the north end the cross-pieces were resting upon the pillars. We had placed a jack and a piece of timber about 8 or 4 feet from the end of the center rail. The jack and timber were located in such a way as to be perpendicular. There were no other braces, props, or supports under the center rail at the time the floor fell. The west rail had been raised up, and some brick had been put under the north end of it. The east rail running north and south at the time of the accident had a 4x4 timber setting under it. The center rail running north and south at the north end fell, the rail under which the jack and piece of timber were placed. At the time the floor fell Mr. Bright was standing on the east side near the north end. The floor fell something like 8 or 9 feet. The north end of center rail landed on the ground, and laid up over the center rail under the brick piers. In other words the north end went down and the south end went up."

Now, the question to be determined here is: Did the court commit an error when these witnesses were permitted to give their opinion as to whether the place was safe?

The views this day expressed in the case of Federal Oil Co. v. D. C. Campbell (No. 7797) 183 Pac. 894, not yet officially reported, will present our views upon the admission of this testimony. We think this evidence was prejudicial to the rights of the plaintiff in error, and under the record here should operate as a reversal of this cause.

The judgment of the lower court is therefore reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

VINSON v. DAVIS. (No. 10110.)

(Supreme Court of Oklahoma. July 29, 1919.
Rehearing Denied Sept. 30, 1919.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS ¶524(1)—
**FOREIGN EXECUTOR CAN SUE FOR MONEY
DIVERTED BY HIS ATTORNEY TO FEES OF AD-
MINISTRATOR OF ANOTHER ESTATE.**

N. died in Pottawatomie county, Okl., leaving surviving him as his sole and only heir, C., who resided in Salem county, N. J. C. secured an order from the county court of Pottawatomie county, Okl., authorizing V., the administrator of the estate of N., to disburse to her \$45,000. Before the order was effectuated C. died. The last will and testament of C. was duly probated in the surrogate's court of Salem county, N. J., and D. qualified as executor under the will. D., as executor, authorized R., an attorney in Oklahoma, to receive from V., administrator aforesaid, the \$45,000. After V. had paid R. this amount, R. paid to V., out of the sum so received, \$5,000, in full of all fees and charges of V. as administrator of N.'s estate. This payment was made without authority from D. *Held*, that D. was the proper party to bring suit against V. to recover the \$5,000.

(Additional Syllabus by Editorial Staff.)

2. EVIDENCE ¶85—**ATTORNEY PRESUMED TO
KNOW LIMITATIONS OF HIS AUTHORITY.**

An attorney, who as administrator was authorized by the sole heir under order of the county court to disburse to her a certain amount of intestate's estate, was bound to know and is presumed to know the limitations which the law places upon the authority of an attorney.

3. ATTORNEY AND CLIENT ¶101(1)—**ATTOR-
NEY CANNOT BIND CLIENT BY COMPROMISE
OF PENDING SUIT.**

An attorney, by virtue of his retainer, may do all things clearly pertaining to the prosecution of his client's cause and the protection of his client's interest involved in the action, but without further express authority cannot bind his client by compromise of a pending suit, or other matter intrusted to his care.

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by J. Warren Davis, executor of Harriet Nichols Cook, deceased, against S. C. Vinson. Judgment for plaintiff, and defendant brings error. Affirmed.

Maben & Pitman, of Shawnee, for plaintiff in error.

T. G. Cutlip, of Tecumseh, for defendant in error.

PITCHFORD, J. This case was instituted in the district court of Pottawatomie county on the 23d of August, 1917. In the court below the plaintiff in error was defendant and the defendant in error was plaintiff. For convenience, the parties will

be referred to according to the position they occupied in the lower court. The defendant had for some time been the administrator of the estate of Enos Nichols, deceased, and at the time the suit was filed the plaintiff claimed to be the executor of the estate of Harriet Nichols Cook, deceased. In the decree of heirship in the Enos Nichols estate, the said Harriet Nichols Cook was found and decreed to be the sole next of kin and heir at law of the said Enos Nichols, and entitled to his estate. On August 16, 1912, Mrs. Cook, in due form, declared and published her last will and testament, and therein nominated J. Warren Davis sole executor of her estate. Mrs. Cook departed this life on or about the 13th day of April, 1913, at Salem, N. J., and thereafter her will was admitted to probate in the surrogate's court of and for the county of Salem, N. J., and the defendant was duly appointed and commissioned as sole executor of her will. Thereafter, on June 5, 1913, her will was probated by the county court of Pottawatomie county, Okl. An order of partial distribution of the funds of the estate of Enos Nichols in the amount of \$45,000 to the heir at law of Enos Nichols was made by the county court of Pottawatomie county, and the defendant as administrator of said estate was ordered to disburse said amount to Mrs. Cook. Before the order could be effectuated, Mrs. Cook died, and after the plaintiff was commissioned as executor of her will the county court of Pottawatomie county directed the defendant as said administrator to disburse said amount to the plaintiff as executor and representative of the Cook estate. In compliance with said order, the defendant on September 19, 1915, drew his check for the amount of \$45,000 against the fund of said Nichols estate under his control as administrator thereof, and payable to the order of J. Warren Davis, executor, and F. H. Riley, his attorney. This check was delivered to F. H. Riley, attorney for the plaintiff, on February 11, 1916. The check was received by Riley as attorney for the plaintiff, and indorsed and deposited in the Shawnee National Bank to the joint credit of Riley and one R. W. Cook.

After the \$45,000 check was delivered to Mr. Riley and the amount deposited in the bank, there were then gathered together, in the office of the defendant, the defendant, S. C. Vinson, T. G. Cutlip, R. W. Cook, and F. H. Riley. The question was then and there discussed as to the amount of fees that should be allowed the defendant as administrator in the Enos Nichols estate. There seems also to have been quite a discussion as to the amount of fees that should be allowed to the attorneys for the plaintiff. Finally it appears that all these mat-

ters were amicably and satisfactorily adjusted, and the \$45,000 was then distributed among the parties easily and speedily—the defendant receiving \$5,000, as compensation as administrator in the Enos Nichols estate; Mr. F. H. Riley receiving \$10,000, presumably as attorney for the executor in New Jersey; Mr. R. W. Cook receiving \$5,000; Mr. T. G. Cutlip, \$2,500; and Mr. Embry, \$4,000. It appears that Mr. Riley wrote the checks, and was assisted by Mr. Cook; that is, Mr. Cook would call off the names and the amounts for which the checks should be written. After making the foregoing distribution, it appears that three of the special legatees in Mrs. Cook's will were paid \$4,000 apiece, and the remainder was sent to certain heirs in New Jersey and Philadelphia, but the plaintiff appears to have been entirely ignored.

Upon the conclusion of all the evidence, the court found that the plaintiff should have recovered from the defendant the sum of \$5,000, with interest thereon, less one-twelfth of said sum of \$5,000, in the amount of \$416.66, together with interest thereon at the rate of 6 per cent. per annum, from the 11th day of February, 1916, the interest amounting to \$473.57; total amount of the judgment against the defendant being \$5,056.91. It would appear that the trial court deducted from the amount to which the plaintiff was entitled the interest of Mr. Cook, on the theory that Cook had assigned his interest to Vinson in the transaction wherein the distribution took place, and that such interest so assigned was an advancement, and should be set off against his interest when the Cook estate was settled. The assignments of error argued by the defendant are as follows:

(1) That the court erred in refusing to enter judgment for the defendant at the close of the plaintiff's testimony and at the close of all the testimony.

(2) That the court erred in overruling defendant's motion for a new trial, which was duly excepted to at the time.

(3) That the court erred in rendering judgment for the plaintiff and against the defendant, for the reason that the defendant in error is without legal capacity to sue or maintain said action.

We are not advised as to the course pursued by plaintiff to recover the various sums paid out of \$45,000, further than this action against the defendant. Counsel for defendant has been notably industrious in preparing a very able and elaborate brief, in which the facts in the case have been exhaustively discussed, but has entirely overlooked the importance of citing a single authority from our own, or any other court, or any writer, supporting his contentions. Under section 6465, R. L. 1910, the defendant had authority to deliver to the executor of the last will of Harriet Nichols Cook the \$45,000, and up-

on the delivery of the same in accordance with the order of the county court of Pottawatomie county he was fully discharged in relation to said sum. Under section 245, Id., an attorney has power to receive for his client money claimed by his client in an action or proceeding during the pendency thereof, or afterwards, unless he has been previously discharged by his client, and upon payment thereof, to discharge the claim.

[2, 3] We ascertain from the record that the plaintiff was not present in person at the complete division and disbursement of the \$45,000, nor is there the remotest evidence of anything indicating that the plaintiff had the least intimation that in the state of Oklahoma the relation of attorney and client could or would be construed by any one as giving the attorney, after receiving money for his client, authority to entirely eliminate the client in the transaction, and ignore his interest in the premises, or that the attorney would be empowered to squander, dissipate, or give away the funds received for and in the name of the client. Defendant was bound to know, and we are to presume that he did know, the limitations which the law places on the authority of an attorney. In *First State Bank of Indianoma v. Carr* (decided by this court April 24, 1919, not yet officially reported) 180 Pac. 856, it is said:

"The authorities are almost uniform to the effect that an attorney, by virtue of his retainer, is authorized to do all things fairly pertaining to the prosecution of his client's cause and the protection of his client's interest involved in the action, but by mere virtue of his retainer, without express authority, is not authorized to bind his client by a compromise of a pending suit or other matter intrusted to his care."

To the same effect see *Scott v. Moore*, 52 Okl. 200, 152 Pac. 823; *Turner v. Fleming*, 37 Okl. 75, 130 Pac. 551, 45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831.

[1] The plaintiff himself would not have been authorized to make this payment to the defendant. The defendant was the administrator of the estate of Enos Nichols. The services for which he claimed the \$5,000 due him were services rendered for the estate of which he was administrator. He was not a creditor, nor did he have any claim against the estate of Mrs. Cook. He had no right to look to that estate for his compensation. Sections 6425 and 6427, R. L. 1910, provide how these fees shall be paid. There was no privity between the estate of Enos Nichols, deceased, and that of Harriet Nichols Cook, nor any privity in the management or control of the two estates. The defendant was under the control and supervision of the county court of Pottawatomie county, Okl., while the plaintiff, as executor, was under the control and supervision of the orphans' court of Salem county,

N. J. As we have noted, the \$5,000 paid defendant was not an indebtedness or claim against the estate of Harriet Nichols Cook, and the assets of the latter estate could not be diverted to the payment of a claim against the Enos Nichols estate, as was attempted by the parties so assembled and acting on the 11th of February, 1916. We therefore conclude the court was not in error in refusing to enter judgment for defendant at the close of all the testimony.

In the trial of the cause in the lower court, the defendant sought to introduce evidence for the purpose of showing that letters of administration issued to plaintiff by the county court of Pottawatomie county on the estate of Harriet Nichols Cook had been revoked, and that Martin C. Fleming had been appointed as such administrator and his bond fixed at \$1,000, and, further, that the defendant and R. W. Cook had resigned as agents appointed by plaintiff for the purpose of securing service on the plaintiff in the event he was sued in the courts of Oklahoma, and also that the regular county judge had disqualified himself generally in the Harriet Nichols Cook estate by reason of bias and prejudice. We must keep in mind that the plaintiff herein is suing as the executor of the last will and testament of Harriet Nichols Cook by virtue of letters issued to him from the surrogate's court of Salem county, N. J. Our statutes permitted him to sue in the courts of this state. Section 6312, R. L. 1910, provides:

"It shall be lawful for any person or persons to whom letters testamentary or of administration have been granted, by the proper authority in any of the United States or the territories thereof, to maintain or defend any suit or action, and to prosecute and recover any claim in the courts of the state of Oklahoma, in the same manner as if the letters testamentary or of administration had been granted to such person by the proper authority in this state. * * *

The plaintiff was not suing as administrator with the will annexed by virtue of any order of the county court of Pottawatomie county, and we are unable to understand how the revocation of the letters issued by the last-named court could affect this action, or what connection the resignation of defendant and R. W. Cook, as agents for service, could have with the case at bar. Under section 6263, R. L. 1910, it is provided:

"Every * * * administrator * * * appointed in, but residing out of the state, shall,

before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed, and shall by such writing stipulate and agree that the service of any legal process against him as such * * * administrator * * * if made on said agent shall be of the same legal effect as if made on himself personally within the state. * * *

If the plaintiff had appointed these parties for this purpose, and suit had afterwards been brought against the plaintiff in the courts of Oklahoma, and service had been had upon the agents appointed by him, notwithstanding they had attempted to resign, no one could take advantage of the service, except the plaintiff himself, and it is doubtful if the plaintiff would be allowed to question the service; nor can we see what connection the order entered by the county judge of Pottawatomie county, disqualifying himself to act in any matter involving the estate of Harriet Nichols Cook, could have with the present action.

It is not necessary for us to, at this time, pass upon the liability of the plaintiff to the heirs of Harriet Nichols Cook relative to the \$45,000 received by Riley, the attorney for the plaintiff. But when the plaintiff ascertained that any part of this money had been diverted, and that the defendant had been paid, or had received from Riley, the \$5,000, with no authority from the plaintiff to Riley to pay this sum, the plaintiff was the proper party to bring the action to recover the sum so diverted. There is no attempt to show that the letters issued to the plaintiff as executor by the courts of New Jersey had been revoked. It therefore follows that he was still the executor of the last will and testament of Harriet Nichols Cook, and the defendant, without right, having received \$5,000, being part of the assets of the estate under the control of plaintiff. It follows that plaintiff was the proper party to bring this action. Section 6303, R. L. 1910.

We fail to find error in the action of the court in sustaining the objection to the evidence sought to be introduced by the defendant. We are therefore of the opinion that the judgment of the lower court should be affirmed; and it is so ordered.

OWEN, C. J., and KANE, SHARP, HARRISON, JOHNSON, and McNEILL, JJ., concur.

RAINEY and HIGGINS, JJ., absent and not participating.

SCHREINER v. CITY NAT. BANK OF McALESTER et al. (No. 8667.)

(Supreme Court of Oklahoma. July 22, 1919.
Rehearing Denied Sept. 30, 1919.)*(Syllabus by the Court.)***1. PLEADING** \S 205(1) — WHERE PLEADING AUTHORIZES ANY RELIEF GENERAL DEMURRER OVERRULED.

Where a pleading states any facts upon which a pleader is entitled to any relief under the law, a general demurrer to the same should be overruled.

2. NOTICE OF DISHONOR—STATUTORY WAIVER.

Notice of dishonor is excused when the notice is waived by the party entitled thereto.

3. LIMITATION OF ACTIONS \S 155(3) — PARTIAL PAYMENTS BY PRINCIPAL TOLL STATUTE AS TO INDORSER.

The payment of interest and partial payments by the principal debtor, on a note which contains a stipulation "that the makers and indorsers in case this note is not paid at maturity, consent and agree to any and all extensions and partial payments before or after maturity without prejudice to the holder," tolls the statute of limitations as to an indorser on a note executed, and due prior to the passage of the Negotiable Instruments Law (Laws 1909, c. 24) of this state.

Appeal from District Court, Pittsburg County; R. W. Higgins, Judge.

Suit by the City National Bank of McAlester against E. W. Schreiner and another. Judgment for plaintiff against defendant Schreiner, and he brings error. Affirmed.

Counts & Counts, of McAlester, for plaintiff in error.

W. H. Fuller and Geo. M. Porter, both of McAlester, for defendants in error.

MCNEILL, J. This proceeding arose by the City National Bank of McAlester, Okl., bringing suit against the McAlester Brick Company and E. W. Schreiner on a promissory note dated March 20, 1908, due June 18, 1908, signed by McAlester Brick Company and indorsed by William Busby and E. W. Schreiner. The note was credited with certain payments, and interest payments indorsed thereon. The last indorsement was dated October 2, 1913. The defendant Schreiner demurred to the amended petition for the reason that it did not state a cause of action in favor of the plaintiff and against himself. Said demurrer was overruled, and defendant excepted and filed his answer, denying that he was one of the makers of the note, but stated the fact that he had indorsed the same for accommodation, and that he was not liable thereon for the reason that before and after said note became due the bank, without any knowledge or notice to the

defendant, entered into a contract with the brick company, extending the time of the payment of said note, and without any notice to the defendant again extended said note from time to time, and that no demand was ever made until the 16th day of October, 1914; that by reason of said facts, the payments and extensions of time were granted without his knowledge or consent, and that more than five years had expired from the date the note was due, and the same was barred by the statute of limitations. The bank filed a demurrer to the answer of the defendant, which was sustained. On the trial of the case, judgment was rendered in favor of the bank and against the defendant. The case is brought here now on appeal.

The first question argued is that the court erred in overruling the demurrer to the amended petition. It is argued that the petition fails to state a cause of action, in that the petition alleges that Schreiner was a maker, when the note shows upon its face that he was only an indorser, and that, while he might be joined as a party defendant, he would have to be sued upon his contract as an indorser and not as a maker. The law in force at the time of making the note and at the time the same became due was the statute of 1903. Section 4237 provides "that persons severally liable," which includes indorsers and guarantors, may at the option of the plaintiff be included in the same cause of action.

[1] The plaintiff in error complains that the court overruled his demurrer, which was a general demurrer to the petition. The rule of this court is as follows:

"Where a pleading states any facts upon which the pleader is entitled to any relief under the law, a general demurrer should not be sustained thereto." Bishop-Babcock-Becker Co. v. Estes Drug Co., 168 Pac. 276; Sharp Lumber Co. v. Kansas Ice Co., 42 Okl. 689, 142 Pac. 1016; Cockrell v. Schmitt, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737; Owen v. Tulsa, 27 Okl. 264, 111 Pac. 320; Emmerson v. Botkin, 26 Okl. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953; Hurst v. Sawyer, 2 Okl. 470, 87 Pac. 817; Anderson v. Muhr, 36 Okl. 184, 128 Pac. 296.

The petition stated the defendant Schreiner was a maker, and the demurrer admits this fact; therefore states a cause of action. By taking the plaintiff in error's position that he was liable upon said note as an indorser and not as a maker, still the plaintiff would be entitled to the same relief. There would be no difference in the relief demanded, but might be a difference as to what defense might be interposed.

[2] The plaintiff in error further contends that the plaintiff did not plead that the note was dishonored by the principal, and for that reason the petition does not state a cause

of action, and cites in support of his contention the case of *Grimes v. Tait*, 21 Okl. 361, 99 Pac. 810. It is true, the court did so hold in that case, but that case arose by one indorser of the note suing a prior indorser, and in that case the note contained no waiver of demand, protest, notice of protest, and notice of nonpayment. In the instant case, the note contains such a waiver. Section 3645, Statutes of 1903, provides:

"Notice of dishonor is excused. * * * When the notice is waived by the party entitled thereto."

If the plaintiff in error's contention is true, that he was an indorser, then by the terms of the note he waived any notice that the note was dishonored. Therefore it was not necessary to either allege or prove said fact, and the court did not commit error in overruling the demurrer.

[3] The next question presented is: Did the court err in sustaining the demurrer to the defendant's answer wherein he pleaded the statute of limitations? The question presented is:

"Will partial payments or payments of interest by the principal debtor before the note is barred by the statute of limitation toll the statute of limitation as to the sureties?"

This question does not appear to have been decided by this court. There is a conflict in the decisions of the courts of other states upon this question. The note in the instant case is dated March 20, 1908. Interest was paid on said note practically every three months until February 28, 1912. Partial payments were made on said note beginning June 3, 1912, and extending to October 2, 1913. It is admitted that if the payment of interest and the partial payments did not toll the statute of limitations, on the theory of the answer of Schreiner, pleading that he was an indorser, then the note was barred as to Schreiner. If the payments toll the statute of limitations, then the answer does not state a defense.

The note in the instant case contains the following provision:

"Makers and indorsers hereby severally waive demand of protest. * * * In case this note is not paid at maturity and consent and agree to any and all extensions and partial payments before or after maturity without prejudice to holder."

The plaintiff in error cites and relies on numerous cases, among them being the case of *Steele v. Souder*, 20 Kan. 39, wherein the court held that the payments of interest and partial payments by the principal did not prevent the surety from taking advantage of the statute of limitations, and the payments did not operate to extend the limitation as to the sureties. There is a long line of cases supporting this theory, one of the later cases

being *Dwire v. Genry*, 95 Neb. 150, 145 N. W. 350, where the court stated:

"Payment of interest on a note by the principal without the authority, knowledge, or consent of the surety will not stop the running of the statute of limitations as to the surety."

But an examination of these cases discloses they are practically all founded upon cases where the note sued upon contained no waiver or stipulation in the note, and in a great number of the cases, the opinion is based upon the proposition that payments of interest or partial payments made without the knowledge or consent of the surety will not toll the statute of limitations as to the sureties. Cases holding to the contrary, on practically the same kind and character of notes, are the following cases: *Nicholas v. Porter*, 181 Ind. 332, 103 N. E. 842, Ann. Cas. 1916D, 328; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Moore v. Carr*, 123 N. C. 425, 31 S. E. 832; *Schindel v. Gates*, 46 Md. 604, 24 Am. Rep. 528; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581, 13 Am. Dec. 458; *Real Estate Bank v. Hartfield*, 5 Ark. 551; *Colburn v. Averill*, 30 Me. 310, 50 Am. Dec. 630.

The rule announced by *Wood on Limitations* (4th Ed.) vol. 1, p. 574, is as follows:

"Payment of interest by the principal debtor with the knowledge and consent of the surety tolls the statute of limitations as to the surety."

We do not believe that the cases cited by plaintiff in error are controlling in the case at bar, for the reason the surety in the case at bar consented to partial payments and payments of interest, and so stipulated in the note, and the stipulation further provided that said payments should be without prejudice to the holder. It cannot be said that the payments of interest and the partial payments were made without the consent of the defendant, because he had stipulated that the same might be made, and he waived any defense by reason thereof. Having consented to said payments either before or after maturity, he will be deemed to have waived any defense by reason of said payments being made. Having consented and agreed to said payments, the same tolled the statutes of limitations as to him.

Counsel for plaintiff in error also suggest that one extension would be all that would be permissible. This court in the case of *Pioneer Construction Co. v. First State Bank*, 158 Pac. 894, held, where a note contained a stipulation to waive all defense on the grounds of "any" extension of time of payment was waived, the use of the word "any" before "extensions" means that one or more extensions of time are contemplated.

The petition shows upon its face that by reason of the partial payments the note was not barred by the statute of limitations, and the defendant, having pleaded or raised the

statute of limitations in his answer alleging that said payments were made without his knowledge or consent, did not state a defense when the instrument disclosed that he had stipulated said payments might be made without prejudice to the holder thereof. It therefore follows that the court did not commit error in sustaining the demurrer to the answer of the defendant.

For the reasons stated, the judgment of the trial court is affirmed.

KANE, SHARP, HARRISON, and JOHNSON, JJ., concur.

TUCKER v. LEONARD et al. (two cases).
(Nos. 9050, 9051.)

(Supreme Court of Oklahoma. Sept. 16, 1919.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD §17—APPOINTMENT OF STRANGER AS GUARDIAN INSTEAD OF MOTHER NOT SUBJECT TO COLLATERAL ATTACK.

Orders and decrees made by the county court need not recite the existence of facts upon which the jurisdiction of the court may depend, and when the court appointed a stranger to the exclusion of the mother, a single woman, as guardian of a minor under the age of 14 years, the irregularity, if any, of such appointment, cannot be shown upon collateral attack.

2. INDIANS §6—APPOINTMENT OF GUARDIAN PRESUMABLY CORRECT AND NOT SUBJECT TO COLLATERAL ATTACK.

Assuming that section 4, Original Creek Agreement (31 Stat. 863, c. 676), providing that "all guardians or curators appointed for minors and incompetents shall be citizens," was not superseded by the provisions of Act Cong. May 27, 1908, c. 199, 35 Stat. 312, still, when the county court appointed L. as guardian of G., a Creek minor, and the records of the county court being silent as to the citizenship of L., it will be presumed the court, in the proper discharge of its duty, upon inquiry, adjudged that L. possessed the requisite qualifications, and such judgment is not subject to collateral attack.

3. COURTS §202(4)—COUNTY COURTS HAVE JURISDICTION OF MINORS' ESTATES, WITH RIGHT TO MODIFY OR VACATE JUDGMENTS.

County courts have full control and jurisdiction of all minors' estates, and until the minor becomes of age all judgments and orders sleep in the bosom of the court, and may be modified, vacated, or set aside during such time, upon proper notice and for good cause shown.

4. DEEDS §25—VENDOR AND PURCHASER §224—PURCHASER UNDER QUITCLAIM DEED MAY BE BONA FIDE PURCHASER.

A quitclaim deed, made in compliance with section 1161, R. L. 1910, is as effectual in

conveying the title of the grantor as is a warranty deed, and one can be a bona fide purchaser under the former as under the latter; the distinction being that in a quitclaim deed the words "and warrant the title to the same" are omitted.

5. GUARDIAN AND WARD §95 — SALE OF WARD'S PROPERTY VALID, THOUGH NO INVENTORY FILED.

Section 6532, R. L. 1910, provides that before the order appointing any person guardian takes effect, and before letters issue, the judge must require of such person a bond to the minor; one of the conditions forming and constituting a part of such bond being to make an inventory of all the estate of the ward, and return the same within such time as the judge may order, *held*, failure on the part of the guardian to return an inventory does not render void a sale of the ward's lands, under proper orders of the county court.

6. GUARDIAN AND WARD §96—NOTICE OF SALE OF WARD'S LAND SUFFICIENTLY DESCRIBED LOCATION.

The following notice of sale of minor's land was published: "Notice is hereby given in pursuance of an order of the county court of the county of Wagoner, state of Oklahoma, made on the 9th day of October, 1911, that the undersigned, guardian of the estate of George Tucker, a minor, will sell at public sale to the highest bidder, subject to confirmation by the court on Monday, the 6th day of November, A. D. 1911, at 10 o'clock a. m., at the courthouse in Sapulpa, Creek county, Okl., all the right, title, and interest of said George Tucker, a minor, in and to the following described real estate, situated in Wagoner county, state of Oklahoma, to wit: The S. W. ¼ of the S. W. ¼ of Sec. 3, Twp. 17 N., R. 7 E., and the S. W. ¼ of the S. E. ¼ of Sec. 17, Twp. 17 N., R. 7 E., and the W. ½ of the S. W. ¼ of Sec. 33, Twp. 18 N., R. 8 E., in Creek county, Okl. Said real estate will be sold on the following terms and conditions, to wit: All cash upon confirmation of sale by the county court of Wagoner county, Okl." *Held*, that such notice was a substantial compliance with the statute, and that no one could have been misled as to the location of the land to be sold.

7. GUARDIAN AND WARD §107—CONFIRMATION OF SALE OF WARD'S LAND NOT SUBJECT TO COLLATERAL ATTACK.

After a county court obtains jurisdiction of a guardianship sale proceeding, all nonjurisdictional irregularities and defects between the acquirement of jurisdiction and the order of confirmation are cured by the order of confirmation, to the extent that the order of confirmation may not be collaterally attacked on account of such irregularities.

8. PLEADING §204(2)—IF ANY PART OF PETITION IS GOOD, GENERAL DEMURRER DOES NOT LIE.

Where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good, and states a cause of action, the demurrer should be overruled.

9. VENDOR AND PURCHASER §242 — PURCHASER OF LAND FRAUDULENTLY ACQUIRED BY GRANTOR MUST PROVE GOOD FAITH.

Purchasers of land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed.

Error from District Court, Creek County; Ernest B. Hughes, Judge.

Action in ejectment and to quiet title by George Tucker, a minor, by J. L. McCowan and Ella Tucker, his next friends, and action by Fred Tucker, both against M. B. Leonard and others. Demurrers to petitions sustained, and judgments entered for defendants, and plaintiffs bring error. The actions were consolidated in the Supreme Court. Reversed.

Norman Barker, of Bartlesville, Hainer, Burns & Toney, of Oklahoma City, Asberry Burkhead, of Tahlequah, and McGuire & Devereux, of Tulsa, for plaintiffs in error.

J. E. Thrift and C. J. Davenport, both of Sapulpa, Geo. S. Ramsey, of Muskogee, Edgar A. De Meules, of Tulsa, Malcolm E. Rosser, of Muskogee, Villard Martin, of Tulsa, and Jno. G. Ellinghausen, Edwin A. Ellinghausen, and McDougal, Lytle, Allen & Hodges, all of Sapulpa, for defendants in error.

PITCHFORD, J. This is an action in ejectment and to quiet title, instituted by the plaintiff against the defendants, who claimed title to the land in question by mesne conveyances at a guardian's sale made pursuant to the orders and under the supervision of the county court of Wagoner county, Okl.; the land involved being the allotments of Fred and George Tucker, new-born Creek freedmen. Two actions were brought, and consolidated in the Supreme Court; the other action, No. 9051, being by Fred Tucker. In both cases the petition of the plaintiffs in the court below attacked the validity of the guardian's sale on account of alleged errors and irregularities in the proceedings in the county court of Wagoner county, Okl., in appointing a guardian and in ordering and confirming the sale. The trial court sustained the several demurrers of defendants to these petitions. Plaintiffs refused to plead further, judgment was entered for the defendants, and the plaintiffs bring action here.

The propositions presented for our consideration may be summarized as follows:

First. That the court was without jurisdiction to appoint the defendant Leslie as guardian, the minors being under the age of 14 years and in the custody of their mother, who claimed to be suitable and competent to have the care and guardianship of the minors, and that the appointment of a stranger as guardian of a minor, without notice to the parents or persons having the custody of said minors, is void.

Second. That the county court was without authority to appoint a guardian of Creek minors, who are citizens of the Creek Nation or Tribe of Indians, when said guardian is not a citizen or member of said tribe.

Third. That where a petition is filed with the county court by the guardian for the sale of his ward's land, and where upon hearing a judgment is rendered, denying the petition and finding that it is not necessary for the support of the ward, and that it is not for the best interest of said ward that said real estate be sold, and where there is no appeal from said order and judgment of the court and findings of fact, and where no motion or petition is filed to vacate, modify, or set aside the same, said order and judgment becomes a final judgment of said county court, and is res adjudicata until a change of conditions arises, or the necessity for the sale of the ward's real estate be shown upon some separate and different grounds than those contained in said petition so adjudicated, and that the county court of Wagoner county was without jurisdiction to hear and determine the petition for the sale of real estate, filed and determined October 9, 1911, for the reason that all the matters therein presented had been adjudicated by the order and judgment of said county court under date of September 11, 1911, and that this judgment of said county court was res adjudicata.

Fourth. That where a purchaser of real estate at a guardian's sale has knowledge of fraud practiced by the guardian upon the court and next of kin, he is bound by such fraudulent act of the guardian, which vitiates the entire proceedings; and where the purchaser conveys the land so acquired by him to his grantee by a quitclaim deed, said grantee and all persons holding under him are charged with knowledge of the fraudulent character of the proceedings and the defects of the record, which may be raised either upon direct or collateral attack; and where such purchaser at guardian's sale, with knowledge of fraudulent, void, and irregular proceedings, conveys said real estate to his grantee by quitclaim deed, said grantee and all subsequent grantees take with notice of all defects of record and fraud, and are not innocent purchasers.

Fifth. That the proceedings before the county court leading up to the sale of plaintiff's allotment were void, because the guardian had failed to file an inventory of his ward's estate.

Sixth. That the sale was void for the reason that no notice was given of the sale as required by law; that the property to be sold was located in Creek county, whereas the notice of sale described it as being located in Wagoner county.

Seventh. That the sale of the plaintiff's land by the guardian being a private sale, and the land not having been appraised, the

court was without jurisdiction to confirm the sale.

Eighth. That the petition for the sale of said real estate was fraudulent and void for the reasons that there was no necessity for the sale; that the guardian entered into a fraudulent and collusive agreement with Ella Tucker, the mother of the plaintiff, and wrongfully and fraudulently induced the said Ella Tucker to consent to the sale of the lands and not to appear, contest, or oppose the sale; that the guardian fraudulently induced the said Ella Tucker to sign a petition giving her consent to the sale of 80 acres of her minor sons' allotments, that is, 40 acres of the allotment of each minor; and that the guardian induced the said Ella Tucker to believe he would apply the proceeds to the payment and discharge of a certain mortgage.

[1] 1. The first proposition raised by the plaintiff is the appointment of the defendant Leslie as guardian to the exclusion of the mother; she being a single person, and the minor being under the age of 14 years. Section 6530, R. L. 1910, provides as follows:

"The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor."

There is no ambiguity in this statute. It is clear that the mother, being single and competent to transact her own business, is entitled to the guardianship of the person and estate of her minor children under the age of 14 years. The petition filed by the defendant Leslie in the county court of Wagoner county gave the ages of George and Fred Tucker as under the age of 14 years; also that they were in the custody of their mother, and that their father was dead and was their guardian prior to his death. It was not alleged in said petition that the mother was disqualified or incompetent in any way to act as guardian. There was no waiver on her part of her right to the guardianship, nor is there any showing that she filed any written request or nomination for the appointment of the defendant Leslie. The plaintiff contends that as a consequence the appointment of the defendant Leslie was void, and, being void, the order appointing him as guardian is subject to collateral attack.

Section 6522, R. L. 1910, provides:

"The county court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person in behalf of such minor. Be-

fore making the appointment the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor."

Section 6523, Id., provides:

"If the minor is under the age of 14 years, the county judge may nominate and appoint his guardian; if he is above the age of 14 years, he may nominate his own guardian, who, if approved by the judge, must be appointed accordingly. And the county court, in appointing a guardian is to be guided by considerations named in section 4942 (3831)."

Section 3331, Id., provides:

"In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations: First. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference the court or judge may consider that preference in determining the question. Second. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father."

All the questions raised by the plaintiff were matters before the court, and we are to presume that the court had before him the statutes above quoted. As to whether or not the mother was a fit and proper person, and qualified to be appointed guardian, or as to whether or not she had notice of the application of the defendant to be appointed guardian, were matters within the jurisdiction of the court. The order appointing the defendant Leslie contains the following finding of the court:

"And it being further proven that Ella Tucker, mother of said minors, and Charlie Tucker, brother, had been duly served with notice of said hearing to be had on the 31st day of July, 1911, by serving copies of said notice upon them in Wagoner county, Okl. * * *"

The county court of Wagoner county having jurisdiction over the subject-matter and the parties, and being a court of record, its orders and judgments should be accorded like force, effect, and legal presumptions as the judgments and decrees of other courts of general jurisdiction. *Berry v. Tolleson*, 172 Pac. 630; *Reeve v. Kennedy*, 43 Cal. 643; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. Ed. 381. In *Welch v. Focht*, 171 Pac. 730, L. R. A. 1918D, 1163, Justice Rainey, in delivering the opinion of the court, said:

"The county courts of this state are courts of record and have original general jurisdiction in probate matters. The orders and judgments of such courts, when acting within their jurisdiction, are entitled to the same favorable

presumptions and the same immunity from collateral attack as are accorded those of other courts of general jurisdiction."

In *Wheatland Gr. & Lbr. Co. et al. v. Downing et al.*, 173 Pac. 956, Justice Hardy, delivering the opinion of the court, said:

"When in a judgment rendered by a domestic court of competent jurisdiction there is an express finding that service of process was had upon certain garnishees in the action, such finding cannot be attacked in a collateral proceeding."

In *Moffet v. Jones*, 169 Pac. 652, the court said:

"In a collateral attack upon probate proceedings in the county court, the scope of the inquiry is confined to the question whether the county court had jurisdiction of such proceedings, and its orders will not be held void for errors or irregularities occurring during the progress of the proceeding."

In *Parmenter v. Ray*, 58 Okl. 27, 158 Pac. 1183, Justice Sharp said:

"However, for the purposes of this decision, it may be conceded that the court committed error in appointing Conner; but from this it does not necessarily follow that the court acted without or in excess of its jurisdiction. Errors of law in making an order should not be confounded with the power of the court to make the order. The latter only involves jurisdiction, the former, the exercise of jurisdiction."

We have seen that section 6530, R. L. 1910, supra, provides that the mother, while she remains unmarried and competent to transact her own business, and is not otherwise unsuitable, must be entitled to the guardianship of the minor. In the case of *Carolina v. Montgomery*, 177 Pac. 612, Hunter Montgomery, the defendant in error, was the plaintiff in the trial court. He filed an action in Okfuskee county to quiet his title to certain real estate, the same being the allotment of the plaintiff in error, Jeanetta Carolina—the defense there being that Gracie Williams was the mother and guardian of Jeanetta Carolina; that, Gracie Williams being a married woman at the time of her appointment as guardian, the appointment was void and subject to collateral attack. In the trial of the cause, the court found for the plaintiff, and the main ground relied upon for reversing the judgment of the trial court, was in holding "that the county court of Okfuskee county had jurisdiction to appoint Gracie Williams, mother of plaintiff, as her guardian, notwithstanding said Gracie Williams was at the time a married woman." Upon appeal to this court, it was held that the appointment of a married woman as guardian of her child is voidable, but not void, and the illegality of such appointment cannot be shown upon collateral attack.

In *King v. Mitchell*, 171 Pac. 725, it was

held that, where the judgment of the county court was silent as to the qualifications of the guardian, it was to be presumed that the court found he was qualified. We take it that the converse of this proposition would be true in the instant case; that is, the court found that Ella Tucker, the mother, was not a fit and suitable person to be appointed. Whether or not Ella Tucker, the mother, was in court at the time the defendant Leslie was appointed guardian, is not disclosed by the record. We have seen, however, that she had notice of the hearing. The order appointing Leslie guardian carries with it the presumption that the county court found every essential fact prerequisite to the validity of his appointment, and it was not necessary that the order should contain any finding that Ella Tucker was not fit and suitable to have the care and guardianship of the minors, George and Fred Tucker. It is provided by section 6489, R. L. 1910:

"Orders and decrees made by the county court, or the judge thereof, need not recite the existence of facts, or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this chapter. * * *"

In *Ex parte Miller*, 109 Cal. 643, 42 Pac. 428, John McComb, a stranger, had been appointed guardian of the person of Lillie Miller. The parents of the ward instituted habeas corpus proceedings to contest the right of the guardian to the custody of the minor. It was there held:

"As the filing of the petition for the appointment of a guardian gave to the superior court jurisdiction of the subject-matter, and the appearance of the parents at the hearing of the petition, as well as the service upon them of the citation, gave to the court jurisdiction over their persons, it was incumbent upon them to present to that court any matter, if such existed, which would have justified the court in denying the petition. They cannot afterwards, upon proceedings in habeas corpus, assert a right to the custody of the infant as against the guardian, which they might have presented in that proceeding, but which they neglected to present."

[2] 2. The plaintiff next contends that Leslie, the guardian, was not a citizen or member of the Creek Tribe of Indians, and was therefore not qualified to be appointed as guardian for George and Fred Tucker; they being Creek minors. This contention upon the part of the plaintiff is founded upon section 4, Original Creek Agreement of March 1, 1901 (31 Stat. 863, c. 676), which provides as follows:

"Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minori-

ty. All guardians or curators appointed for minors and incompetents shall be citizens."

The petition filed in the county court by Leslie, asking to be appointed guardian, and the order appointing him as guardian, fail to state whether or not he was a citizen of the Creek Tribe of Indians; however, the order itself recites:

"And the said petitioner appearing in person and by attorney, and no person appearing in opposition thereto, and the court having heard the evidence offered in said cause, and being fully advised in the premises, it is ordered that C. K. Leslie be and is hereby appointed guardian of the estate of the above named Fred Tucker and George Tucker, minors, and that letters of guardianship be issued to C. K. Leslie," etc.

We are not advised as to the nature or extent of the evidence heard by the court, but we are to presume sufficient was introduced to satisfy the court as to the competency and the qualifications of the petitioner. In the case of *King v. Mitchell*, 171 Pac. 725, this identical question was involved. *Bleakmore, C.*, writing the opinion, said:

"The competency of plaintiff's guardian and the necessity for the sale of her interest in the lands in suit were questions properly and necessarily presented for the consideration of the county court when the guardian was appointed and the sale ordered and confirmed. If the provision of the Original Creek Agreement, that 'all guardians or curators appointed for minors and incompetents shall be citizens,' was in force and controlling at the time of the appointment of the guardian in the instant case (concerning which we express no opinion), yet, as the record of the county court is silent relative to the citizenship of such guardian, it will be conclusively presumed that, in making the appointment, the court, in the proper discharge of its duty, upon inquiry, adjudged that the person designated as guardian of plaintiff possessed the requisite qualifications; and such judgment, being that of a court of general jurisdiction, is not subject to collateral attack, and may not be impeached by evidence aliunde. *Baker v. Cureton* [49 Okl. 15] 150 Pac. 1090; *Hathaway v. Hoffman* [53 Okl. 72] 153 Pac. 184; *Johnson v. Johnson*, 159 Pac. 1121."

In *Johnson v. Johnson*, 159 Pac. 1121, it is said:

"The appointment of a guardian for a minor by the county court imports general jurisdiction in the court so to do, and, the record thereof being regular upon its face, it will be inferred, from the fact that such appointment was made, that all the facts necessary to vest the court with jurisdiction to make the appointment, including the determination of the proper qualifications of the guardian appointed, had been found to exist before such appointment was made."

We find by reference to section 4 of the Original Creek Agreement, *supra*, that the allotments of minors shall not be sold dur-

ing minority. This restriction was removed by Act Cong. May 27, 1908, c. 199, 35 Stat. 312, which provides:

"All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions."

Section 6, *Id.*, provides:

"That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

In *Chupco et al. v. Chapman et al.*, 170 Pac. 259, Justice Rainey, delivering the opinion of the court, said:

"Act Cong. May 27, 1908, c. 199, 35 Stat. 312, entitled 'An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes,' is a revising act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of Act Cong. April 26, 1906, c. 1876, 34 Stat. 187, and previous congressional enactments in conflict therewith on the same subject."

But whether it was intended to supersede that portion of section 4 of the Original Creek Agreement, to the effect that guardians or curators appointed for Creek minors shall be citizens, we are not called upon to decide. There must have been some reason at the time the agreement was made for this provision, but we are unable to understand how it could have any force or effect as applied to conditions now existing. It would appear that, when Congress gave the probate courts of Oklahoma full and complete jurisdiction over the person and estate of minors, it was intended that the laws of Oklahoma relating to guardians should apply. Any other construction in many instances would nullify the statutes of Oklahoma concerning the competency of persons for guardianship. The provisions of the Oklahoma statutes providing that the father, and in case of his death the mother, being single, should have the preferential right to the guardianship of their minor children, would be denied; that is, in case of the father not being a Creek citizen, though married to a Creek woman, by whom he had several children, or of a mother not being a citizen, but married to a Creek citizen, by whom she was the mother of several children, and the father was dead. In the first instance mentioned, the father, under this provision of section 4, *supra*, would not be qualified to act as guardian of his own children, notwithstanding he might in all other respects be entirely qualified; and in case of his death, the mother, notwithstanding her qualifications in every other respect, would not be

competent. We cannot believe that it was ever intended for the section to go to that extent.

[§] 3. The next ground relied upon by the plaintiff for reversal is that the county court of Wagoner county was without jurisdiction to order the sale of the lands of his wards, for the reason that the court had denied the order to sell on a previous hearing, and that the matters contained in the former petition to sell were the same as in the petition wherein the order to sell was granted, that the judgment of the court refusing the order in the first petition was final, that there had been no appeal therefrom, and that the same had become *res adjudicata*. We are unable to agree with the contention of plaintiff on this point. The county courts in Oklahoma have general and exclusive jurisdiction to transact any and all business with reference to the estate of minors. See article 7, § 13, Constitution of Oklahoma. This jurisdiction cannot be lost, except in some manner prescribed by law, and the court has the right at any time to take proper steps to protect the interest of the minor, as it shall find are for the best interest of the minor. The record is silent as to what was before the court when the first petition was denied. We are not able to see from the record that the evidence before the court was the same at the subsequent hearing as it was at the prior hearing. All we do know is that the first petition was denied. If the contention of plaintiff is sound, then there could never thereafter be authority in the county court to grant an order to sell for the reasons assigned in the first petition. We do not think it can be successfully contended that the order denying the sale would prevent the court from ever at any time in the future granting such an order. Section 6553, R. L. 1910, gives the court the right to make an order to sell the property of a minor for his maintenance and education. Section 6554, *Id.*, gives the right to order a sale for the purpose of investment. The court would have the right to make an order at any time when conditions were changed, and it would have a right, upon a reconsideration of the evidence, without any change in conditions, to make an order upon proper motion and notice. So far as we are able to judge from the record, the court did nothing more in this case than to exercise its power in that regard.

In *Twin State Oil Co. v. Johnson*, 179 Pac. 605, Chief Justice Hardy said:

"It is now well settled that county courts of this state have full control and jurisdiction of all probate matters, and may at any time prior to the majority of the minor whose estate is involved in any proceeding pending in said court, upon proper notice and for sufficient legal grounds, modify or vacate any order or judgment made by said court in the interest

of said minor. *Ozark Oil Co. v. Berryhill*, 43 Okl. 523, 143 Pac. 173; *Morris et al. v. Sweezy*, 53 Okl. 163, 155 Pac. 537."

In *Hickory v. Campbell*, 182 Pac. 233, decided by the Supreme Court of Oklahoma June 17, 1919, Justice Higgins said:

"A probate sale of a minor's land, when the proceeds are merely intended as an investment, is one friendly to the minor, and when it is made to appear to the court, prior to the passing of title, that it is not to the best interest that the lands be sold, then it is the duty of the court, upon proper notice, to hear the matter, and, if the best interest of minors require it, to set aside the order previously given authorizing the sale."

Further on in the opinion we find:

"Defendants in error rely upon *Estate of Thomas Spriggs*, 20 Cal. 121, and in support of their contention that the decree of sale became final after the expiration of time for an appeal. The same is held in *Estate of Leonis*, 138 Cal. 194, 71 Pac. 171. We do not believe the law of California is applicable to the case at bar, for the reason that the judgments of probate courts there, if no appeal is taken, become final at the expiration of the term, wherein the law of this state, as above stated, is that, until the minor becomes of age, all judgments and orders sleep in the bosom of the court, and may be modified, vacated, or set aside during such time upon proper notice and for good cause shown."

While the order empowering the guardian to sell fails in direct terms to vacate the former order denying the petition to sell, the effect of the last order was to annul, vacate, and set aside the former order. The case of *Callahan v. Griswold*, 9 Mo. 784, is in many respects similar to the case at bar. There the county court had denied a petition for authority to sell a certain estate. From this order an appeal was taken. The judgment of the lower court was affirmed. Thereafter a second petition was filed in the county court and an order was made authorizing the sale. *Griswold*, who had purchased from some of the heirs, objected to the last order and appealed, contending the first order denying the right to sell was *res adjudicata*. The Supreme Court of Missouri held against this contention, saying:

"It is contended by the defendant in error that the judgment in the case of *Hughes, Adm'r, v. Griswold* [6 Mo. 245], which was affirmed by the Supreme Court in 1840, is a bar to any further proceedings on the subject-matter therein adjudicated. We do not regard the refusal of the county court of Warren as a judgment of this character. It may be questioned whether the principle of *res adjudicata* applies to those decisions which are made by courts acting in a summary way upon an application addressed to their discretionary jurisdiction. In such cases, if the facts upon which relief is claimed be the same upon a second application that they were in the first, by analogy to pro-

ceedings in the ordinary course of judicial investigation, parties will generally be held precluded by the result of the first application.

* * * But it seems that where it subserves the purposes of parties, courts will hear the second application and decide it differently, without being bound by the former adjudication. *Sampson v. Hart*, 14 Johns [N. Y.] 63. In the case now under consideration, the record does not show what facts were before the court when the application was first rejected by the county court of Warren. It seems that the cause, when up in this court, turned entirely upon the absence of record proof to show the jurisdiction of the circuit court of Franklin county over demands against the estate of R. McKinney, and that the case was not at all decided on its merits. The decision of the county court may have been based upon the same or similar grounds, and therefore would be no bar, even though the evidence was in other respects substantially the same on the second application as it had been upon the first."

As was said in *Holmes v. Holmes*, 27 Okl. 140, 111 Pac. 220, 30 L. R. A. (N. S.) 920:

"The orders and decrees of a probate court are not required to recite the existence of facts or the performance of acts upon which the jurisdiction of the court depends, and the failure to recite such jurisdictional facts does not raise a presumption that such facts do not exist."

In *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572, it was said:

"Where across the face of a judgment it was written that it was vacated and set aside, and another judgment of later date was entered on record, which record shows no irregularities, such second judgment is to be regarded in collateral proceedings as the final and only judgment, and it cannot be impeached by affidavits or matter outside of the record. The court having power, under some circumstances, to take such action, it will be presumed on collateral attack, the record being silent, that such circumstances existed in this case."

[4] 4. Plaintiff next contends that the defendant Leonard, who was the purchaser at the guardian's sale, had knowledge of the fraud practiced by the guardian upon the court and upon the ward and next of kin; that, having this knowledge, he was bound by such fraudulent act of the guardian, and the entire proceedings were vitiated by such fraudulent acts; that, as he conveyed the land so acquired by him to his grantee by quitclaim deed, said grantee and all persons holding under him are charged with a knowledge of the fraudulent character of the proceedings, and the defects of the record, which might be raised either upon direct or collateral attack; and that where such purchaser at the guardian's sale, with knowledge of fraudulent, void, and irregular proceedings, conveys said real estate to his grantees by quitclaim deed, said grantees and all subsequent grantees take with notice of

all defects of the record and fraud, and are not innocent purchasers. The evidence of fraud relied upon by the plaintiff relates to the allegation of the efforts of the guardian to induce the mother of the plaintiff not to appear and object to the sale of the minors' lands, alleging that the guardian promised her that he would use a certain part of the proceeds of the sale to pay off a mortgage against her homestead and certain personal property, and, further, that she was induced by the guardian to believe that the entire allotments of the minors were not to be sold, but only 40 acres of each allotment. The allegation is made that Leonard, the purchaser from the guardian, was well aware of all these facts, and was therefore not a bona fide purchaser, and any one taking title from him by a quitclaim deed is chargeable with like notice, and cannot claim the protection accorded a bona fide purchaser. There is no contention on the part of plaintiff that the purchasers from Leonard had direct knowledge of any fraud alleged, but, in accepting a quitclaim deed, that that fact, and that alone, was sufficient to put them on notice that there was some defect in the title, and, had they prosecuted the inquiry called for by this knowledge, they would have been led to a full knowledge of the fraud.

We have been unable to find any authority in Oklahoma directly deciding this point. Our statutes provide two forms of conveyance of real estate. Section 1184, R. L. 1910, prescribes the form for a warranty deed, the effect of which is set out in section 1162, Id. Section 1185, Id., provides:

"A quitclaim deed to real estate may be substantially the same as a warranty deed, with the word 'quitclaim' inserted in connection with the words 'do hereby grant, bargain, sell and convey,' as follows: 'Do hereby quitclaim, grant, bargain, sell and convey,' and by omitting the words 'and warrant the title to the same.'"

In the case of *Mosier v. Momsen*, 13 Okl. 41, 74 Pac. 905, the court said:

"Our attention is directed by counsel for plaintiff in error to numerous authorities, among which is *Oliver v. Piatt*, 3 How. 410 [11 L. Ed. 622], and *May v. Le Claire*, 11 Wall. 217 [20 L. Ed. 50], wherein it is held that a person who holds only by virtue of a quitclaim deed from his immediate grantor, whether he is a purchaser or not, is not a bona fide purchaser. It is not now necessary for us to decide this question, for under our statute the quitclaim deed to defendant in error conveyed to him all the right, title and interest of the Smithers in and to the premises there described. However, it will be found upon examination that the Supreme Court of the United States in a later case, *Moeller v. Sherwood*, 143 U. S. 21 [13 Sup. Ct. 426, 37 L. Ed. 350], held 'that the receipt of a quitclaim deed does not of itself prevent a party from becoming a bona fide

holder, and the doctrine expressed in many cases, that the grantee in such a deed cannot be treated as a bona fide purchaser, does not rest upon any sound principle."

In 13 Cyc. 525, with reference to quitclaim deeds, it is said:

"Whether a deed is a quitclaim depends largely upon the words used, but it may be inferred, not only from the terms of the deed, but from the adequacy of the price given, and other circumstances showing the purpose of the instrument; and it is not to be determined by the mere omission of the covenant of general warranty of title."

In *McConnel v. Reed*, 5 Ill. (4 Scam.) 117, 38 Am. Dec. 124, it was said:

"A deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale, and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect there is no distinction between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had been previously conveyed."

This view seems to have been taken by the Supreme Court of Mississippi, in the case of *Chapman v. Sims*, 53 Miss. 154, in which it was sought to show that the grantee in a quitclaim deed was not a bona fide purchaser. The court said:

"We conclude that there is no authority for the proposition that a quitclaim deed in the chain of title deprives him who claims under it of the character of a bona fide purchaser. There are dicta and suggestions and inferences to that effect, but we deny and repudiate the proposition as unsound, and insupportable on authority, principle, or policy."

See *Finch v. Trent*, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679.

The quitclaim deed executed by the defendant Leonard was just as effective in conveying the title purchased by him at the guardian's sale, as if he had executed a warranty deed. In other words, one can be a bona fide purchaser under a quitclaim deed where the vendor undertakes to sell and convey the land described in the deed, as he can under a warranty deed, the difference in form between a quitclaim deed and a warranty deed being that in the former the words "and warrant the title to the same" are omitted. A quitclaim deed made in substantial compliance with the provisions of chapter 13, R. L. 1910, conveys all of the right, title and interest of the maker thereof in and to the premises therein described. Section 1161, R. L. 1910. The records fail to contain copies of any deeds sought to be canceled; therefore we are unable to know the exact language used. However, the term "quitclaim deed" is

well understood by the legal profession, as well as by the laity, to convey the title then held by the grantor in the lands sold, as would be conveyed by a warranty deed, with the exception that in the former the title is not warranted against the claim of all others, but is good as against the vendor and those claiming under him by title thereafter acquired.

[5] 5. The contention of plaintiff that the judgment of the trial court should be reversed, for the reason that the guardian failed to file an inventory of his ward's estate, we think is untenable. Sam Tucker, the father of plaintiffs, had been appointed and qualified as guardian. Upon his death, the defendant Leslie was appointed. As the statutes require an inventory to be made, and as it is presumed every officer has complied with the requirements of the law until the contrary appears, we are to presume there was an inventory on file returned by the former guardian. However this may be, we see from the petition filed by the defendant Leslie for the sale of the lands that the ward had no personal property, that the ward owned certain real estate therein described, and that it was to the best interest of the minors that all of said lands be sold. The court could clearly gather from this petition that all the estate of the minor consisted of his allotment, which was sought to be sold. In 21 Cyc. 42, under the heading "Guardian and Ward," appears the following:

"The requirement in a statute that before any one shall be appointed guardian he shall file a statement of the ward's estate is directory only, and failure to file the statement will not of itself render an appointment void."

[6] 6. Plaintiff next contends that the sale was void for the further reason that no notice was given of the sale of real estate as required by law; that the property to be sold was located in Creek county, whereas the notice of sale described it as being located in Wagoner county. This notice was published in both Creek and Wagoner counties. The publication in Creek county correctly described the lands. The publication in Wagoner county read as follows:

"Notice of Sale of Real Estate in the Guardianship of George Tucker.

"Notice is hereby given in pursuance of an order of the county court of the county of Wagoner, state of Oklahoma, made on the 9th day of October, 1911, that the undersigned guardian of the estate of George Tucker, a minor, will sell at public sale to the highest bidder, subject to confirmation by the court on Monday, the 6th day of November, A. D. 1911, at 10 o'clock a. m., at the courthouse in Sapulpa, Creek county, Oklahoma, all the right, title and interest of said George Tucker, a minor, in and to the following described real estate, situated in Wagoner county, state of Oklahoma, to wit: The S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 3, Twp. 17 N., R. 7 E., and the S.

W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 7, Twp. 17 N., R. 8 E., and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of Sec. 33, Twp. 18 N., R. 8 E., in Creek county, Oklahoma. Said real estate will be sold on the following terms and conditions, to wit: All cash upon confirmation of sale by the county court of Wagoner county, Okl."

When any person desiring to bid upon the lands saw this notice, he could not have been misled thereby. Any one would know that the lands were in Creek county, and intended to be described as being in Creek county. He would readily see that "Wagoner county" was intended to be Creek county. He would be advised that the land was to be sold at Sapulpa, in Creek county, and, when so advised, he knew exactly what land was to be sold and where the land was located. We cannot bring ourselves to believe that a defect of this nature could or should affect the validity of the sale. Section 6383, R. L. 1910, provides that the land to be sold must be described with common certainty in the notice. In *Richardson v. Farwell*, 49 Minn. 210, 51 N. W. 915, the county and state in which the land was situated were not mentioned in the notice. In passing upon this question, the court said:

"But it is admitted that land of that description, by government subdivisions, is within the county of Hennepin where the land was sold, and where by statute it was required to be sold; and, being land of the minors referred to, the description was not presumptively misleading. There could be no other corresponding description within the county or state, and this the court will take notice of."

In *Howbert et al. v. Heyle*, 47 Kan. 58, 27 Pac. 116, the court said:

"Where a petition by a guardian to sell certain land belonging to his ward states, among other things, that the ward had no money nor personal property, and that it was to his interest, and necessary for his support and education, that the land should be sold, and describes the land as being an undivided one-twelfth interest 'in the following described real estate, to wit: The southeast quarter of section 32, range 17, township 12'—without stating specifically in what county or state the land was situated, or whether in range east or west, or township north or south, but land answering to the aforesaid description was in fact situated in Shawnee county, where all the parties interested resided, and where all the proceedings were had, held, that the petition must be held to be sufficient when the sale under it is many years afterwards attacked collaterally."

[7] 7. Plaintiff next contends that the sale of the lands by the guardian was a private sale, and, before the court would have jurisdiction to confirm it, it was imperative that the lands to be sold be appraised, and that the court was without jurisdiction to confirm, unless the price bid was 90 per cent. of the appraised value of the same. If the

sale herein was private, we agree with the contention of plaintiff. Section 6384, R. L. 1910, provides:

"No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least 90 per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof."

In *Winters v. Okla. Portland Cement Co.*, 164 Pac. 965, the court said:

"The words of this section are expressly prohibitory. They do not simply and only say that an appraisement shall be had, but directly say that the court shall not act except under the given conditions. The inhibition strikes at the power of the court, and leaves no discretion whatsoever in the court. It does not pertain to any step intermediate to the acquirement of jurisdiction of the sale proceeding and the order of confirmation, but to the power to make the order of confirmation itself. The appraisement is not even necessarily a part of the sale proceeding proper, but may have been made at any time within a year prior thereto, and long before the court acquired jurisdiction of the sale proceeding; but the statute provides that the court shall not make the order, except it is in existence, and in conformity to it."

Was the sale made by the guardian herein public or private? Section 6563, R. L. 1910, provides if, after full examination by the county court, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof, should be sold, the court may grant an order therefor, specifying therein the reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale. By reference to the record, we find the petition filed by the guardian for authority to sell prays that upon hearing had he be authorized to sell at public or private sale. The court thereafter granted the order and authorized the guardian to sell at public sale to the highest bidder. The guardian gave the necessary notice that on the date therein named he would sell at public sale to the highest bidder. The order confirming the guardian's sale recited that the sale was public. We have carefully examined the record in this case, and are of the opinion that there has been a substantial compliance with the requirements of the statutes relative to guardian's sale. Section 6386, R. L. 1910, provides for the return of the sale, and that the court or judge must fix the day for the hearing of such return; provides for the notice that shall be given, and that upon the hearing, if the court was of the opinion that the

bid was disproportionate to the value, and if it appeared to the court that a sum exceeding such bid at least 10 per cent. might be obtained, the court had authority to vacate the sale, and direct another to be had, of which notice should be given, and the sale in all respects conducted as if no previous sale had taken place; that if an offer of 10 per cent. more in amount than that named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. The return of the guardian set out in full detail all the proceedings had in executing the order of sale. The court had before it full proof of the notice required, and determined that the statutes had been complied with. The order of confirmation contained recitals showing a compliance with all the provisions of the statute, and we are of the opinion that the action of the court, in its judicial determination of whether or not the guardian complied with all the provisions of the statute, should, in case of collateral attack, be treated as conclusive in the absence of fraud.

In *Winters v. Okla. Portland Cement Co.*, supra, it was said:

"After a county court obtains jurisdiction of a guardianship sale proceeding, all irregularities and defects between the acquirement of jurisdiction and the order of confirmation are cured by the order of confirmation, to the extent that the order of confirmation may not be collaterally attacked on account of such irregularity; but this rule does not extend to jurisdictional matters."

[8] 8. The plaintiff further contends that the sale of the real estate herein was secured by the fraudulent practices of the guardian, that there was no necessity for the sale of the same, and that the guardian entered into a fraudulent and collusive agreement with Ella Tucker, the mother of the plaintiff, whereby the said guardian, in order to wrongfully and fraudulently induce the said Ella Tucker to consent to the sale of the lands of the plaintiff and his brother, Fred Tucker, and as an inducement for her not to appear, contest, or oppose the sale of the same, represented to the said Ella Tucker that one Harsher had a mortgage on the homestead belonging to Sam Tucker, deceased, and which comprised the family homestead of the said Ella Tucker, together with the plaintiff and his minor brother, that the guardian wrongfully and fraudulently represented to the said Ella Tucker that, if she would consent to the sale of 80 acres of her minor sons' allotments, that is to say, 40 acres of the allotment of each minor, the guardian would apply the proceeds thereof to the payment and discharge of the mortgage indebtedness; that the said Ella Tucker consented to the sale of 80 acres of the allotments of her minor children as

above described, and that she did not hear until a long time thereafter that she had given her consent to the sale of all the allotments of her minor children; that she was deceived and misled in that regard, and that she believed that she had only given her consent to the sale of 80 acres, or 40 acres each out of the allotments of George and Fred Tucker, respectively; that the guardian, C. K. Leslie, by fraud and deceit, inserted in said petition the entire allotments of both George and Fred Tucker; that he thereafter purchased the mortgage on the homestead, and fraudulently procured an order from the county court of Wagoner county, permitting him to apply \$400 out of the proceeds of the sale of the lands of George and Fred Tucker, which he wrongfully converted and applied to the payment of the indebtedness of the said Sam Tucker, deceased; that the said C. K. Leslie had procured his appointment as guardian for no other purpose than the fraudulent intent and purpose of obtaining control of the allotments of the plaintiff herein, and for the purpose of realizing upon said mortgage to his individual advantage and benefit, and to the detriment of the rights of the plaintiff and his brother, Fred Tucker, and that the county court of Wagoner county was deceived and fraud was practiced upon it in not knowing the real facts and purposes of the said Leslie in procuring his appointment as guardian; that at the time the said Ella Tucker consented to the sale the guardian represented that the land was practically worthless, that it was only a pile of rock and brush, and did not disclose to the mother that it was valuable for oil and gas purposes. It is alleged by the plaintiff that all the above enumerated acts committed by the guardian were well known to the defendant M. B. Leonard prior to the sale of the allotments of the minors to him by the guardian.

The law in its wisdom, and having regard for the interest of minors, requires that, in applying for an order to sell, notice thereof shall be given to certain persons. In this case, the allegation is contained in plaintiff's petition that by the fraud of the guardian the mother was induced to give her consent for the sale. If the guardian was guilty of the charges made in the petition, we are forced to say his conduct was very reprehensible. When a demurrer is filed to a petition as defective, in that it does not state facts sufficient to constitute a cause of action, the petition must be liberally construed, and all its allegations taken as true for the purpose of the demurrer; therefore we take as true the allegation that the guardian had purchased this mortgage against the homestead of Sam Tucker, that he induced Ella Tucker to believe that he was only selling 40 acres of each of the allotments of her minor children, that he induced her not to appear before the county court and protest

against the sale, and that the court was imposed upon. It is further alleged that the defendant Leonard had notice of the fraudulent acts of the guardian, and as a matter of fact, if this was true, he could not be a bona fide purchaser; therefore the petition stated facts sufficient to constitute a cause of action against the defendant Leonard at least.

In *Blackwell Oil & Gas Co. v. Whitesides*, 174 Pac. 573, it is held that, where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, the demurrer should be overruled. We hold that the court was in error in sustaining the demurrer as to the defendant M. B. Leonard; the remaining defendants claiming that they had no notice of any fraud, and there being no allegation that they had notice, only such as would be conveyed to them by quitclaim deed. In *Adams Oil & Gas Co. v. Hudson et al.*, 55 Okl. 386, 155 Pac. 220, it is held:

"To constitute a 'bona fide purchaser' three things must exist. A purchase in good faith, for value, and without notice; and, where a subsequent purchaser interposes the defense of a bona fide purchaser, the burden is upon him to show a purchase for value, and, on his failure to do so, he cannot claim the benefits of a bona fide purchaser."

In other words, if Leonard's title was defective, that is, having been induced by the fraud of the guardian, and Leonard had notice of this fraud, then before the grantees from Leonard could claim to be bona fide purchasers the burden is shifted to them to show that they had no notice of the fraud, and that the purchase was in good faith and for value. As we understand the rule in the trial of the cause, the plaintiff would first be required to establish the fraud, together with the fact that Leonard had notice. When this was established, then the purchasers from Leonard would be required to introduce evidence showing that they purchased without notice of the fraud and for value and in good faith.

[9] Mr. Justice Dunn, speaking for this court on rehearing in the case of *Brooks et al. v. Garner*, 20 Okl. 236, 94 Pac. 694, 97 Pac. 995, quotes approvingly from the Supreme Court of Michigan, in the case of *Letson v. Reed et al.*, 45 Mich. 27, 7 N. W. 231, as follows:

"Purchasers of land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed."

In the case of *Vose v. Penny*, 185 Pac. —, decided by this court June 17, 1919, McNeill, J., quotes with approval the following from *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637, wherein Justice Hughes, discussing the defense of a bona fide purchaser for value, stated the rule as follows:

"In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession. The consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed. Notice must be denied previously to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out."

Counsel for plaintiff concede that the proposition presented as to the jurisdiction of the court, regarding the appointment of Leslie as guardian of plaintiff, the mother of plaintiff being a single woman and qualified for the guardianship, is the most important one presented in this case for the consideration of the court, and further concede that upon the court's decision of this proposition largely depends the final determination of the case. Notwithstanding this concession on the part of counsel, we have carefully considered every question presented and argued, we have carefully examined the entire record, and our conclusion is that the judgment of the lower court should be reversed on the eighth proposition presented by plaintiff; and it is so ordered.

All the Justices concur, except KANE, J., absent and not participating.

STATE ex rel. FREELING, Atty. Gen., v. ROSS, County Superintendent of Public Instruction. (No. 10779.)

(Supreme Court of Oklahoma. Sept. 16, 1919.)

(Syllabus by the Court.)

1. MANDAMUS —1—SUPREME COURT WILL GRANT WRIT ONLY WHEN QUESTIONS PUBLICI JURIS ARE INVOLVED.

The power of the Supreme Court to grant mandamus and to hear and determine the same, as authorized by section 2, art. 7, Constitution, will be exercised only when the questions involved are publici juris, or when some unusual situation exists, whereby not to entertain jurisdiction would work a great wrong or result in a practical denial of justice.

2. MANDAMUS —4(5)— SUPREME COURT'S ORIGINAL JURISDICTION—REMEDY BY APPEAL NOT ADEQUATE ON DENIAL IN DISTRICT COURT.

Where an action in mandamus has been brought by the state on the relation of the Attorney General, against a county superintendent of public instruction, in the district court having jurisdiction, to compel the performance of a ministerial duty arising under section 2, art. 7, c. 219, Sess. Laws 1913, and such court erroneously holds that the parties have a remedy at law by appeal, and refuses to entertain jurisdiction, and the effect thereof, if an appeal therefrom were prosecuted to this court, would, in the ordinary course of the law, be to work great delay in the opening of the public schools of the affected districts, the Supreme Court will entertain and exercise its original jurisdiction by mandamus, so as to prevent a denial of justice.

3. MANDAMUS —79—PERFORMANCE OF DUTIES OF COUNTY SUPERINTENDENT WILL BE ENFORCED BY SUPREME COURT.

The duties imposed upon a county superintendent by section 2, art. 7, c. 219, Sess. Laws 1913, in respect to declaring school districts disorganized and a consolidated district composed thereof organized, involve the exercise of no discretion on the part of such superintendent, but are purely ministerial in their character, and their performance may be enforced by mandamus brought in the Supreme Court, in proper cases.

4. SCHOOLS AND SCHOOL DISTRICTS —39— APPEAL FURNISHES NO REMEDY, WHERE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION REFUSES TO ACT AS TO FORMATION OF CONSOLIDATED DISTRICT.

Section 2, art. 4, c. 219, Sess. Laws 1913, providing that "in the alteration of, or refusal to alter, the boundaries of any joint school district," any person or persons aggrieved thereby may appeal to the state superintendent of public instruction, affords no remedy to the officers or school patrons of a consolidated school district organized under the provisions of article 7, c. 219, where the county superintendent of public instruction refuses or neglects to perform the duties enjoined upon him by section 2 of the act, governing the formation of

consolidated school districts, whether such consolidated district be comprised of territory located in one or more than one county.

5. MANDAMUS —154(2)— PETITION SUFFICIENT FOR ENFORCEMENT OF PERFORMANCE OF STATUTORY DUTIES BY COUNTY SUPERINTENDENT.

Petition examined, and held sufficient to state a cause of action entitling the relator to a peremptory writ of mandamus.

6. MANDAMUS —164(3)— ANSWER INSUFFICIENT TO DENY ALLEGATIONS OF PETITION.

In a mandamus proceeding begun against a county superintendent to compel the performance of the duties of his office, an answer that "defendant is not in a position to admit or deny the material allegations therein contained, and therefore asks that plaintiff be required to make proof thereof," does not traverse or deny the facts alleged in the relator's petition, and, in effect, is an admission of such allegations.

7. PLEADING —126—ANSWER NOT ATTEMPTING TO DENY SUBSTANCE OF PETITION ADMITS MATERIAL AVERMENTS.

An answer which confines itself to denying, in the same words, an allegation of the petition, and does not attempt to deny its substance and spirit, admits the material averments of the petition and only raises an immaterial issue.

(Additional Syllabus by Editorial Staff.)

8. MANDAMUS —164(3)—ANSWER, IN FORM NEGATIVE PREGNANT, ADMITS AVERMENTS OF PLEADING.

In view of Rev. Laws 1910, § 4745, allegations of a petition in mandamus are admitted by the failure to properly put them in issue, and an answer to a paragraph of petition, which is in form a negative pregnant, admits the averments of that paragraph.

Original application for mandamus by the State of Oklahoma, on the relation of S. P. Freeling, Attorney General, against Mrs. A. K. Ross, Superintendent of Public Instruction of Rogers County. Peremptory writ granted.

S. P. Freeling, Atty. Gen., and R. E. Wood, Asst. Atty. Gen. (Adams & Wills, of Claremore, and Harris & Howard, of Oklahoma City, of counsel), for relator.

Mack R. Shanks, Co. Atty., D. M. Battensfield, Asst. Co. Atty., and H. Tom Kight, all of Claremore, for respondent.

SHARP, J. The proceedings in this case grow out of the efforts of the electors of school district No. 28, Rogers county, and school district No. 14, Tulsa county, and a portion of school district No. 17, Tulsa county, to organize a consolidated school district, under and pursuant to the provisions of article 7, c. 219, Session Laws 1913. The Attorney General was permitted to file the action upon a showing made meeting the re-

quirements of rule 15 of the Supreme Court, (165 Pac. viii). The facts will sufficiently appear from a consideration of the several propositions involved.

[1] It is first contended that the question involved and necessary to a determination of the case is not *publii juris*; hence this court is without jurisdiction. Counsel cite in support of their contention the case of *State ex rel. Freeling v. Lyon*, 165 Pac. 419. In that case the court held that the refusal of the secretary of state to deliver commissions to notaries public throughout the state to persons appointed by the Governor was *publii juris*, and accordingly entertained jurisdiction of an action brought by the state on the relation of the Attorney General directing the secretary to deliver the commissions. The question of original jurisdiction of this court to issue writs of mandamus and other prerogative writs, independent of the jurisdiction to exercise a general superintending control over all inferior courts and all commissions and boards created by law, has heretofore been considered in the cases of *Homesteaders v. McCombs*, 24 Okl. 201, 103 Pac. 691, 38 L. R. A. (N. S.) 1000, 20 Ann. Cas. 181; *State ex rel. West v. Cobb*, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639; *Montgomery v. State Election Board*, 27 Okl. 324, 111 Pac. 447; *Smith v. Hall*, 28 Okl. 435, 114 Pac. 608; *State ex rel. Freeling v. McCullough*, 168 Pac. 413. In the *Homesteaders Case* jurisdiction was denied on the ground that the question involved was not *publii juris*. In the *Cobb Case* it was held that the question of removal of a county judge for misconduct and malfeasance in office presented such a situation as authorized the court in assuming jurisdiction. The action was, however, dismissed on other grounds. In the *Montgomery Case* jurisdiction was denied on authority of the rule announced in the *Homesteaders Case*. *Smith v. Hall* was a quo warranto proceeding brought by relator, who was contesting the right of respondent to the office of county judge of Delaware county. No showing was made that the relief demanded could not be secured by an action in the district court, and the case was dismissed on the authority of the opinion in the *Homesteaders Case*. *State ex rel. Freeling v. McCullough* was dismissed for the failure of the Attorney General to observe rule 15 (165 Pac. viii) of this court.

[2] We shall not undertake to enter upon a general discussion of the authorities defining the limitations of courts of last resort, in states having organic provisions similar to section 2, art. 7, of our Constitution, or to attempt to reconcile the apparent divergence of views upon the question of jurisdiction, for the reason that it seems to be very generally and wisely held that upon sufficient showing the court should exercise

original jurisdiction in cases involving an unusual situation, or where to decline to entertain jurisdiction would work a great wrong or result in a practical denial of justice. Such a case we think is presented by the record at hand. In the first place, the case is one brought by the state on the relation of the Attorney General, who, among other allegations, charges that school district No. 28 of Rogers county, and school district No. 14 of Tulsa county, and a portion of school district No. 17 of Tulsa county, on account of the action of the respondent, are now in a disorganized condition; that the time for the officers of the school districts, whether separately or as a consolidated district, in which to make up their estimates of revenues and expenses for the coming year is at hand; that the school districts, either separately or as a consolidated district, will require the services of a large number of teachers, and that it is necessary for this court to determine the matters herein submitted, not only in order that such district or districts may know their legal status, but that those who may contract with them, either as teachers or who may furnish supplies, may know and be advised as to the legal status of such district or districts; that in order for school or schools to be conducted therein for the coming school years such contracts will have to be expressly made and entered into, and if a decision of this case upon its merits shall be delayed for any considerable time it will deprive several hundred children of school age, residing within the territory contained within such school districts, of the rights, privileges, and benefits of attending such schools for the period during which such litigation is pending. Also it is made to appear that, until a final decision is reached, it cannot be known who has the power to make the necessary estimates to the excise board upon which to procure a levy of taxes upon which to conduct a school in the affected territory. Furthermore it is made known to the court that on the 7th day of July, 1919, an original application for mandamus was presented to the district court of Rogers county, and denied on the grounds "that the plaintiffs in said application had an adequate remedy at law by appeal"; that if an appeal were taken from the action of the district court to this court in that case, considerable time would elapse before a decision could be reached, and the court could then only determine the question of the trial court's action in refusing to entertain jurisdiction; that in the event of a reversal of such judgment the cause would be remanded to the district court of Rogers county, "and that before a final determination of said matter could be had many months would probably elapse."

It is in this class of cases that the Supreme Court should and will entertain origi-

nal jurisdiction. The newly elected officers of the consolidated district, the school patrons, and the Attorney General of the state have with commendable zeal exercised every power at their command to speedily end the controversy into which the district has become involved by the conduct of the respondent. The Constitution, by section 1, art. 13, provides that the Legislature shall establish and maintain a system of free public schools, wherein all the children of the state may be educated. In a sense, at least, the question involved is public juris, though the interest of the state at large may not be directly involved, its sovereignty violated, or the liberty of its citizens menaced. The public schools of the state are a matter of general state concern, as distinguished from a purely local or municipal affair. *Board of Education v. State ex rel. Best*, 26 Okl. 366, 109 Pac. 563; *Oklahoma Ry. Co. v. St. Joseph's Parochial School*, 33 Okl. 755, 127 Pac. 1087; *Thurston v. Caldwell*, 40 Okl. 206, 137 Pac. 683; *State ex rel. Friend v. Cummings*, 47 Okl. 44, 147 Pac. 161. When organized, the public school districts, of whatever kind, are agencies of the state (*School District No. 17 v. Zediker*, 4 Okl. 599, 47 Pac. 482; *Oklahoma Ry. Co. v. St. Joseph's Parochial School*, supra), prepared for and intended to discharge an important and imperative governmental duty, not only in the matter of education and the economic efficiency attendant thereon, but in a knowledge of our institutions, thereby tending to inculcate in the youthful mind a love of country and a respect for law and good government. There is no more sacred governmental duty than that arising out of our free public school system. Indeed, the very future of the republic may be rested very largely on the education of the youth of the land. This beneficent work cannot go on in an orderly fashion and as intended, if here and there obstreperous individuals, who, for the time, occupy positions of trust in the work of education, are permitted to nullify the law and bring about a condition whereby the school children of a community or communities are, for any considerable length of time, deprived of the opportunity of gaining an education.

That the court should in exceptional cases entertain original jurisdiction, and that such was in the mind of the court in the preparation of the Homesteaders Case, appears clear from the authorities cited, particularly the cases of Attorney General v. Eau Claire, 37 Wis. 443; *State ex rel. Wood v. Baker*, 38 Wis. 71; *State ex rel. McIlhenny v. Stewart*, 32 Mo. 382; *Wheeler v. Northern Colorado Irrigation Co.*, 9 Colo. 248, 251, 11 Pac. 103; *People ex rel. Kludel v. Clerk of District Court*, 22 Colo. 282, 44 Pac. 507; *State ex rel. Steele v. Fabrick*, 17 N. D. 532, 117 N. W. 860. A petition by the people, on the relation of a

school district, against the board of county commissioners, for a mandamus to compel them to levy a tax was held to be a proceeding in which the Supreme Court of Colorado would take original jurisdiction (*People v. Lake County*, 12 Colo. 89, 19 Pac. 892); while in *People v. Montez*, 48 Colo. 436, 110 Pac. 639, it was held that the Supreme Court would take original jurisdiction of a mandamus proceeding brought by the people, on the relation of the public examiner of the state, to compel a county clerk and recorder to permit the relator to examine the records, books, and files of the respondent's office. In *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692, the court took original jurisdiction of an application for a writ of mandamus against the secretary of state to compel him to revoke the license of an insurance company to do business within the state, because it had broken the conditions under which it received its license. In *State v. Goff*, 129 Wis. 668, 109 N. W. 628, 9 L. R. A. (N. S.) 916, it was held that the court would take original jurisdiction of the construction of the primary law and the duties of executive officers thereunder, because the decision of such question was necessarily of general importance to the state, even though the case in which it arose affected directly only the rights of a local officer and especially because an authoritative decision in such cases could only be reached through the exercise of the appellate jurisdiction, on account of the shortness of the time between the primary election and the general election, when the question must be tested, if tested at all. In *State v. Woodbury*, 74 Kan. 877, 87 Pac. 701, it was held to be a sufficient reason for not applying to the district court for a writ of mandamus that that court had in a similar suit denied the writ. In *Hitchcock v. Taylor*, 99 Mich. 128, 57 N. W. 1097, it was held that the fact that the circuit judge, before taking his seat upon the bench, had been one of the attorneys to the controversy, afforded sufficient reason for applying to the Supreme Court for the writ in the first instance. In *Johnson v. Reichert*, 77 Cal. 34, 18 Pac. 858, it was held that the showing made was sufficient to authorize the court in entertaining original jurisdiction. See, also, *State ex rel. Burns v. Linn*, 49 Okl. 526, 153 Pac. 826, Ann. Cas. 1918B, 139. The use of the writ of mandamus, as defined by Lord Mansfield in *Rex v. Barker*, 3 Bun. 1265, was "to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." The same principles are declared by Lord Ellenborough in *Rex v. Archbishop of Canterbury*, 8 East, 219. Considering, therefore, the nature of the writ and the situation before the court,

it is very clear that jurisdiction should be entertained; otherwise, a great wrong and injustice will be done for which those affected will have no adequate remedy.

[3, 4] Has the plaintiff a plain, speedy, and adequate remedy at law by appeal to the state superintendent of public instruction? Counsel have seemingly overlooked the fact that the present action is one prosecuted by the state, on the relation of the Attorney General and not by the electors, taxpayers, and public school patrons of the consolidated school district, though brought at their instance. No statute has been called to our attention, and we know of none, whereby the state may appeal in matters affecting the organization of consolidated school districts. The statute relied upon by counsel (section 2, art. 4, c. 219, Session Laws 1913) provides only for an appeal by "any person or persons [who] shall feel aggrieved." But this statute involves only the organization of joint districts, which we understand are nothing more or less than ordinary school districts lying partly in two or more counties. In the formation of such districts no election is held, the statute requiring only that, "when application shall be made in writing to any one of them [superintendents] by five householder residents therein," the county superintendents of the respective counties, shall, if by them deemed necessary, meet and proceed to lay off and form a joint school district. If, in the alteration of, or refusal to alter, the boundaries of any joint district, any person or persons shall feel aggrieved, such person or persons may appeal to the state superintendent of public instruction within ten days after the rendition by them of the decision appealed from. The instant case presents no such situation, but instead involves the organization of a consolidated school district. In order to organize such a school district, whether composed of territory in one or more counties, an election must be held, as provided for in article 7, c. 219, Session Laws 1913, section 1 of which was amended by the act of February, 14, 1917 (Session Laws 1917, pp. 473, 474.) This is the statute under which the parties proceeded, and the only statute governing the formation of a consolidated school district.

While it is true that both joint school districts and consolidated school districts may include territory situated in two or more counties, the mere fact that there is this common provision in the statute affords no sound reason for concluding that, because the statute authorizing the formation by the county superintendents of joint school districts provided for an appeal therefrom, the same right of appeal is given from the action of the electorate in the formation of consolidated school districts. It is true that section 8, art. 7, provides generally that in all matters relating to consolidated districts

not provided for in paragraphs 1 to 7 thereof the law relating to school districts shall be enforced, where said laws are applicable. But, even were we to read the words "school districts" in said section to include the laws governing the formation of joint school districts, and the right of persons affected thereby, still we cannot conclude that it was intended thereby to give the right of appeal to the state superintendent of public instruction, and thereby confer on such officer the power to set at naught the result of an election. It is proper that some form of review of the action of the county superintendent or superintendents in the formation of a joint school district should lie. But it would be a most unusual statute that would vest authority in the state superintendent to pass upon and determine the validity of proceedings had for the formation of consolidated school districts. The right to appeal is very properly given in the one case, while in the other, the statute not being applicable, the right will not be extended by construction.

We are aware these views are to some extent in conflict with *Felkner v. Winningham*, 33 Okl. 204, 122 Pac. 534, where it was said that under a somewhat similar statute an appeal from the action of the county superintendent to the state superintendent of public instruction would lie. In that case an appeal was taken from an order of the county superintendent, disorganizing a constituent school district, to the board of county commissioners. On the hearing the board of county commissioners dismissed the appeal, on the ground that they were without jurisdiction in the premises. Mandamus proceedings were instituted in the district court to require the commissioners to hear and determine the appeal; also suit was brought and a temporary injunction granted, restraining the directors of the proposed consolidated district from performing any official act until the determination of the mandamus proceedings. Afterward the injunction was dissolved, and an appeal prosecuted to this court, where the judgment of the trial court was affirmed. It was unnecessary to a decision of the case to point out the remedy of the aggrieved persons, and we think in doing so the court labored under a mistaken view of the law. In so far, therefore, as the opinion in that case, and in the case of *Woodard v. Strossider*, 33 Okl. 277, 124 Pac. 967, are in conflict with the views herein expressed, they are overruled.

Proceedings begun and which result in the formation of a consolidated school district in no manner involve the alteration of, or the refusal to alter, the boundaries of a joint school district; and it is only from such act that an appeal is provided for. Again, the appeal provided for in the section named is one given to aggrieved persons, and is prosecuted from the "decision" of the county superintendent. It is not shown, and in the

face of their action in this court it will not be presumed that either of the officers of the consolidated school district, elected at the time of the election held to organize the consolidated district, or the other electors and taxpayers at whose instance the present action was begun, were "aggrieved persons." They are not complaining, and have not complained, of anything that was done in the formation of the district, but, instead, are grievously complaining of the failure of the respondent, as county superintendent of Rogers county, to perform a plain ministerial duty. This much, in effect, was held in *Felkner v. Winningham*; while by section 2, art. 7, it is required that upon receipt of the report of the clerk of the special meeting, by the county superintendent, such superintendent shall declare the constituent school districts disorganized and the consolidated school districts organized. Where the consolidated district comprises territory lying in more than one county, the county superintendents of the several counties shall act together in doing the things necessary to the formation of the consolidated district. This duty, when, as here, the requirements of the statute have been met, is mandatory, and may be enforced by mandamus. Public officers, such as county superintendents, are charged with the performance of the statutory duties pertaining to their office—not according to their own whims or predilections, or when it may suit their notions, but as ordained in the statutes and laws of the state. Old as is this rule, and though universally pronounced by the courts, frequent occasions are afforded for its exercise. The law governing the rights of the parties is the same as that recently announced in the case of *Rasure, County Superintendent, v. Sparks et al.*, 183 Pac. 495 (not yet officially reported).

[5-8] The third and fourth points urged in the brief of respondent may be considered together. The one is that the petition does not state facts sufficient to constitute a cause of action; the other, that the answer contains a defense to relator's cause of action. The first contention is wholly without merit, as the petition clearly makes out a case entitling the state to a peremptory writ of mandamus. The allegations of the petition stand substantially admitted. Paragraphs 1, 2, 3, 4, 6, 7, 8, 10, 11, and 12 of relator's petition are admitted by the failure properly to put them in issue. The answer to paragraph 5 of relator's petition is in form of a negative pregnant and therefore the averments of that paragraph stand admitted. Paragraph 9 is in effect an admission that the report of the secretary of the meeting, duly signed by such secretary, was by him presented to respondent. The paragraphs of the petition other than 5 and 9 all substantially charge that as to such paragraphs "defendant is not in a position to either admit

or deny the material allegations therein contained, and therefore asks that plaintiff be required to make proof thereof." Section 4745, Revised Laws, by the first subdivision thereof, provides that an answer shall contain "a general or specific denial of each material allegation of the petition controverted by the defendant"; while section 4779 declares that "every material allegation of the petition, not controverted by the answer * * * shall, for the purposes of the action, be taken as true."

The answer does not even contain an averment that the respondent is without knowledge or information thereof sufficient to form a belief, or a denial in any form. It simply states that she is not in a position to either admit or deny the material allegations thereof, and asks that relator be put upon proof thereof. This is not a sufficient denial—or, indeed, any denial at all—under the Codes of any of the states with which we are familiar. Such an answer is a mere call for proof, and does not serve as a denial, but, by failure to deny, is an admission of the allegations of the petition. *Abbott's Trial Brief*, § 492; *Bentley v. Dorcas*, 11 Ohio St. 398, 408; *Building Association v. Clark*, 43 Ohio St. 427, 2 N. E. 846; *Ryan v. Anglesea R. Co.* (N. J.) 12 Atl. 539.

The remaining paragraphs of respondent's answer are not sufficient to make out a defense to the allegations of relator's petition, or, if established, to defeat or set aside the result of the election. Paragraph 13 in part is subject to the same objection as the answer to paragraph 5. It does not directly and without evasion state a defense, except by way of negative pregnant. Other issues tendered involve either immaterial averments, nonessentials, or conclusions of law, and do not therefore raise an issue of fact.

No complaint is made that the county superintendent of public instruction of Tulsa county has neglected or refused to perform the duties devolving upon her in the matter of the "disorganization" of school district No. 14 of Tulsa county, and that part of school district No. 17 in Tulsa county, within the proposed consolidated school district.

It is therefore ordered that the peremptory writ of mandamus issue to the respondent, commanding and requiring her forthwith to dissolve school district No. 28 of Rogers county, and, together with the county superintendent of Tulsa county, to declare the consolidated district, composed of school district No. 28 of Rogers county and school district No. 14 and that portion of school district No. 17 of Tulsa county, included within the proposed consolidated school district, duly organized, and to do any and all acts incident thereto, or necessary to a full and complete organization of such consolidated school district.

RAINEY, HARRISON, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

HEJDUK v. SNYDER. (No. 8842.)

(Supreme Court of Oklahoma. July 1, 1919.
Rehearing Denied Sept. 30, 1919.)

(Syllabus by the Court.)

1. ANIMALS §100(1)—ASSESSMENT OF DAMAGE BY TRESPASSING ANIMALS IS A "SPECIAL PROCEEDING."

The proceeding provided in sections 153 and 154, Revised Laws 1910, regarding the restraining of stock for trespassing upon the lands of another, and permitting the justice of the peace to assess the damages, is a "special proceeding" before the justice of the peace, as defined by section 4645, Revised Laws of 1910, and is not a "cause of action," as defined in section 4644, Revised Laws 1910.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action; Special Proceeding.]

2. JUSTICES OF THE PEACE §144—STATUTE LIMITING APPEALS TO CASES INVOLVING \$20 OR MORE NOT APPLICABLE TO SPECIAL PROCEEDINGS.

Chapter 135, Session Laws of 1913, which limits appeals from justice of the peace in causes of action involving less than \$20, has no application to special proceedings before the justice of the peace, when said proceedings are instituted in conformity with sections 153 and 154 of the Revised Laws of 1910.

3. FENCES §6—ADJOINING LANDOWNERS MUTUALLY BOUND TO MAINTAIN LINE FENCES.

Under and by virtue of section 6645 of Revised Laws of 1910, adjoining landowners are mutually bound to maintain line fences between them, where the lands of both are inclosed.

4. ACTION §1—PLAINTIFF CANNOT RECOVER FOR DAMAGES CAUSED BY HIS OWN WRONG.

It is a well-settled rule of law that a person cannot maintain a claim for damages based upon his own wrong, or caused by his own neglect.

Appeal from County Court, Noble County;
A. Duff Tillery, Judge.

Proceeding by Vaclov Hejduk against Fred Snyder. From the judgment on a verdict for defendant in a trial de novo in the county court, on appeal from a judgment of a justice of the peace, plaintiff brings error. Affirmed.

H. A. Johnson, of Perry, for plaintiff in error.

Johnston, Robinson & Rice, of Perry, for defendant in error.

McNEILL, J. This controversy arose by the plaintiff in error restraining certain stock of the defendant in error that was trespassing upon plaintiff's premises, and proceeding in accordance with sections 153 and 154, Revised Laws of 1910, to have the justice of

peace assess the damages. The damages as assessed by the justice of the peace were less than \$20. The defendant appealed from the assessment of damages made by the justice of the peace, as provided in section 154, to the county court of Noble county. In the county court, the plaintiff in error moved to dismiss the appeal, for the reason the amount in controversy was less than \$20, which motion was overruled, to which ruling the plaintiff in error excepted. The case was tried de novo, and upon a verdict of a jury, a judgment was rendered in favor of the defendant in error. From said judgment, plaintiff in error appealed to this court. The parties will be referred to, Hejduk as the plaintiff, and Snyder as the defendant, being the position they occupied in the county court, and the same position they occupy in this court.

[1, 2] The plaintiff argues but two questions on appeal: First, the justice of the peace having assessed the damages at less than \$20, the plaintiff argues that no appeal would lie from said assessment of damages by virtue of chapter 135, page 292, Session Laws of 1913, and the county court acquired no jurisdiction in said cause.

In this state remedies are divided into two classes: First, actions; second, special proceedings. Section 4644, Revised Laws of 1910, defines actions. Section 4645 defines special proceedings. The procedure for instituting actions in justice courts is provided in sections 5359 to 5363, Revised Laws of 1910. This controversy in the justice court was not controlled by any of said provisions of the statute, but the controversy before the justice of peace was a special proceeding, and controlled by the procedure outlined in sections 153 and 154, Revised Laws of 1910, for the restraining of stock. The procedure adopted for assessing damages by a justice of peace under sections 153 and 154, supra, is not a cause of action, as defined by section 4644, Revised Laws of 1910, but is a special proceeding, as defined by section 4645, Revised Laws of 1910. Section 5474 of Revised Laws of 1910, as amended in limiting appeals, the second subdivision is:

"Second, concerning causes of action involving less than \$20.00."

This court recognized the distinction between this class of proceeding from an action at law, in the case of Ellis, Sheriff, et al. v. Smith, 25 Okl. 234, 105 Pac. 653. Chief Justice Kane, in delivering the opinion, said:

"Where a party elects to recover damages alleged to have been incurred by a violation of the foregoing provision, by action at law, he waives any lien that might have attached to the stock doing the injury."

In this class of proceedings, the justice of the peace does not render a judgment against

the person whose stock is restrained, but only assesses the damage and files the same with the county clerk. This is a lien on the stock, and not a personal judgment. The justice of the peace may order the property sold to satisfy said lien, but when proceeding under sections 153 and 154, supra, he could not issue an execution and levy upon other property for the damages; nor, if the property was sold and failed to bring sufficient amount to pay the damages, could he issue execution for the balance. In so far as the proceeding before the justice of the peace is concerned, it was a special proceeding, and the law limiting the right of appeal in causes of action in justice courts has no application to the case at bar, as it was not a cause of action; and as the statute limiting appeals applies only in causes of action, therefore the trial judge did not commit error in overruling the motion to dismiss the appeal from the county court.

[3] The next question argued by plaintiff in error is that the court erred in admitting testimony which put in issue the line fence between the farms of the plaintiff and defendant, and excepts to the instructions given by the court upon this question. The facts, as appears from the record, were that these parties were residing on adjoining farms, and a line fence had been maintained between the two farms for years. One of the parties had been maintaining the north half of the fence and the other the south half. The plaintiff in error moved the portion of the fence that had been maintained by him from the line, and placed it back upon his land several feet from the line. This left a small gap or opening of from four to six feet between the fences, and the stock of the defendant passed through said gap on the land of the plaintiff, and was then restrained by the plaintiff. The plaintiff did not notify the defendant that he was removing his portion of said line fence from the line between the two farms back on his own farm, and was leaving a gap, so that the fence thereafter did not connect. It is the contention of plaintiff in error that there was no duty upon the plaintiff in error to maintain said line fence, but he simply relies upon the fact that all animals should be restrained from

running at large, and, if the cattle of the plaintiff were upon the land of the defendant, this created a liability no matter how they came there.

As a general proposition, this perhaps is true; but section 6645, Revised Laws 1910, provides:

"Coterminous owners are mutually bound equally to maintain: * * * The fences between them, unless one of them chooses to let his land lie open as a public common, in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter."

This statute makes it the duty of coterminous owners to maintain the fence between them, and it was therefore the duty of the court to instruct the jury regarding the line fence. While it might not have required a notice in writing before removing the line fence, but it was admitted that no notice at all was given, so, as to the instruction of the court as to whether the notice should be in writing or not, it would be immaterial.

[4] It was the duty of both parties to maintain this line fence, and if the plaintiff in error was bound to assist in maintaining such line fence, by tearing down the portion of the fence he was to maintain or had been maintaining by agreement or otherwise, and leaving the same open, and permitting the defendant's cattle to pass through the opening on his own place, he would be violating a statutory duty, and would not be entitled to recover. The rule of law is well established that no one can recover damages caused by his own negligence, or his own wrong; so in the case at bar, if the defendant's cattle were upon the plaintiff's premises by reason of the plaintiff's neglect in tearing down the fence he was in duty bound to help maintain, and he removed the same without any notice to the adjacent landowner, he could not set up his own wrong as a basis for recovery.

There being no material error in the record, the judgment of the trial court is therefore affirmed.

SHARP, HARRISON, PITCHFORD, and HIGGINS, JJ., concur.

WHATLEY v. STATE. (No. A-3240.)
(Criminal Court of Appeals of Oklahoma.
Oct. 1, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1124(3)—WITHOUT TRANSCRIPT OF TESTIMONY RULING ON MOTION FOR NEW TRIAL NOT RENEWABLE.

Without a duly authenticated transcript of the testimony taken upon the trial, the question as to whether the court erred in overruling a motion for new trial on the ground of newly discovered evidence, is not before the Criminal Court of Appeals.

Appeal from County Court, Bryan County; Lewis Paullin, Judge.

R. E. Whatley was convicted of a violation of the prohibitory law, and he appeals. Affirmed.

Crockett & Fowler and Victor C. Phillips, all of Durant, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, R. E. Whatley, was convicted on a charge that he did sell to one S. Saunders, for the sum of \$12, three quarts of alcohol, and in accordance with the verdict of the jury was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. From the judgment he appeals.

The errors assigned are: (1) That the court erred in overruling the motion for a new trial; (2) that the court erred in giving instruction No. 6; (3) that the court erred in its rulings admitting incompetent evidence on the part of the state, and in refusing to admit competent evidence on the part of the defendant; (4) because of inability of plaintiff in error to make and file in this court a true and correct case-made, for which condition plaintiff in error is in no wise responsible.

The record shows that the plaintiff in error acted as his own counsel, and that he refused the offer of the court to appoint him counsel.

No objection was made or exception taken during the course of the trial, and the testimony was not taken by the court reporter. The record contains the following statement of the trial judge:

"The statement of the county judge, Lewis Paullin, with reference to the fact that it is his recollection that he asked the defendant and counsel for the state if they needed a stenographer to take the evidence in the case, and both answered in the negative."

The motion for new trial was based on the ground of newly discovered evidence. Attached to the same is what purports to

be a statement of the evidence in the case, but the same is not authenticated. In the absence of a duly authenticated transcript of the testimony taken upon the trial, the question as to whether the court erred in overruling the motion for a new trial on the ground of newly discovered evidence is not before the court. The question could not be raised in that manner.

Finding no error in the record proper, the judgment is affirmed.

BELCHNER v. STATE. (No. A-3335.)
(Criminal Court of Appeals of Oklahoma.
Sept. 29, 1919.)

(Syllabus by Editorial Staff.)

INTOXICATING LIQUORS §236(7)—EVIDENCE SUSTAINING CONVICTION OF POSSESSION WITH INTENT TO SELL.

In a prosecution for possession of intoxicating liquor with intent to sell it, evidence held to sustain a conviction.

Appeal from County Court, Tulsa County; H. L. Standeven, Judge.

G. Belchner was convicted of a violation of the prohibitory law, and appeals. Affirmed.

Ed. Crossland, of Tulsa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, G. Belchner, was convicted on a charge that he did have possession of 9 half pints of whisky with intent to sell the same, and was sentenced to be confined for 30 days in the county jail and to pay a fine of \$50.

The only testimony in the case was that of two police officers of the city of Tulsa, in substance: That they observed the defendant on the date alleged in a monument yard in the 200 block, west side of North Main street, Tulsa. He was standing by a monument, and stooped down, and picked up something, and put it in his pocket, and walked away. The officers intercepted him and searched him, finding 2 half pints of whisky. They then walked back into the monument yard and found 7 half pints of whisky, concealed in a hole, near the place where he was standing, when first seen by the officers. The defendant stated that that was all; that there was no more there.

The errors assigned are to the effect that this evidence was insufficient to support the verdict. It is sufficient to say that the

case was one for the consideration of the jury, and the evidence of guilt was ample to justify the verdict.

The judgment is therefore affirmed. Mandate forthwith.

THAXTON v. STATE. (No. A-3297.)

(Criminal Court of Appeals of Oklahoma.
Oct. 4, 1919.)

(Syllabus by the Court.)

1. SALE OF INTOXICATING LIQUORS — EVIDENCE.

The record in this case carefully examined, and the evidence, though in conflict, found to sufficiently sustain the verdict of the jury, and that no prejudicial error intervened in the trial.

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW §1159(4) — VERDICT WILL NOT BE DISTURBED WHERE TRIAL FREE FROM ERROR.

The veracity of witnesses is within the exclusive province of the jury, and where they have determined it, the Criminal Court of Appeals will not disturb their verdict, where the trial is free from prejudicial error.

Appeal from County Court, Love County;
J. H. Hays, Judge.

Homer Thaxton was convicted of violating the prohibitory liquor laws, and he appeals. Affirmed.

Cameron & Walden, of Marietta, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Homer Thaxton, hereinafter designated as defendant, was informed against for selling intoxicating liquors, convicted and sentenced to pay a fine of \$50, and the costs of this prosecution, and to be imprisoned in the county jail of Love county for 30 days. To reverse the judgment rendered he prosecutes this appeal.

[1, 2] There is only one question presented by the record, or argued in defendant's brief—the sufficiency of the evidence to sustain the conviction had.

The evidence was in direct conflict, and, as said in defendant's brief, "The question resolves itself into the proposition as to whom the jury should believe." This question of fact, the veracity of the witnesses, was within the exclusive province of the jury to determine, and, having determined it, this court, as held by its unbroken line of decisions, will not disturb the verdict rendered,

where, as in the instant case, the trial is free from prejudicial error.

The judgment of the trial court is therefore affirmed.

DOYLE, P. J., and MATSON, J., concur.

JOHNSON et al. v. STATE. (No. A-2954.)

(Criminal Court of Appeals of Oklahoma.
Sept. 27, 1919.)

(Syllabus by the Court.)

1. RIOT §1 — STATUTORY DEFINITION OF CRIME.

The crime of riot is defined by section 2558, Revised Laws 1910. Subdivisions 3 and 4 of section 2559, Revised Laws 1910, contain no definition of the crime of riot.

2. CRIMINAL LAW §1172(8) — INSTRUCTION AS TO RIOTING AND INCITING TO RIOT NOT PREJUDICIAL.

For instruction held to be not prejudicial to the defendants under the evidence in this case, see body of opinion.

3. CRIMINAL LAW §829(1) — INSTRUCTION ON POINTS ALREADY COVERED PROPERLY REFUSED.

It is not error for the trial court to refuse to give a requested instruction, although it may contain a correct statement of the law, if the principles stated therein have already been covered in the general instructions.

4. CRIMINAL LAW §814(1) — INSTRUCTION NOT APPLICABLE TO EVIDENCE PROPERLY REFUSED.

It is not error to refuse a requested instruction not applicable to the issues.

5. CRIMINAL LAW §1186(4)—WHERE REGULAR PANEL WAS PRESENT AND EXAMINED REFUSAL TO CALL JURORS HARMLESS ERROR.

Where the record shows that all the jurymen composing the regular panel were present and in attendance upon the court, and that all of such jurymen were examined upon their voir dire before an open venire was issued for additional jurymen, the refusal of the trial judge to have all the jurors in the regular panel called, as provided in section 5828, Revised Laws 1910, when the case is called for trial, is not reversible error, because the purpose of said statute is to enable the state and the defendant to select the trial jury from the members of the regular panel as far as possible before the issuance of an open venire or an order for the drawing of additional jurors. When it is clear that the defendant was not deprived of any substantial right or privilege by the alleged misconduct of the trial court, the judgment of conviction will not be reversed for that reason.

Appeal from District Court, Cherokee County; John H. Pitchford, Judge.

O. P. Johnson, Albert Pitts, and Phillip Halpain were each convicted of the crime of riot, and each appeals. Judgments affirmed.

Bruce L. Keenan, of Tahlequah, for plaintiffs in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Cherokee county, wherein the defendants O. P. Johnson, Albert Pitts, and Phillip Halpain were each convicted and sentenced to two years' imprisonment upon a joint trial for the crime of riot.

The charging part of the information is as follows:

"That is to say, the said O. P. Johnson, Albert Pitts, Jack Wagner, and Phillip Halpain did, in Cherokee county and state of Oklahoma, on or about the 26th day of June, 1916, then and there being, then and there willfully, unlawfully, feloniously, and riotously assemble to commit an assault and battery upon the person of W. H. Philpott, and the said O. P. Johnson, Albert Pitts, Jack Wagner, and Phillip Halpain, by the use of force and violence and acting in concert, then and there did assault, strike, bruise, beat, wound, and maltreat the said W. H. Philpott, and they, the said O. P. Johnson, Albert Pitts, Jack Wagner, and Phillip Halpain, being then and there armed with dangerous and deadly weapons, to wit, certain pistols, and disguised, did then and there, in the manner and by the means aforesaid, unlawfully, willfully, intentionally, and feloniously commit the crime of riot, contrary to the form of the statutes in such cases made and provided."

Jack Wagner, who was jointly tried with these defendants, was acquitted.

Riot is defined by section 2558, Revised Laws 1910, as follows:

"Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot."

The punishment for riot is fixed according to the circumstances under which the participants committed the crime; section 2559, Id., providing the punishment as follows:

"Any person guilty of participating in any riot is punishable as follows:

"First. If any murder, maiming, robbery, rape or arson was committed in the course of such riot, such person is punishable in the same manner as a principal in such crime.

"Second. If the purpose of the riotous assembly was to resist the execution of any statute of this state or of the United States, or to obstruct any public officer of this state or of the United States, in the performance of any legal duty, or in serving or executing any legal process, such person is punishable by imprisonment in the penitentiary not exceeding ten years and not less than two.

"Third. If such person carried at the time of such riot any species of firearms or other deadly or dangerous weapon, or was disguised, he is

punishable by imprisonment in the penitentiary not exceeding ten years and not less than two.

"Fourth. If such person directed, advised, encouraged or solicited other persons who participated in the riot to acts of force or violence, he is punishable by imprisonment in the penitentiary for not exceeding twenty and not less than two years.

"Fifth. In all other cases such person is punishable as for a misdemeanor."

The prosecuting witness, W. H. Philpott, testified that he was a member of an organization known as the Working Class Union; that on the night of June 26, 1916, he attended a meeting of a local of this organization held at the Lost City schoolhouse, in Cherokee county; there were about 20 or 25 members of the organization present at that meeting; that some time between 10 and 11 o'clock in the evening, after the meeting had been in progress some two or more hours, five masked men entered the schoolhouse, and by force took the said Philpott therefrom out into the schoolhouse yard, where four of the number held him, while the fifth member beat him over the body with a piece of wet rope, administering some 30 licks; that these parties wore masks over their faces, and were armed with pistols and revolvers; that he was armed with a pistol, but that the said parties took his gun away from him before he was taken from the schoolhouse. Philpott further testified that he was well acquainted with Halpain, Pitts, Johnson, and Wagner, and recognized them by their actions and by hearing some of them talk; that he had known each of these parties some four or five years. The fifth party, Philpott, said he did not know.

Halpain, Pitts, and Wagner relied upon alibi as a defense, while Johnson admitted that he was present at the meeting of the lodge at the Lost City schoolhouse on that occasion, but testified that he did not leave the schoolhouse, took no part in the alleged riot, nor did he in any manner advise, direct, encourage, or solicit the participants to use force or violence.

[1, 2] Among other instructions given was the following:

"No. 6. You are instructed that if you believe and find from the evidence in this case, beyond a reasonable doubt, that the defendants, or any three or more of them, in Cherokee county, Okl., and on or about the date alleged in the information, or within three years next before the filing of the information against them in court, without authority of law, feloniously combined together, acting in concert and in pursuance of a common design and intent, by means of force or violence, or by any threat to use force or violence, accompanied by immediate power of execution, and carried at the time any firearms or other deadly or dangerous weapons, or were disguised by means of masks or otherwise, entered the schoolhouse mentioned in the evidence, where a congregation of people were in attendance, and took therefrom the prosecuting witness, Philpott, against his will and by the means

just stated, it would be your duty to find the defendants, or such of them as you believe beyond a reasonable doubt aided in committing the offense, if the number so committing the offense amounted to three or more, guilty as charged in the information, and to assess their punishment in the penitentiary for not less than 2 years nor more than 10 years; provided, if you further find from the evidence, beyond a reasonable doubt, that the defendants, or any of them, acting in the manner above stated, went further and directed, advised, encouraged, or solicited each other, or any one of them, or any other person so participating in the riot, to acts of violence or force upon the person of the prosecuting witness, then and in that event the punishment for the defendants so directing, advising, encouraging, or soliciting such acts of force or violence would be by imprisonment in the penitentiary for not less than 2 nor more than 20 years."

Counsel for defendants strenuously complain of the foregoing instruction, insisting that by the giving of the instruction the court authorized the jury to find either of the defendants not only guilty of participating in the riot, while armed with dangerous weapons or under disguise, but also authorized the jury to find either of the defendants guilty of inciting a riot, which it is claimed under our statutes is a separate and distinct offense.

We do not believe that instruction No. 6 is subject to the criticism made by defendants' counsel, nor do we believe that it was the intention of the Legislature in enacting subdivisions 3 and 4 of section 2559 to define several species or degrees of the crime of riot. The crime of riot is made out upon proof of the elements of that offense defined by section 2558, supra. The various subdivisions of section 2559 provide merely rules of evidence which authorized an increased punishment to be administered to participants in a riot according to the circumstances under which or the means by which the said offense was committed.

Under our statutes the crime of riot is a felony, because it is such a crime as may be punished by imprisonment in the state penitentiary, and the district court or superior court would have jurisdiction to try offenders charged with riot as defined in section 2558, supra. No different or separate offense is created by either of subdivisions 3 or 4 of section 2559, but when any of the facts set out in either of said subdivisions appear in evidence against persons charged with a riot, then the jury or the court inflicting the punishment may administer a punishment accordingly as the facts warrant.

For instance, the evidence might disclose that some participants carried at the time of such riot certain firearms; that others were disguised; but the evidence might also disclose that only one of such persons directed, advised, encouraged, and solicited the others to acts of force and violence. If such cir-

cumstances as above set forth appear, then the maximum punishment that could be given those who did not direct, advise, encourage, and solicit acts of force and violence would be 10 years, while the party who did so direct, etc., would be subject to a maximum punishment of 20 years, although all the participants engaged in the riot and used force and violence in carrying it into effect.

Subdivision 4 of section 2559, supra, is intended to reach the leader of the rioters. To be subject to the punishment prescribed by said subdivision, the person must not only be a participant in the riot, but he must be a director, advisor, and solicitor of the others to use force and violence in carrying the purposes of the riot into execution.

In giving instruction No. 6, supra, the court not only required the jury to find that these defendants participated in the riot while armed or disguised, but before the maximum punishment of 20 years could be imposed, as set forth in said instruction, they must find that some one or more of said participants directed, advised, or solicited acts of force and violence to be perpetrated. The instruction correctly states the law, but had it been an incorrect statement of the law, in this instance we fail to see wherein any of these defendants could have been harmed. It only authorized the jury to inflict an increased punishment. But as each of the defendants were found guilty "as charged in the information," and as the information charged each of them with the crime of riot, with the additional allegation that they carried firearms and were disguised, and only the minimum punishment of 2 years' imprisonment in the penitentiary, as provided in subdivision 3 of section 2559, was imposed against each, it is evident that instruction No. 6 resulted in no harm to either of these defendants. Had the jury imposed a punishment in excess of 10 years against either of the defendants, then it would be evident that as to such defendant the jury found that he directed, advised, encouraged, or solicited the use of force and violence by the others engaged in the riot. But the verdict in this case shows that the jury did not find that either of these participants was the director or leader in the crime. We find no merit in the contention that instruction No. 6 resulted prejudicially to the substantial rights of either of these defendants.

The case of *Gracy v. State*, 13 Okl. Cr. 643, 166 Pac. 442, in which this court held that an accused person may not be put on trial for the commission of more than one offense at the same time, relied upon by counsel as supporting their contention, is not in point. The facts of that case and instruction given by the trial court in the *Gracy* Case presented an entirely different situation from that in this case. In the *Gracy* Case, two separate and distinct acts of rape committed on the prosecuting witness at different times

were permitted to go before the jury, and under the instructions given the defendant could have been convicted of the commission of either act upon the theory that he committed one act himself and aided and abetted another person to commit the other separate act. Not so in this case. Here there is evidence of only one crime committed, and the prosecuting witness testifies that each of these convicted defendants was a participant in that crime. Instruction No. 6 is not open to the criticism that it permits some of the defendants to be convicted of one crime and others of another. Its purpose was for the guidance of the jury in the infliction of punishment, and for that purpose alone.

[3] It is also contended that the court erred in refusing to give the following instruction:

"Gentlemen of the jury the defendant O. P. Johnson has offered evidence to prove that he was in the Lost City schoolhouse during the whole time of the commission of the alleged riot; and you are instructed that you would not be warranted in finding him guilty merely because he was so present in the Lost City schoolhouse during the whole time of the commission of the riot, unless you further find from the evidence, beyond a reasonable doubt, that he was armed with a deadly or dangerous weapon, or was disguised, and was an actual participant in the alleged riot."

[4] The substance of this request is contained in instruction No. 6 given by the court, which requires the jury to find beyond a reasonable doubt that—

"The defendants, or any three or more of them, * * * without authority of law, feloniously combined together, acting in concert and, in pursuance of a common design and intent, by means of force or violence, or by any threat to use force or violence, accompanied by immediate power of execution, and carried at the time any firearms or other dangerous or deadly weapons, or were disguised by means of masks or otherwise, entered the schoolhouse mentioned in the evidence, where a congregation of people were in attendance, and took therefrom the prosecuting witness, Philpott, against his will and by the means just stated, it would be your duty to find the defendants, or such of them as you believe beyond a reasonable doubt aided in committing the offense, if the number so committing such offense amounted to three or more, guilty as charged in the information."

The instruction given was as favorable to the defendant Johnson as the one requested; as under it, before the jury would be authorized to convict the defendant Johnson, the court instructed that the jury must find beyond a reasonable doubt that three or more of these defendants combined together and acted in concert in the pursuance of a common design to commit this offense; that the jury must have believed beyond a reasonable doubt, before a verdict of guilty could be returned, that the defendant aided in commit-

ting the offense; and the jury is also told in instruction No. 6 that the participants must have carried at the time firearms or deadly or dangerous weapons, or have been disguised by means of masks or otherwise. The language employed by the court in instruction No. 6 is equally as clear and definite as that contained in the requested instruction. It has repeatedly been held that it is not error for the trial court to refuse to give a requested instruction, although it may contain a correct statement of the law, if the principles therein stated have already been covered in the general instructions. *Manning v. State*, 7 Okl. Cr. 367, 123 Pac. 1029; *Moss v. State*, 4 Okl. Cr. 247, 111 Pac. 950; *Smith v. State*, 5 Okl. Cr. 282, 114 Pac. 350; *Martin v. State*, 5 Okl. Cr. 355, 114 Pac. 1112.

The further contention that the refusal to give the foregoing requested instruction was particularly prejudicial to the defendant Johnson, in that the proviso contained in instruction No. 6 permitted the jury to convict such defendant, although not present at the time of the assault on Philpott, on the ground that he directed, advised, encouraged, or solicited other persons who participated in the riot to the use of acts of violence at a time prior to the commission of the offense, is without merit. Instruction No. 6 is not open to the construction counsel contend for. It is clear from a reading of instruction No. 6 that the trial court, before authorizing the jury to convict a person under the proviso therein contained, required that such person be an actual active participant, as defined in the first part of instruction No. 6. The verdicts against each of the defendants show that the jury found each of them guilty as an actual participant in the riot in the manner charged in the information. A consideration of the entire record of the trial of the case fails to disclose any prejudice to any of the defendants in the refusal of the court to give this requested instruction.

It is also contended that the court erred in refusing to give requested instructions Nos. 4 and 6, as follows:

"Request No. 4. You are instructed gentlemen of the jury, that the defense interposed is what in law is termed an alibi, which means that the defendants at the time the alleged crime was committed were at some other place than the place of the commission of the crime alleged in the information; and you are instructed that if the whole proof raises in your minds a reasonable doubt as to whether these defendants were at the place of the commission of the offense at the time it was committed, or were at a different place, then in that event your verdict should be not guilty."

"Request No. 6. Gentlemen of the jury, the defendants O. P. Johnson, Jack Wagner, Albert Pitts, and Philip Halpain are charged with the commission of the alleged riot; and you are instructed that by the provisions of the statutes

of Oklahoma three or more of these defendants must act together in order to commit the crime of riot as here alleged; a less number than three cannot commit such an offense."

Requested instruction No. 6 was properly refused because the substance of the requested instruction was covered in the general charge of the court, and requested instruction No. 4 was properly refused because not applicable to the facts of the case as to defendant Johnson. The court gave an instruction on the defense of alibi applicable to the other defendants. While it is contended that the defendant Johnson relied upon an alibi as a defense, the testimony shows that Johnson, by his own admission, was in the Lost City schoolhouse at the time this riot commenced. His defense was not an alibi, but that he took no part in the riot. No error resulted to either of the defendants in the refusal to give these requested instructions.

[5] It is also contended that the trial court erred in refusing to have all the jurors in the regular panel called at the request of counsel for defendants at the time the case was called for trial. Section 5828, Revised Laws 1910, provides:

"When the case is called for trial, and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and the court in its discretion may order that an attachment issue against those who are absent; but the court may, in its discretion, wait or not for the return of the attachment."

It is the contention: (1) That the foregoing section is mandatory, and gives a right to the defendants to have the names of all the jurors called when the case is called for trial; (2) if that part of the statute requiring the names of all the jurors to be called is not mandatory but directory, then a refusal to call the names of the jurors composing the regular panel will be either reversible or harmless error, depending upon whether the defendants show they had or not a fair and impartial trial.

The purpose of the foregoing statute is to enable the defendant to select his trial jury from the members of the regular panel who are called to serve as jurors at the term as far as possible; and in order to preserve to him the benefit of such privilege, the above statute, requiring, when requested, the names

of all the regular panel to be called immediately preceding the calling of the case for trial, was enacted. In this instance, the court denied the request of counsel to call the names of the 29 men who then composed the regular panel of jurors, but the record shows, and it is not contended to the contrary, that all of the 29 men composing the regular panel were present and in attendance upon the court, and that the first 12 called to the jury were drawn from this panel, and that the entire 29 were examined upon their voir dire before an open venire was issued for additional jurors.

Had the trial court complied with the request of counsel for defendants and called the names of the entire 29 men composing the regular panel of jurors, the result would have been that all 29 would have answered present. The entire record of impaneling the trial jury is set out in full, and it is disclosed thereby that the entire 29 men composing the regular panel of jurors at that term of court were examined as to their qualifications to sit as jurors in the trial of this case before the defendants were compelled to select trial jurors from any other source, and no contention is made, although an open venire was issued and a part of the jury selected therefrom, that a trial jury was selected composed of men any one of whom was a disqualified juror.

When it is clear that the defendant was not deprived of any substantial right or privilege by the alleged misconduct of the trial court, the judgment of conviction will not be reversed for that reason.

This case has been thoroughly and ably briefed by counsel representing the defendants. Counsel were particularly zealous, both in the trial court and in this court, to preserve every possible question in behalf of their clients. Thoughtful consideration has been given the numerous errors assigned as grounds for reversal, and after an examination of the entire record it is the opinion of this court that these defendants had a fair and impartial trial; that there is evidence in the record which, if believed, amply supports the jury's verdicts; that the instructions were fair to the defendants and not misleading; and for the reasons stated the judgments are affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

THAYER v. STATE. (No. A-3287.)

(Criminal Court of Appeals of Oklahoma.
Oct. 1, 1919.)*(Syllabus by Editorial Staff.)*

1. CRIMINAL LAW §1044 — WITHOUT MOTION TO QUASH INFORMATION, DEFECTIVE VERIFICATION WAIVED.

Defendant, by not moving to quash or set aside the information because of the defect in the verification appearing on its face, waived the defect.

2. INDICTMENT AND INFORMATION §133(6) — QUESTION OF DEFECTIVE VERIFICATION OF INFORMATION NOT RAISED BY DEMURRER.

Under Code of Criminal Procedure the method of attacking an information sufficient for all purposes, but not verified, so as to authorize a warrant of arrest, must be by motion to quash or set aside information, and such question is not properly raised by a demurrer, especially by a demurrer on ground that it does not state facts sufficient to constitute a public offense.

3. INDICTMENT AND INFORMATION §159(3) — AMENDMENT OF INFORMATION FOR UNLAWFUL TRANSPORTATION BY CHANGE OF CITY STREET IMMATERIAL.

An amendment of an information for unlawfully transporting intoxicating liquor, made on motion of county attorney, changing place to which liquor was alleged to have been conveyed from the intersection of Western and G avenues to a place about a quarter of a mile west of that intersection, did not materially change offense charged in original information.

4. CRIMINAL LAW §1032(4) — REVERIFICATION OF INFORMATION AFTER AMENDMENT WAIVER.

Where defendant proceeded to trial on an amended information, without asking additional time to plead thereto and without filing any motion to quash or set it aside, he waived failure to reverify it.

Appeal from County Court, Oklahoma County; William H. Zwick, Judge.

Dick Thayer was convicted of the crime of conveying intoxicating liquors, and sentenced to pay a fine of \$100 and to serve 60 days in the county jail, and he appeals. Judgment affirmed.

Prulett, Sniggs & Burns, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Oklahoma county, in which the defendant was convicted of the crime of unlawfully conveying intoxicating liquors, and sentenced to pay the fine and to serve the term of imprisonment as above stated.

For grounds of reversal, two alleged errors are relied upon:

(1) That the court erred in overruling the demurrer to the original information, for the reason that the same was verified before a person unauthorized to administer an oath. The original information filed in this case appears to have been verified before a person designating himself "Deputy Court Clerk."

The defendant interposed no motion to set aside or quash this information because of this defective verification, but entered his plea of not guilty and proceeded with the impaneling of the jury. After the impaneling of the jury commenced, the defendant asked leave of the court to withdraw his plea of not guilty for the purpose of demurring to the information, which leave was granted. Thereupon, the defendant filed a demurrer to the information upon two grounds: (1) That the same did not state facts sufficient to constitute a public offense; (2) that the information did not conform to the law and did not particularly set out the crime, or charge a crime against the laws of the state, so as to give the defendant sufficient notice of the nature and character of the charge attempted to be filed against him. The demurrer on these two grounds was overruled by the court, to which the defendant excepted, and the defendant thereupon entered his plea of not guilty.

[1, 2] The defendant, failing to move to quash or set the information aside because of the defect in the verification, which appeared upon the face of the information, waived the defect. The information was sufficient for all purposes without a proper verification, except to authorize the issuance of a warrant of arrest, and under our Code of Criminal Procedure the method of attacking such an insufficiently verified information must be by motion to quash or set aside the same. Such question is not properly raised by a demurrer; especially would this be so of a demurrer upon the grounds above stated. In *re Talley*, 4 Okl. Cr. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805; *Muldrow v. State*, 4 Okl. Cr. 324, 111 Pac. 656; *Blair v. State*, 4 Okl. Cr. 359, 111 Pac. 1003.

[3, 4] On motion of the county attorney, the court permitted the original information to be amended by inserting the words "about a quarter of a mile west of the place where western avenue intersects G avenue in Capitol Hill, in said city, county, and state," and striking therefrom the words, "designated as Western and G avenue, said city, county, and state."

The effect of the amendment was to change the place to which the whisky was alleged to have been conveyed from the intersection of Western and G avenues to a point about a quarter of a mile west of said intersection. This amendment, having been made over the objection and exception of the defendant, is

alleged to have been particularly prejudicial to him, in that it materially changed the description of the offense, and also because the information was not required to be reverified after the amendment was made.

It is sufficient to state that, in the opinion of the court, the amendment did not materially alter the offense as charged in the original information; also, it may be observed that, had the information been materially altered by an amendment, the fact that the defendant proceeded to trial without asking additional time in which to plead to such amended information, and without filing any motion to quash or set the same aside, amounted to a waiver of the failure to reverify the same.

Finding no prejudicial error in the record, the judgment of conviction is affirmed.

WEEKS v. STATE. (No. A-3324.)

(Criminal Court of Appeals of Oklahoma. Oct. 4, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 576(8, 11), 1144(7)—BURDEN ON DEFENDANT, ON MOTION TO DISMISS, TO SHOW LACHES IN PROSECUTION.

In the absence of a proper record affirmatively showing the contrary, the presumption is that the court had continued the case for a presumably lawful cause. The burden was on the defendant, in support of his motion to dismiss, to show that the laches was on the part of the state through its prosecuting officers; otherwise, the presumption is that the delay was caused by or with the consent of the defendant himself, and when on bail he must demand a trial, or resist the continuance of the case from term to term. A defendant, who has never demanded or been refused trial, is not entitled to a discharge under the constitutional provision (article 2, \S 20) and the statutory provision (section 5547, Rev. Laws).

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW \S 603(8) — APPLICATION FOR CONTINUANCE FOR ABSENT WITNESS INSUFFICIENT.

An application for a continuance for the absence of a witness was insufficient, where it did not aver that defendant was unable to prove by other witnesses the facts to which it was alleged such absent witness would testify.

3. CRIMINAL LAW \S 595(10)—CONTINUANCE FOR ABSENT WITNESS AS TO MATTER PROVABLE BY RECORD PROPERLY DENIED.

An absent witness would be incompetent to testify that he was county attorney when information was filed, that it was agreed that if defendant relinquished all interest in an automobile his case would be dismissed, and that he told defendant that county judge approved

agreement, as the only competent evidence as to dismissal was the trial court's record.

Appeal from County Court, Jefferson County; E. L. Dillard, Judge.

C. D. Weeks, convicted of a violation of the prohibitory liquor law, appeals. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error was convicted in the county court of Jefferson county upon an information filed in said court on May 4, 1915, which charges the unlawful conveyance of intoxicating liquors. On the 12th day of February, 1918, in accordance with the verdict of the jury he was sentenced to be confined for 30 days in the county jail and to pay a fine of \$100. From the judgment he appeals.

The undisputed facts, as shown by the testimony of the sheriff of Jefferson county and a deputy sheriff, are that these officers, about 2 o'clock in the morning of the date alleged, stopped the defendant on the highway, about three miles west of Waurika. He was driving a Ford car loaded with 12 cases of whiskey.

[2, 3] The refusal to grant a continuance is assigned as error. The continuance was asked on the ground of the absence of P. T. Hamilton, who, if present, would testify that he was county attorney of Jefferson county when the information was filed, and that it was afterwards agreed that, if the defendant would relinquish all right, title, and interest in the Ford car this case would be dismissed, and that he told this defendant that the county judge approved the agreement, and that the defendant thereupon withdrew any claim to said car, and the same was sold by the county.

The application was insufficient, in that it was not averred that the defendant is unable to prove such facts by any other witness. We also think that the absent witness was incompetent to testify to the facts proposed to be proven by him. The only competent evidence as to whether or not the case was dismissed was the record of the trial court. It follows that the continuance was properly denied.

[1] When the case was called for trial, counsel for the defendant made the following motion:

"Comes now the defendant, C. D. Weeks, and moves to dismiss this action, for the reason it has been on the docket since 1915; some eight terms of this court having been held since said case was filed, and six terms of said court held after the same was assigned, and no attempt was made by the state to try the same.

"The Court: Motion overruled; exception allowed."

At the close of testimony the motion was renewed and overruled. It is contended by counsel for the defendant that the court erred in not sustaining the motions to dismiss.

When the state rested its case, the defendant called the court clerk as a witness, and over the objection of the county attorney introduced the docket entries of the case, showing, among others, the following entries:

"May 6, 1915. Appearance bond filed, approved, and recorded.

"July 12-15. Continued for the term.

"November 8-15. Continued for the term.

"9-24-1917. Set for trial.

"1-23-18. Setting down for trial.

"2-1-18. Motion for continuance filed.

"2-7-18. Case called for trial."

In the case of *Bowers v. State*, 7 Okl. Cr. 316, 126 Pac. 580, it was said:

"In the absence of a proper record affirmatively showing the contrary, the presumption is that the court had continued the case for a presumably lawful cause. The burden was on the defendant, in support of his motion to dismiss, to show that the laches was on the part of the state through its prosecuting officers; otherwise, the presumption is that the delay was caused by or with the consent of the defendant himself, and when on bail he must demand a trial or resist the continuance of the case from term to term. A defendant who has never demanded or been refused trial is not entitled to a discharge under the constitutional provision (article 2, § 20), and the statutory provision (section 6488, Comp. Laws 1909)." Section 5547, Rev. Laws.

And see *Head v. State*, 9 Okl. Cr. 356, 181 Pac. 937, 44 L. R. A. (N. S.) 871. It follows that the court did not err in refusing to sustain the motions to dismiss.

Finding no prejudicial error in the record, the judgment is affirmed.

ARMSTRONG and MATSON, JJ., concur.

CITY OF PORTLAND v. TRAYNOR.*

SAME v. KITCHEN.

(Supreme Court of Oregon. Sept. 16, 1919.)

1. HEALTH §21—ORDINANCE TO PROTECT HEALTH WITH NO RELATION TO THE MATTER UNCONSTITUTIONAL.

An ordinance enacted to protect the public health, but which has no real or substantial re-

lation to the subject-matter, and is an unreasonable and unwarranted interference with a lawful business, is unconstitutional.

2. LICENSES §7(1)—ORDINANCE GIVING OFFICER ARBITRARY POWERS AS TO ISSUANCE INVALID.

Any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession, without regard to the qualification of the applicant, is void.

3. MUNICIPAL CORPORATIONS §611—ORDINANCE PERMITTING PROHIBITION OF LAWFUL OCCUPATION VOID.

An ordinance by or under which an occupation lawful, and not injurious to person, property, or public, when lawfully conducted, may be absolutely prohibited at the dictation of any public official, without just cause or reason, is void.

4. LICENSES §42(2)—DEFENSE FOR OPERATING SOFT DRINK ESTABLISHMENT WITHOUT LICENSE INSUFFICIENT.

The contention that the medical examiners of the city are careless and negligent in the discharge of their duties goes only to the administration and not to the validity of an ordinance requiring, as a condition to issuance of a license, medical examination of persons owning or working in food and soft drink establishments, and is not a defense to a charge of having violated the ordinance by operating such an establishment without a license.

5. MUNICIPAL CORPORATIONS §597—ORDINANCE FOR LICENSING FOOD ESTABLISHMENTS SUFFICIENTLY DEFINITE.

Ordinance of the city of Portland, No. 35013, providing if the location of a food establishment is found to be suitable, and in proper sanitary condition, according to the ordinances of the city and the regulations of the United States as to plumbing, etc., the bureau of health shall issue a food establishment permit or license to the applicant, is definite and certain, though there is no specification of what shall constitute physical fitness in an applicant for license, or suitability in the location.

6. MUNICIPAL CORPORATIONS §597—CITY CAN PROVIDE FOR REGULATING FOOD AND SOFT DRINK ESTABLISHMENTS BY LICENSES.

Under its charter giving the city of Portland power to make regulations to prevent the introduction of contagious diseases, etc., the city had power and authority to adopt its ordinance No. 35013, providing for the licensing of food and soft drink establishments on approval of their location, physical examination of the proprietor, and payment of a fee.

In Banc.

Appeal from Circuit Court, Multnomah County; Robert Tucker and George W. Stapleton, Judges.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied October 14, 1919.

P. F. Traynor and another were convicted of violating Ordinance No. 35013 of the city of Portland, providing for the licensing of persons conducting or working in food and soft drink establishments, and they appeal. Affirmed.

Inasmuch as the legal questions involved in both cases are very similar, for the purposes of the opinion this and the companion case of *City of Portland v. Catherine Kitchen* will be considered as one. On January 31, 1919, the city of Portland passed Ordinance No. 35013, entitled "An ordinance amending article XV½ of ordinance number 34046 as amended, and repealing ordinance number 34800, and declaring an emergency." The first four sections of the ordinance are as follows:

"Article XV½.

"Section 1. *Definitions.* The term 'food establishment,' whenever used in this ordinance, shall mean and include every place in the city of Portland where food products are sold or offered for sale or served to the public, or manufactured, produced, concocted, prepared, or cooked for the public.

"The term 'soft drink establishment,' whenever used in this ordinance, shall be deemed to mean every place in the city of Portland where drinks are sold, manufactured, or served or offered for sale to the public.

"The word 'person,' whenever used in this article, shall mean any person, firm, or corporation, and the masculine pronoun shall include the feminine, and the singular number shall include the plural, unless otherwise indicated by the text.

"Sec. 2. *Licenses.* It shall be unlawful for any person to open for business, conduct, or maintain, or cause to be opened, conducted, or maintained, any food establishment or soft drink establishment in the city of Portland without first securing a license therefor as provided by ordinance.

"Sec. 3. *Sanitary Conditions—Permit.* Any person desiring to secure a food establishment or soft drink establishment license shall make application to the bureau of health for inspection of the location where such establishment is intended to be located, which application shall state the exact location of such establishment, and the name and address of all persons interested therein, either as owner, proprietor, or manager. If, upon investigation, such proposed location is found to be suitable for a food establishment or soft drink establishment, as the case may be, and in proper sanitary condition, according to the ordinances of the city of Portland and the rules and regulations of the United States with reference to plumbing, water supply, ventilation, and cleanliness, the bureau of health shall issue to such applicant a permit for such establishment. Such permit shall be presented with the application for a license to conduct such food establishment or soft drink establishment, and no such license shall be issued unless accompanied by such permit.

"Sec. 4. *Revocation of License.* Any license issued hereunder may be revoked for failure to comply with any of the provisions of the ordinances of the city of Portland and/or the regu-

lations of the United States government relating to food and soft drink establishments, and no such license shall be transferable."

Section 5 provides that it shall be unlawful for any individual to be employed or to work in any food establishment without first having obtained a health certificate, or for any employer to hire any individual without such certificate. It is specified that the certificate is to be renewed quarterly, and that no certificate more than three months old shall be recognized by any employer. Section 6 of the ordinance is as follows:

"Section 6. *Examination.* Any person desiring to secure a certificate of health as herein required shall present himself to the bureau of health for examination at least once every three months, and, if found by said bureau to be physically fit and free from diseases which are dangerous to the public, the bureau of health shall issue to such person a certificate of health entitling such person to work in a food establishment or soft drink establishment. Each such applicant for a health certificate shall pay to the bureau of health a fee of twenty-five cents for such examination and permit."

The enactment further provides:

"If the bureau of licenses refuses approval of any application, it shall at once so notify the applicant in writing, and the applicant may appeal to the council within ten days thereafter, and the council shall proceed to hear and determine said appeal, and its decision shall be final."

To carry out the provisions of the ordinance the city of Portland was divided into seven districts, and inspectors were appointed for each. It was their duty to examine all of the food and soft drink establishments in the city of Portland, to ascertain whether the owners thereof were complying with the municipal health ordinances in the construction of their buildings and sale of their merchandise, and in particular to note whether employes coming in contact with soft drinks, groceries, fruit, and vegetables with their hands were healthy and free from contagious or infectious diseases. A card index system was established, and after inspection the employes were required to report to the bureau of health, and submit to physical examination, for which, under the terms of the ordinance, a nominal charge was made. If it was found by the inspectors that the premises where the business was to be conducted were sanitary and complied with the ordinances of the city, a license was then granted to conduct the business upon the payment of an annual fee. If upon examination an employe was found to be free from contagious or infectious diseases, a certificate was then issued to him by the bureau of health, authorizing him to handle and sell such merchandise in bulk, as distinguished from canned or carton goods.

The defendant was engaged in conducting

a grocery store in the city of Portland, and refused to obtain a license for his business. A complaint was filed against him in the police court of the city, upon which he was convicted, and appealed to the circuit court. In the latter court a jury was waived. The defendant objected to the introduction of any evidence, upon the ground that the complaint did not state facts sufficient to charge a crime; that the ordinance is void for the reason that it is an unnecessary and unwarranted interference with lawful business, and violates the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States, and section 20 of article I of the Constitution of the state of Oregon, in that it grants special immunities and privileges to some which are not given to all, and confers an arbitrary power upon the city government. The objections were overruled, and the defendant was tried, convicted, and sentenced. He appeals to this court.

J. Le Roy Smith and Wilson T. Hume, both of Portland, for appellants.

W. P. La Roche, City Atty., and E. Y. Lansing and L. E. Latourette, Deputy City Attys., all of Portland, for respondent.

JOHNS, J. (after stating the facts as above). [1-3] We agree with defendant's counsel that an ordinance which is enacted to protect the public health, that has no real or substantial relation to the subject-matter, and is an unreasonable and unwarranted interference with the conduct of a lawful business, is unconstitutional; that any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession, without regard to the qualification of the applicant, is void; and that an ordinance by or under which a lawful occupation, when lawfully conducted, is not injurious to the person, property, or the public, may be absolutely prohibited at the dictation of any public official, without any just cause or reason, is void.

We have carefully read the record, and there is no proof of any discrimination by the inspector, or public health officials, of the city of Portland. Indeed, it appears, as a result of inspections, that about 2,500 individuals coming under the provisions of the ordinance have complied with its terms, and paid their licenses, and that the defendant is the only one who has not. It appears from his own testimony that his chief objection to paying it lies in the fact that he was required to go to the city hall for examination, and that he did not have any particular objection if it could be held in his own place of business.

[4] Defendant's contention that the medical examiners are careless and negligent in the discharge of their duties is not supported by the evidence; but, assuming that to be true, it would go only to the administration, and

not to the validity, of the ordinance, and would not be a defense to the charge against him. In the leading case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 80 L. Ed. 220, upon which appellant relies, it appeared that the petitioner had complied with every requisite of the ordinance and of the officers charged with its administration; that, notwithstanding such compliance, the supervisors withheld the required license from him and 200 others similarly situated, and that 80 other and different persons were permitted to carry on the same business under similar conditions.

In construing those ordinances that court says:

"They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress, by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility."

And the rule is there laid down that—

"class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." And that "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

That is good law, but there are no such facts in this record.

In the *Yick Wo Case* the petitioner complied with the ordinance, and, with 200 others, was arbitrarily refused a license by the supervisor. In the instant case 2,500 other business men have complied with the ordinance, paid the fee, and obtained their license, and the inspectors have examined defendant's premises, and the board of health is ready and willing to grant him a license upon payment of the required fee, which the defendant refuses to pay, but wants to do business without a license.

[5] He contends that the "ordinance makes no provision or regulation by which the bu-

bureau of health is to be guided in determining in what particular the applicant for license shall be 'physically fit,' nor what requirements must be met to constitute a grocery store 'a suitable place'; and cites *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750. That is a case where the board revoked a license which had been granted, and the court held that, in legislation providing for the revocation of a certificate of a person for professional or moral unfitness, the acts or conduct authorizing such forfeiting must be declared with certainty and definiteness, and that the acts upon which the board based its decision were not definite and certain: That is not this case. Here no license had been revoked, and it is only refused because the defendant will not pay the fee, and, as we construe it, the ordinance in question is certain and definite in its terms. It provides if, upon investigation, the location—

"is found to be suitable for a food establishment, and in proper sanitary condition according to the ordinances of the city of Portland and the regulations of the United States with reference to plumbing, water supply, ventilation, and cleanliness, the bureau of health shall issue to such applicant a food establishment permit."

If the premises comply with the ordinance of the city and the rules and regulations of the government with reference to plumbing, water supply, ventilation, and cleanliness, the permit must be granted, and the health officer has no right to refuse it. The ordinance of the city of Portland, and the rules and regulations of the government in such matters, are both definite and certain, and the only question which the board of public health has any authority to consider is whether or not the premises or place of business come within such terms and provisions.

The intent is to provide for an inspection of the premises before any business is done, and, if the inspector makes an unfavorable report, the applicant may have the matter further investigated by the city health officer, and, if that officer will not grant the permit, he still has his remedy by direct appeal to the city commissioners.

It is not within the authority, or even the discretion, of the bureau of health to grant arbitrarily a permit to one person who has complied with the ordinance, rules, and regulations, and deny it to another who has complied with them. In the instant case, as to his place of business, there is no claim or pretense on the part of the city that the defendant has not complied with the city ordinance, rules, and regulations. The offense consists in his failure and neglect to pay the required license fee, which he admits he had not paid. In *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713, the syllabus recites:

"In determining whether the constitutional rights of a party have been affected by a state statute, the courts will presume, until the contrary is shown, that any administrative body to which power is delegated will act with reasonable regard to property rights."

The purpose and intent of both the city of Portland and the government was to control and to prevent the spread of contagious and infectious disease.

[8] Under its charter the city of Portland has the power "to make regulations to prevent the introduction of contagious diseases into the city," and "to secure the protection of persons and property therein, to provide for the health, cleanliness, ornament, peace, and good order of the city," and "to exercise within the limits of the city of Portland all the powers commonly known as police powers, to the same extent as the state of Oregon has or could exercise said power within said limits," and "to make and enforce within the limits of the city all necessary water, local, police, and sanitary laws," and the execution of such laws is vested in its board of health, and power is also given "to grant licenses with the object of raising revenue, or for regulation or both, for any and all legal acts, things, or purposes, and to fix by ordinance the amount to be paid therefor, and to provide for the regulation of the same." To do this, plenary power is vested under the city charter, and the execution of that power is vested in the board of health. In *Lieberman v. Van De Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305, the rule is laid down:

"A state has the right, in the exercise of the police power, and with a view to protect the public health and welfare, to make reasonable regulations in regard to such occupations as may, if unrestrained, become unsafe or dangerous, and the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on such a trade or business is not violative of the Fourteenth Amendment. There is no presumption that a power granted to an administrative board will be arbitrarily or improperly exercised, and this court will not interfere with the exercise of such a power where the record does not disclose any ground on which the board acted."

In *State v. Briggs*, 45 Or. 866, 77 Pac. 750, 2 Ann. Cas. 424, the rule is stated that, in the regulation and licensing of trades, occupations, callings, and professions "which affect the public welfare, the legislature must enact the law necessary to accomplish the object in view; but it may be carried into execution by some officer or board appointed for that purpose, and such officer or board may be authorized to prescribe the qualifications of those desiring to follow such callings or professions." In *White v. Holman*, 44 Or. 180, 185, 74 Pac. 933, 1 Ann. Cas. 848, it is said:

"Under a Constitution like ours, any lawful business, the management of which might be injurious to the public, may be regulated so as to limit the place or to prescribe the manner in which it shall be conducted, provided that in doing so no privileges or immunities are granted to any individual or class of persons that shall not equally belong to all citizens upon the same terms."

In *State v. Superior Court*, 103 Wash. 409, 174 Pac. 973, it is held that—

"Laws and ordinances creating boards of health, and granting wide powers for the effectual carrying out of legislative plan for protecting health, must be liberally construed"; and "it is within power of Legislature, in dealing with problems of public health, to make determination of fact by properly constituted health officer final and binding on public as well as upon courts."

Under its charter the city of Portland had a legal right to adopt the ordinance here involved. It is not for this court to say whether or not the measure should have been enacted; that is a legislative, and not a judicial, question. The charter also makes it the duty of the bureau of health to enforce such an ordinance, and vests it with power to make the necessary rules and regulations for its enforcement.

There is no evidence that the requirements of the bureau of health are arbitrary or unreasonable, or that there was any discrimination in their enforcement. The judgment in each case is affirmed.

PAULSON v. HURLBURT, Sheriff.

(Supreme Court of Oregon. Sept. 9, 1919.)

1. HOMESTEAD §33 — WHEN OWNER OF HOMESTEAD ERECTING HOUSE THEREON AND ENTERING IT CAN CLAIM EXEMPTION.

Under L. O. L. § 221, declaring family homestead exempt from judicial sale for satisfaction of any judgment, and requiring only that it must be the actual abode of, and owned by, such family, or a member thereof, and section 224, providing that when an officer shall levy on it the owner may notify him that he claims it as his homestead, the owner of land, a member of a family, contracting for erection of house thereon, while living with her family on rented premises, but moving into the house before foreclosure of liens for labor and material entering into it, may claim exemption against execution on foreclosure decree, having done nothing to lose or waive homestead right.

2. HOMESTEAD §171 — RIGHT TO CLAIM AGAINST DEED IN FACT A MORTGAGE.

One's right to claim homestead exemption is not affected by her executing an instrument

on its face an absolute conveyance of the property; it being accompanied by a defeasance in writing showing it was a security as to certain claims, and so constituted a mortgage, not divesting title from grantor.

3. HOMESTEAD §38 — EXEMPTION STATUTE APPLYING TO DECREES NOT AFFECTED BY CODIFICATION.

The homestead exemption statute does not lose its natural effect, standing by itself, as a remedial statute, of applying to decrees, though in terms exempting from judicial sale for satisfaction of any judgment, because put in L. O. L. as sections 221-226, while section 415 provides that sections 213-220, which apply to the constituent elements of executions, and 227-258, which cover exemptions as they were codified before enactment of the homestead statute, shall apply to enforcement of a decree, so far as its nature may require or admit of it.

4. MECHANICS' LIENS §14—HOMESTEAD EXEMPTION STATUTE BECOMES PART OF CONTRACT FOR BUILDING DWELLING.

The homestead exemption statute, L. O. L. §§ 221-226, existing when contract for erection of a dwelling is made, enters into it, and so makes it part of the contract that exemption may be claimed against execution on decree foreclosing lien for labor and material entering into the building.

Johns, J., dissenting,

Department 2.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Suit by Josephine Paulson against T. M. Hurlburt, Sheriff of Multnomah County, for injunction. Decree for plaintiff, and defendant appeals. Affirmed.

The defendant Hurlburt is sheriff of Multnomah county. The plaintiff is the owner of a lot in Irvington and the dwelling constructed thereon, and resides there with her family; their actual physical occupation of the premises as their home having commenced on Thanksgiving Day of 1914. She was the owner and holder of the legal title of the property at the time the construction of the residence mentioned began, and continued as such owner, except as the title thereto is affected by a conveyance to W. J. Clemens on December 30, 1914, which was accompanied by a defeasance in writing of that date, conditioned in substance that Clemens would reconvey the property on payment of all charges against the property, with certain exceptions; the payment to be made within one year. The construction of the dwelling began prior to August 24, 1914; there being no building on the property before that time. The plaintiff and her family were living then on other property not owned by her. The dwelling mentioned was completed in the

latter part of December, 1914. Suit to foreclose certain mechanics' liens upon it was commenced January 25, 1915, ending in a decree of foreclosure directing the property in dispute to be sold for the satisfaction of the liens. Execution was issued after the case had been appealed to this court, and returned to the circuit court modified, and the sheriff was proceeding to advertise the property for sale when on July 14, 1917, he was notified in writing by the plaintiff here that she claimed the property to be exempt from execution as her homestead. As the defendant failed to desist in his purpose to sell the property, this suit was instituted to enjoin the sale so long as the plaintiff continues to occupy it as her homestead. In the stipulation of facts from which the foregoing statement is condensed, it is agreed that the plaintiff did not interpose her homestead right as a defense in the suit to foreclose the liens; further, that if she were allowed to testify on the subject she would state that when she commenced the building of the residence on the property she intended to make it her home as soon as she could occupy it, and that the intention had never been abandoned. The circuit court adopted the stipulation as findings of fact, and as a conclusion of law upheld the plaintiff's claim of homestead, and enjoined the sale. The defendant appeals.

Arthur H. Lewis, of Portland (Lewis, Lewis & Finnigan, W. S. Asher, Angell & Fisher, and Hall & Lepper, all of Portland, on the brief), for appellant.

L. P. Hewitt, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] The question to be determined is whether or not the owner of realty, being a member of family living in a dwelling erected on the land, can claim homestead as against an execution issued on a decree foreclosing liens for labor and material furnished in the erection of the house into which the owner moved and took up her residence with her family prior to foreclosure. It is not necessary to decide what would result if she had not occupied the dwelling until after issuance of execution, for that is not the aspect of this case.

There are two lines of authority. Those precedents cited by the defendant are to the effect that the lien binds the property as against the homestead exemption from the date of furnishing the labor or material, so that, although at that time the would-be homesteader owned the property and intended to occupy it with his family as a home as soon as he could do so, yet all this would not prevent its sequestration by execution issued on a decree of foreclosure subsequently obtained. The other decisions, on the contrary, are to the effect that homestead is a

privilege to be exercised by the owner of the property only when an attempt is made to sell it, and if at that time he comes within the purview of the homestead statute he can successfully claim the benefit of the homestead privilege. All the cases are affected in different ways by the particular terms of the statute under which they are decided, but in the main the enactments are very much alike. Our own statute does not require any previous notice of the claim of homestead. It is said in section 221, L. O. L.:

"The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must be the actual abode of, and owned by such family or some member thereof."

It is provided in section 224, L. O. L., that when any officer shall levy upon such homestead, the owner thereof, wife, husband, agent, or attorney of such owner, may notify such officer that he claims such premises as his homestead, describing the same by metes and bounds, lot or block, or legal subdivision of the United States. Then follows other procedure in relation thereto not necessary to be considered here. Some statutes prescribe a notice or notation on the record, or some such thing, to establish a homestead. The law in this state on that subject requires no previous action of that sort. The privilege here depends upon the fact whether the claimant comes within the intent of the statute. It is not necessary to have any precedent record or memorial of that fact, or to follow any particular form in asserting the claim to an officer holding an execution.

Some of the defendant's citations are here noted. In *Hansen v. Jones*, 57 Or. 416, 109 Pac. 868, the plaintiff had acquired property through her former husband's estate. A judgment was docketed against her October 14, 1907. She sold the property November 27th following. The execution was levied December 31st. The land was reconveyed to her on the 10th of the following month, and three days after again acquiring the title she interposed for the first time a claim of homestead against the pending sale. Mr. Justice Slater, discussing the situation, said:

"In this case plaintiff was not the owner of the premises at the time the execution was levied, and therefore she could not then, or thereafter, assert the right of a homestead subsequently acquired as superior to the lien of the judgment."

This language indicates that the matter is controlled by the conditions existing at the time the levy of execution is made. In *Northwest Thresher Co. v. McCarroll*, 30 Okl. 25, 118 Pac. 352, Ann. Cas. 1913B, 1147, the circumstances were that when the judgment was rendered the defendant was living on a

United States homestead not the realty in dispute. Before the execution was levied he returned to the property in suit, which had been his former abode, and then claimed it as his exempt homestead. The court said that—

"It seems to be well settled by the authorities that, when a judgment lien has attached, it cannot be divested by the subsequent occupation of the land for homestead purposes."

In *Upman v. Second Ward Bank*, 15 Wis. 449, the judgment had been rendered and became a final lien upon the land before the debtor came to the state, after which he went upon the land and claimed it as his homestead. The court said:

"For if the judgment debtor could defeat the creditor under such circumstances, and destroy his right to sell the property, we are unable to see why a party might not, upon the same principle, buy real estate subject to sale under prior existing liens, and then utterly defeat those liens by claiming the property for a homestead."

Bunn v. Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48, was a case where the defendant had moved off the land, and it was said in the syllabus:

"When a judgment lien has attached to land, it cannot be defeated or displaced by subsequent occupation as a homestead."

Many of these cases and numerous others cited by the defendant depend upon the circumstances that, when the lien and the decree enforcing it attached to the property, the homestead claimant was a stranger to the title. Many others rest upon the fact that, whereas, he once had homestead in the premises, he had abandoned it.

[2] In the instant case we may dismiss the arrangement with Clemens, for it appears that the instrument ostensibly passing the title, although on its face an absolute conveyance, was accompanied by a defeasance in writing, showing that it was a security as against certain claims. This clearly constitutes a mortgage, and did not divest the title from the grantor.

[3] The defendant cites section 415, L. O. L., reading thus:

"The provisions of section 213 to section 220, inclusive, and section 227 to section 258, inclusive, of this Code, shall apply to the enforcement of a decree so far as the nature of the decree may require or admit of it; but the mode of trial of an issue of fact in a proceeding against a garnishee shall be according to the mode of trial of such issue in a suit."

The part of the Code included in sections 213 to 220 relates to the constituent elements of executions against property, against the

person, and for the delivery of the possession of real or personal property, to what counties the writ may issue, when it is returnable, and the like. Sections 227 to 258 cover exemptions as they were codified before the homestead statute was enacted, the procedure to determine by a sheriff's jury any adverse claim to property seized by him on execution, manner of levy and sale, confirmation redemption, and proceedings after execution. The defendant argues that, because the homestead sections are not mentioned in the category embodied in section 415, they do not apply to decrees in equity. This point was ruled against his contention by this court in *Davis v. Low*, 66 Or. 599, 135 Pac. 314, holding that the homestead is not subject to a mechanic's lien, unless the exemption is waived or abandoned. Lord's Oregon Laws, so called, constitute only a compilation authorized by the act of March 17, 1909 (Laws 1909, page 517), as amended in unimportant particulars by the act of February 23, 1911 (Laws 1911, chapter 213). By this legislation the codifier was directed "to compile, annotate and superintend the publication of the Codes and statutes of Oregon." When he assumed the performance of this task he found the former Code making certain sections treating of executions applicable to the enforcement of decrees. He also found the homestead exemption statute, passed after the compilation upon which the former Code was based. In rearranging all the legislation which had accumulated, the learned compiler put the homestead statute in a chapter with other exemptions, which was an appropriate classification.

But the compiler was not a lawmaker. Neither is codification legislation. The homestead statute neither gains nor loses force by the place it occupies in the collection of laws. Its sanction depends upon its own terms, and would be the same if it had been printed anywhere else in the Code. To withhold decrees from its operation would be to construe a remedial statute with unwarranted strictness, and to put into it exceptions not within the legislative intent.

[4] The defendant also cites a wealth of authority for the proposition advanced in his brief that—

"Mechanics' liens, once acquired under an existing law, are regarded as a vested right, which may not be impaired by any subsequent legislation."

This is true as a major premise, but it is not supported by the minor premise that the homestead statute was enacted in this instance after the liens involved had become vested rights. It was passed by the legislative assembly of 1893, long before any of the occurrences described in the case under consideration. Both the lien law and the home-

stead statute were in force when the contract was made for which the liens are claimed as security, and the agreement is controlled by them. The defendant also argues that—

"The judgment does not give birth to the lien, but only provides the means to enforce it."

This may be conceded, but after all the very means to enforce the decree, viz. the execution, is what is hampered and held in abeyance by the homestead privilege. Here at the outset the plaintiff had the basic element of homestead, viz. ownership of the property. She had her family. She took no backward or divergent step, but persevered in her project of creating a homestead. In this respect the case is unlike any that have been cited by the defendant.

Turning to other precedents, we find in *Walter v. Dobbs*, 38 Miss. 193, that the judgment debtor owned the land and was a single man up to the day advertised for the execution sale. On that very day he married a wife, but before the sale took place occupied the premises with his spouse and successfully claimed homestead in the land. In *McMillan v. Mau*, 1 Wash. 29, 23 Pac. 441, the judgment debtor and his family moved on the land after the judgment lien attached, and homestead was successfully claimed by his widow after his death, despite the judgment. It was said in *Woodward v. People's National Bank*, 2 Colo. App. 369, 31 Pac. 184:

"The statute gives to a judgment creditor a general lien upon all the real estate owned or afterwards acquired, but this general lien must yield to the special law."

The statute of Colorado under consideration required the claimant to cause the word "homestead" to be entered on the record of his title. After the debtor had done this, execution was issued on a judgment rendered before the entry of the word. Commenting upon this situation, the court further said:

"The general judgment lien attaches until the legal designation of the land as a homestead; such designation withdraws it from the operation of the general lien that attaches to all the land owned. * * * The property in question not having been subjected specifically to the judgment lien by the levy of an execution before it was withdrawn as a homestead, it was exempted from the levy of the execution."

In *Dullon v. Harkness*, 80 Miss. 8, 31 South. 416, 92 Am. St. Rep. 563, a debtor made a voluntary conveyance of the property to his wife, which was set aside as having been made to defraud his judgment creditors, after which he was allowed to claim it as a homestead. The principle upon which

this case was decided was in effect that, if the conveyance was made with the intent to defraud creditors, it was utterly void, and the situation was the same as if it had never been made, with the result that, notwithstanding the previous judgments, the execution debtor was in a situation to claim homestead when the writ was issued.

In *Barnes v. Buchanan*, 108 Miss. 822, 67 South. 462, the defendant, while a single man, sold his land to his brother. His creditor, Barnes, obtained a decree subjecting the land to payment of his claim after setting aside the deed as fraudulent, but, before sale could be made under the decree, Buchanan, the defendant, married, bought the land back from his brother, moved upon it with his wife, and maintained it as his homestead as against the decree. The court held that specific liens fixed by equity decrees have no greater force against homesteads than law judgments.

In *Stone v. Darnell*, 20 Tex. 11, after judgment and levy of execution, the judgment debtor completed a house on the land and moved into it with his family. He defended an ejectment action brought by the purchaser at the execution sale on the ground that the land was his homestead at the date of sale. The court said:

"The right to the homestead is placed by the Constitution above any claims or liens for the satisfaction of debts. * * * The very object of the provision was to secure an asylum for the family, whether the head of the family owed or did not owe debts or whether the debts were or were not in judgments. * * * The time of the sale is the time to which we must look in ascertaining the fact whether he did or did not have a homestead."

Hawthorne v. Smith, 3 Nev. 182, 189, 93 Am. Dec. 397, construes thus a statute similar to our own:

"As the law is totally silent as to the time when a selection shall be made of the homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that, after the selection is made and filed for record, no levy upon or sale of the homestead property can be legally made, except for those classes of debts mentioned in the Constitution."

Another case depending upon the Nevada law was *Nevada Bank v. Treadway* (C. C.) 17 Fed. 887. In that instance, five days before execution sale on a judgment against him, a single man married and with his wife filed a declaration of homestead, claiming the land upon which he had resided and continued to reside. He was sustained in his defense against an action of ejectment brought by the purchaser.

In *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832, the court said, in substance, if a homestead cannot be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place, and then he must have a race with the sheriff for possession.

In *Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 392, Erskine obtained a judgment against Kenyon and his wife, and filed a transcript thereof with the county clerk, making it a lien upon realty occupied by the defendants. Afterwards they filed their declaration of homestead, and the court held that this superseded the lien of the judgment and made it nonenforceable. Another Washington case is *Snelling v. Butler*, 66 Wash. 165, 119 Pac. 3. In that instance, after judgment in an action at law against them, the defendants filed their declaration of homestead on property they occupied then and when the judgment was rendered. The court enjoined sale on execution subsequently issued, saying:

"The judgment became a lien upon the property, subject to the right of the owners to defeat an execution sale by the filing of a homestead declaration. They filed the declaration before the issuance of the execution. When the declaration was filed, the property became a homestead, and as such it was exempt from execution or forced sale."

In *Chafee v. Rainey*, 21 S. O. 11, when the judgment was rendered, Rainey was a married man, living with his second wife on the lot in question; it being his homestead. The wife died, and he remained single, living alone about a year, when he married again, and continued to live on the property with the third wife. The levy of execution was made after the third marriage. The court said:

"The right of homestead guaranteed by the Constitution is not an estate, but a mere right of exemption. It is nothing more than a prohibition against the use of the process of the courts for the collection of debts in certain cases, and when a certain condition of things is found to exist. Whether the homestead provision in the Constitution divests the lien of a judgment is not in our judgment a question pertinent to the present inquiry. It unquestionably forbids the enforcement of a judgment, except in the excepted cases provided for in the Constitution, by levy and sale of the homestead of one who is the head of a family. When he became the head of a family is not the question. The real question is: Does the condition of things exist under which the Constitution forbids the use of the process of the courts in enforcing the collection of debts? If they do exist, then we are at a loss to perceive by what authority any officer or any court can refuse obedience to this plain mandate of the Constitution."

The question between a mechanic's lien and the right to claim homestead is not altogether one of priorities. If it were, no one could claim the exemption at all, because the very judgment forming the basis of the execution he seeks to resist is prior to his claim. The two are not to be contrasted in the strict sense of priorities, for the judgment lien is a quasi estate in land, or at least fetters the title, while the right of homestead is a mere personal privilege. It is true that, when filed, the mechanic's lien notice relates back to the time when the work began or the materials were furnished; but that does not give the demand any greater force than if the notice had been filed at the time to which it relates. In all their efforts and litigation here in question the lien claimants were seeking to collect a debt arising from contract. To be enforceable at all it was essential that their claims of liens must be founded on a contract made directly with the owner of the property, or through a contractor whom the statute granting the lien makes the agent of the owner for that purpose. *Smith v. Wilcox*, 44 Or. 323, 74 Pac. 708, 75 Pac. 710; *Litherland v. Cohn Real Estate Co.*, 54 Or. 71, 100 Pac. 1, 102 Pac. 303; *Equitable Savings & Loan Association v. Hewitt*, 55 Or. 329, 106 Pac. 447; *Stuart v. Camp Carson Mining Co.*, 84 Or. 702, 165 Pac. 359. When the claimants of liens made their contract, with whomsoever made, they did so with reference to the existing law relating to the subject-matter of their agreements. That law entered into and was a constituent element of their stipulation, as much as if actually written into the contracts themselves. By that law they were notified in advance that although, by proper steps, pursued in regular and timely order, they might eventually obtain a decree giving them special advantage in collection of their demands, yet under certain conditions at the very end of their course the other party could interpose the claim of homestead, staying the execution by which they would collect their claims and reduce them to possession.

Before they took their decree the plaintiff here owned the property and was in actual possession, using it as the abode of herself and family. Both the elements of homestead were present, namely, actual abode of a family and ownership by a member of that family. The decree was made when those conditions were existent and operant. The plaintiff had no call to assert her right of homestead until the attempt was made to enforce the decree by execution. Counting the statute as an element of the agreement, as we must, it was part of the contract that she might claim homestead at any time prior to execution sale. There is no indication in the record that she ever waived, released.

or abandoned this provision of the contract which the lien claimants are trying to enforce.

It is urged that these claims are for the very labor and material which created the dwelling the plaintiff claims is exempt, and that the allowance of her claim would work a fraud upon the people who furnished the labor and material, by depriving them of just compensation. The argument is persuasive, but not conclusive. It is not fraudulent, because it was a known element of the contract, a provision of the law under which the agreement was made. The lienors ought not to have made such a contract, unless they were willing to be bound by it. They had no business to contract with people who might become entitled to assert homestead. The Legislature has given to laborers and materialmen an exceptionally favorable method of securing and collecting their demands. The same power affords to families an advantageous method of protecting their homes from the extreme pressure of debt. The law-making power provided an extraordinary remedy, but also devised a means of arresting its enjoyment. There is nothing harsh in the homestead law that with equal plausibility may not be urged against any exemption law. The family is the basis of the social fabric, the corner stone of society. While the laborer is justly the object of legislative protection, the family, whether that of the laborer or another, is equally, if not more, deserving of its beneficence. It is a far cry from the olden time, when there was imprisonment for debt and the father might be confined in jail, while his family starved because he could not pay. The world has moved since then, and the law, deeming the family of more importance than its debts, has provided for it the homestead as a citadel in which it is safe as against them for at least a shelter. This was the law under which the lien claimants operated, and they cannot complain if the courts give effect to its provisions as it then stood, although it has been amended since then to except from the homestead law mechanics' liens as well as mortgages. Laws 1919, c. 112. The doctrine is thus stated in *Scofield v. Hopkins*, 61 Wis. 370, 21 N. W. 259, Mr. Justice Casaday delivering judgment:

"The policy of the law is to secure to the debtor and his family a homestead which shall be beyond the reach of his creditors, however numerous. The statute seems to have been made for those who get in debt, and not for those who always pay their debts. Such need no exemption law, for they are a law unto themselves to that extent. This policy of the statute would certainly be frustrated if none are entitled to the exemption except those who have been so fortunate as to obtain a homestead prior to becoming judgment debtors. The spirit, if not the letter, of the law gives the

right of acquisition, as well as protection after acquisition. There can be no such exemption without ownership. If it is also true that there can be no exemption until there is a dwelling house upon the premises, actually occupied by the debtor personally, then it would be almost impossible for a homeless debtor, with judgments docketed against him, to get the benefit of the law; for the very instant he acquired the title the judgment lien would attach. Under such a construction, the only possible way of securing such benefit would be to select premises with a dwelling already thereon, and then actually occupy, with the family, prior to the acquisition. But such strict literalism would do violence to the obvious intent of the Legislature, and the whole current of authority in this state upon this subject. It was among the purposes of the statute to enable any one without a home of his own to acquire one, even though judgments may be docketed against him when he embarks in the enterprise. The acquisition of a completed homestead is seldom instantaneous. Generally, it requires years of industry and economic living. The purpose necessarily precedes the inception of the work, and that is followed by successive steps, until completion is attained. The land must be acquired, the location of the dwelling house designated, the cellar dug, the materials procured, the foundations laid, the superstructure erected, and then all fitted for a dwelling house, before actual occupancy by the family can take place. These successive steps in the acquisition of a completed homestead, made in good faith, come within the spirit of the statute, and are each entitled to the protection afforded by it."

The case before us is not to be confounded with one where the homesteader buys for his home a tract upon which there is already a lien of any kind. In such an instance there is no privity of contract between him and the lienor, so necessary to support a mechanic's lien, and he takes the estate cum onere. The philosophy of the cases relied upon by the defendant, and which hold that after judgment it is too late to occupy the land, and then for the first time claim homestead, seems to be that the claimant has in such an instance chosen for his homestead a property having an inherent defect in the title, that he takes the estate with its existing infirmities, and that he cannot complain if it falls him because of them. By analogy, this theory has countenance in *Hansen v. Jones*, 57 Or. 416, 109 Pac. 868. There, after judgment and before execution, the judgment debtor sold the land, thus destroying one of the essential statutory elements of homestead, that of ownership. This let in the judgment as a final adjustment of the relations of the parties to the land, and when the judgment debtor repurchased it she took an estate less by the effect of the judgment than she had before. On principle, the soundest legal deduction is that as between the parties directly involved in mechanics' and materialmen's liens, the homestead privilege, available as it is, only when

and not until execution issues, attends the contract and affects it from its inception, through all its stages, in whatever form it assumes, to and including its ultimate form of a decree of foreclosure.

On the other hand, for the reason that the right to claim homestead is a nonassignable personal privilege, and that there is no privity of contract to support his homestead in the land beyond the part remaining after the lien is carved out of it, no stranger can buy the property after the lien attaches, and exclude it from its effect on the estate. In the instant case, when the contractual relations in question began, they at once assumed a process of development. The lienors commenced with an essential element of furnishing labor or material. On their side, their status and the contract progressed from thence through all the stages of filing a notice of claim of lien, suit to foreclose, and decree; the final step being execution and sale, by which alone the contract was to be consummated and the chose in action reduced to possession.

Furnishing material does not *ipso facto* give a right to sell the realty; neither does filing notice of lien. These are but steps in an extraordinary remedy for the collection of a debt; also, a suit is necessary, and there must be a decree and execution before the lien claimant can enjoy the fruits of his process. Running with them, as a factor always to be reckoned with, is the element of homestead, which persists and is potent, if urged at any time prior to the execution sale, as taught in *Wilson v. Peterson*, 68 Or. 525, 136 Pac. 1187. In the development of the contractual relations involved, the plaintiff here started with the equally indispensable elements of family and ownership of the property, and coeval with or prior to the decree attained the remainder of the necessary characteristics of homestead right, namely, actual occupancy of the premises as a home for herself and family. As much as any other ingredient of the contractual connection between the parties, the right of the plaintiff to claim homestead, grounded as it was at the outset on her ownership in the property, affected that connection and kept pace in development with the evolution of the claims of the lienors. She did not abandon the basic characteristic of her privilege, that of ownership, by selling the realty, as in *Hansen v. Jones*, *supra*. On the contrary, she continued on her course in preparing her homestead, as sanctioned under similar statutes by the precedents in Arkansas, Texas, Nevada, Nebraska, Michigan, Oklahoma, and South Dakota here noted. *Stone v. Darnell*, 20 Tex. 11, *supra*, followed by *Macmanus v. Campbell*, 37 Tex. 287; *Miller v. Flattery* (Tex. Civ. App.) 171 S. W. 253, stating that "when a homestead dedication has not been

effected by actual occupancy, such effect must nevertheless be accorded to ownership, intention, and visible acts of preparation to use it for a home"; *Nevada Bank v. Treadway*, 8 Sawy. 456, 17 Fed. 887; *Reske v. Reske*, 51 Mich. 541, 16 N. W. 895, 47 Am. Rep. 594, where in an opinion by Mr. Justice Cooley the homestead of a young married couple was protected against an execution sale without their actually sleeping or eating on it or completing their dwelling house, although they had built a stable and out-buildings, kept their stock there, and occupied it as a woodyard, it having been their intention, as manifested by their acts, to make it their homestead; *Mills v. Hobbs*, 76 Mich. 122, 42 N. W. 1084; *Myers v. Weaver*, 101 Mich. 477, 59 N. W. 810; *Corey v. Waldo*, 128 Mich. 706, 86 N. W. 122.

In *Gregory v. Pritchard*, 240 Fed. 414, 153 O. C. A. 246, involving consideration of the Oklahoma statute, a married man having no other realty bought for his homestead a house and lot, then under lease for one year, on the information that the tenant would surrender the lease. After he purchased, he used every effort to get possession, but without avail, as the lessee refused to vacate. During the remainder of the term, the purchaser painted the house and made some repairs. The court protected him in his claim of homestead as against his trustee in bankruptcy. See, also, *McFarland v. Coyle* (Okl.) 172 Pac. 67, where similar conditions availed the homestead claimant against an execution sale; also *Illinois Life Insurance Co. v. Rogers* (Okl.) 160 Pac. 56. *Kingman v. O'Callaghan*, 4 S. D. 628, 57 N. W. 912, teaches that a homestead in realty may be claimed by one who has bought it for that purpose, begins the erection of a house, and moves into it as soon as the nature of the case admits. *Gill v. Gill*, 69 Ark. 596, 65 S. W. 112, 55 L. R. A. 191, 86 Am. St. Rep. 213, holds that the object of occupancy is to give notice of the claim of homestead; that mere intent alone is not sufficient, but that when coupled with actual preparation to enter, such as repairing, cleaning, installing furniture, and the like, occupancy is constructively established. *Hanlon v. Pollard*, 17 Neb. 368, 22 N. W. 767, was a case where a woman having a family bought land then in possession of a tenant. Her purpose was to occupy it as a homestead on expiration of the lease. A judgment was rendered against her after she bought but before she occupied the land. However, on the strength of her proved intention, her claim of homestead was sustained. In *Fogg v. Fogg*, 40 N. H. 282, 77 Am. Dec. 715, the owner was moving into the premises, and had part of his furniture in the house, when an attachment was levied upon the realty. He finished moving next

day, and was sustained in his claim of homestead.

These precedents indicate the length to which many courts have gone in their liberal construction of this protective statute, saying, in effect, that the occupancy required may be proved by the circumstantial evidence of intent, coupled with acts indicative of a purpose to establish a home on the property in question. In the present litigation it is not necessary to occupy the advanced position assumed by these decisions, for when the lienors arrived at the point where they could issue execution, against which alone homestead may be urged, the plaintiff was there before them with her fully developed

right of homestead to prevent their sale. The ultimate purpose of their procedure was to divest her of the title to her property. When they essay the final act of the process, that of sale under execution, they are halted by the privilege the law gives her of claiming homestead. She is then in the situation to exercise it. Then is the only time she can use it, and to deny it to her now is to graft upon the statute in favor of lienors an exception not found there, and so frustrate the benignant purpose of the law.

The decree of the circuit court is affirmed.

BEAN and BENNETT, JJ., concur.

JOHNS, J., dissents.

WERNER v. GRAHAM et al. (L. A. 4952.)

(Supreme Court of California. Aug. 29, 1919.)

1. COVENANTS ⇐72 — BUILDING RESTRICTIONS RELEASED BY QUITCLAIM.

Where lots had been sold subject to building restrictions, grantor's deed to purchaser of a lot, quitclaiming any interest in the lot, had the effect of releasing the restrictions as to the lot, so far as it was in the grantor's power to release them.

2. DEEDS ⇐156—PROVISIONS IN DEED CONDITIONS AND NOT COVENANTS.

If the provisions of a deed regarding building restrictions were in fact conditions, and not covenants, the defendants, owners of other lots with similar restrictions in deeds from a common grantor, were not entitled to enforce them as against plaintiff, where the reversion clause of plaintiff's deed ran in favor of grantor, his heirs and assigns, which does not include the defendants, since, under Civ. Code, §§ 768, 1046, by "assigns" must be meant assignees of the reversion or right of re-entry.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assigns.]

3. COVENANTS ⇐79(3)—NO PRIVACY OF CONTRACT BETWEEN GRANTEE IN DEED WITH RESTRICTIONS AND GRANTEES IN SIMILAR DEEDS.

If the restrictive provisions of a deed, with regard to buildings, amounted to covenants as well as conditions, where neither the plaintiff, seeking to quiet title against the restrictions, nor any of the defendants, owners of other lots under similar deeds, were the original parties to the covenants, and plaintiff did not contractually assume the covenant obligations, and defendants did not acquire by assignment from the common grantor his rights as covenantee, there was no privacy of contract between plaintiff and defendants.

4. COVENANTS ⇐81 — BUILDING RESTRICTIONS NOT COVENANTS RUNNING WITH LAND.

Where plaintiff seeks to quiet title against building restrictions on his lots against owners of other lots with similar restrictions in deeds from a common grantor, there is no privacy of estate between the plaintiff and the defendants in the usual sense of the word, neither holding through or under the other or others, and the restrictions are not recognized by the common law as covenants running with the land, and are not for the benefit of the estate conveyed to plaintiff, but to its detriment.

5. COVENANTS ⇐69(2) — RESTRICTIONS IN DEEDS ARE "EQUITABLE EASEMENTS" FOR BENEFIT OF DOMINANT TENEMENT.

Building restrictions in a deed, frequently spoken of as "equitable easements," were unknown to the common law and are not among the servitudes enumerated by Civ. Code, §§ 801, 802, and the enforcement thereof is limited to those which directly concern and benefit the dominant tenement, and the instrument cre-

ating such servitude will be strictly construed; any doubt being resolved in favor of the free use of the land.

[Ed. Note.—For other definitions, see Words and Phrases, Equitable Easement.]

6. COVENANTS ⇐79(3)—PERSONS ENTITLED TO ENFORCE EQUITABLE EASEMENT CREATED BY BUILDING RESTRICTIONS DETERMINED.

As to the "equitable easement" of building restrictions claimed against a certain lot sold with building restrictions, there is, as to lots sold by the common grantor prior to his conveyance of such lot, no equitable servitude, since it cannot be said that the covenants in the deed to such lot were exacted by him for the benefit of lots he did not own.

7. COVENANTS ⇐79(3) — EQUITABLE EASEMENT OF GRANTOR CREATED BY BUILDING RESTRICTIONS LOST BY QUITCLAIM DEED.

Where lot was sold with building restrictions, but grantor later quitclaimed any interest therein, lots which such grantor sold subsequently had no servitude over such lot; such servitude having been surrendered by the grantor's quitclaim.

8. COVENANTS ⇐79(3) — BUILDING RESTRICTIONS IN DEEDS NOT COVENANTS RUNNING WITH LAND.

Where owner of tract sold a portion thereof with restrictions, but without a word indicating that the land conveyed was part of a larger tract, the balance of which the grantor still retained, or that the restrictions were intended for the benefit of other lands, or that their benefit was to inure to and pass with other lands, and without description or designation of the land which was to be the dominant tenement as to the equitable servitude created by the restrictions, and the only expression as to who might act in case of breach of the restrictions was that in such case the land should revert to the grantor, his heirs or assigns, it is not possible reasonably to construe the restrictions as covenants running, not to the grantor, his heirs or assigns, but to him as the owner of certain land not designated or described, and to his various successors in interest in such land, especially in view of Civ. Code, § 1468, although subsequently enacted, defining covenants running with the land as "expressed to be for the benefit of the land of the covenantee."

9. COVENANTS ⇐79(3) — WHERE LOTS ARE SOLD WITH BUILDING RESTRICTIONS, WITH NO REFERENCE TO COMMON PLAN IN DEEDS, UNDERSTANDING OF PARTIES IMMATERIAL.

Where owner of a tract sells a lot therefrom with restrictions, but without express reference in the deed to a common plan of restrictions, or in any way indicating any agreement between grantor and grantee that the lot is taken subject to such a plan, it is immaterial, as affecting the question whether the restrictions run personally to the owner, and not to the owners of other lots in the tract, that the owner, in selling such lots from time to time, in each conveyance has exacted restrictive covenants evidently in accordance with a common plan, since not the grantor's intent alone, but

160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 Pac. 677, 37 L. R. A. (N. S.) 5; *Bresee v. Dunn*, 172 Pac. 387.

[6] Viewing the facts of the present case in the light of what has just been said, and leaving out of consideration for the time being the element of a general and uniform plan of restriction, it is quickly evident that as to those lots, which Marshall had parted with prior to his conveyance of the plaintiff's lot, there is no equitable servitude. Marshall was no longer interested in those lots and by no possibility can it be said that the covenants in the deed to the plaintiff's lot were exacted by him for the benefit of lots which he did not own.

[7] In like fashion it is plain that there is no servitude over the plaintiff's lot in favor of those lots which Marshall still retained when he gave the quitclaim deed of 1905 and with which he parted subsequently. If a servitude had previously existed in favor of those lots, he, as their owner, had the right to surrender it, and undoubtedly did so by his quitclaim deed.

[8] The remaining question is as to the existence of a servitude in favor of those lots which Marshall still owned when he sold the plaintiff's lot, and with which he parted before he gave his quitclaim deed. This is purely a question of the construction and consequent effect of the deed by Marshall parting with the plaintiff's lot. The situation in this respect is that one, the owner of a tract of land, sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the land conveyed is part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as is claimed, namely, the land which is to be the dominant tenement. Servitudes running with the land in favor of one parcel and against another cannot be created in any such uncertain and indefinite fashion. It is true the nature of the restrictions is such that, when considered in connection with the fact that Marshall still retained the greater portion of the tract, it is not improbable that he exacted them for the benefit of the portion so retained. But the grantee's intent in this respect is necessary, as well as the grantor's, and the deed, which constitutes the final and exclusive memorial of their joint intent, has not a word of that effect, nor anything whatever which can be seized upon and given construction as an expression of such intent. If such was their intent, it has not been expressed. Omitting, as we must, any consideration of what the understanding was between Marshall and his grantees, except as shown by the instruments between them, and

construing the deed in the light of the fact that Marshall was at the time the owner of a large number of other lots in the tract, it may yet well be that the grantee intended to obligate himself only to Marshall, his heirs and assigns. Certainly that is all that is said. It is also difficult to see how there can be any valid creation of what is practically a servitude, without some designation or description of what is an essential factor, namely, the dominant tenement. *McNichol v. Townsend*, 73 N. J. Eq. 276, 57 Atl. 938; *Renals v. Cowlishaw*, L. R. 11 Ch. Div. 866; *Wagner v. Hanna*, 38 Cal. 111, 116, 90 Am. Dec. 354. The fact, also, that the only expression in the deed as to who may act in case of a breach of the restrictions is that in such case the land shall revert to Marshall, his heirs or assigns, is strongly indicative of the fact that it was intended that Marshall, his heirs or assigns, should alone have the right to act. *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120. It is not possible, in view of these considerations and the rule of strict construction very properly applicable, reasonably to construe the restrictions as covenants which run, not to Marshall, his heirs or assigns, but to Marshall as the owner of certain land, not designated or described, and to his various successors in interest in such land. This view is amply supported by authority. *Los Angeles, etc., Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; *Berryman v. Hotel Savoy Co.*, supra; *Bresee v. Dunn*, supra; *Sailer v. Podolski*, 82 N. J. Eq. 459, 88 Atl. 967; *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14; *Badger v. Boardman*, 16 Gray (Mass.) 559; *Skinner v. Shepard*, 130 Mass. 181; *Clapp v. Wilder*, supra. It is also in line with section 1463, Civil Code, which reads:

"A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land."

The restrictive provisions under consideration here are not, as required by this section, "expressed to be for the benefit of the land of the covenantee." The section was not adopted until 1905, after the deed in question was given, and is therefore not controlling; but it is an expression of what the necessary requirements should be in order that covenants of this character may run with the land.

[9] So far the case has been considered without reference to the fact that Marshall in all his deeds exacted similar restrictions, and clearly had in mind a uniform plan of restrictions which he intended to impose, and actually did impose, upon all the lots in the tract as he sold them. Does the addition of

this element make any difference? [It is undoubted that, when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others.] The agreement between the grantor and each grantee in such a case as expressed in the instruments between them is both that the parcel conveyed shall be subject to restrictions in accordance with the plan for the benefit of all the other parcels, and also that all other parcels shall be subject to such restrictions for its benefit. In such a case the mutual servitudes spring into existence as between the first parcel conveyed and the balance of the parcels at the time of the first conveyance. As each conveyance follows, the burden and the benefit of the mutual restrictions imposed by preceding conveyances as between the particular parcel conveyed and those previously conveyed pass as an incident of the ownership of the parcel, and similar restrictions are created by the conveyance as between the lot conveyed and the lots still retained by the original owner. Of this character is *Alderson v. Cutting*, 163 Cal. 504, 126 Pac. 157, Ann. Cas. 1914A, 1.

[The difference between such a case and the one at bar is that here there is no language in the instruments between the parties—that is, the deeds—which refers to a common plan of restrictions, or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan.] Is this difference material? This is the crux of the present case. It has been held that this difference is not material. There are decisions to the effect that, when it appears that the owner of a subdivided tract has sold various lots in it from time to time and in each conveyance has exacted restrictive covenants which, it is evident, when all the deeds are considered together, were exacted in accord with a common plan, it is enough, and that mutual equitable servitudes have been created, although in any single deed taken by itself there is nothing to indicate any intent to create such reciprocal rights. *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122; *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936; *Sayles v. Hall*, 210 Mass. 281, 96 N. E. 712, 41 L. R. A. (N. S.) 625, Ann. Cas. 1912D, 476.

There is likewise authority to the contrary. *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543; *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583; *Sharp v. Ropes*, 110 Mass. 381; *Judd v. Robinson*, 41 Colo. 222, 92 Pac. 724, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018.

An analysis of such a case, however, leaves,

we believe, no reasonable doubt as to which line of authorities is correct. The intent of the common grantor—the original owner—is clear enough. [He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them—in this case, the deed—constitute the final and exclusive memorial of such intent.] It is also apparent that each deed must be construed as of the time it is given. It cannot be construed as of a later date, and, in particular, its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties. Yet that is exactly what is done in the decisions holding that mutual servitudes exist in cases where all the deeds taken together, evidence a common plan of restrictions, although no single deed by itself evidences anything more than an intent to put particular restrictions on a particular lot. As a concrete instance, take the first deed given by Marshall. At that time there was nothing to evidence any general plan of restrictions, and if the question as to the effect of the deed had arisen then, it must necessarily have been construed as if no such general plan existed. If it must have been so construed at that time, it must be so construed now. Whatever rights were created by the deed were created and vested then, and the fact that it later appears that Marshall was pursuing a general plan common to all the lots in the tract cannot vary those rights. The same is true of each deed as it was given. Nor does it make any difference that, as claimed by the defendants, Marshall gave each grantee to understand, and each grantee did understand, that the restrictions were exacted as part of a general scheme. Such understanding was not incorporated in the deeds, and, as we have said, the deeds in this case constitute the final and exclusive memorials of the understandings between the parties. Any understanding not incorporated in them is wholly immaterial in the absence of a reformation. *Long v. Cramer, etc., Co.*, 155 Cal. 402, 406, 101 Pac. 297; *Sailer v. Podolski*, supra; *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622, 45 L. R. A. (N. S.) 962, Ann. Cas. 1914A, 431.

This whole discussion may in fact be summed up in the single statement that, if the parties desire to create mutual rights in real property of the character of those claimed here, they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them, which constitute the final expression of their understanding. It follows that the additional element mentioned—that Marshall exacted similar restrictive covenants from all the grantees of lots in the tract—does not affect the matter, and cannot change the conclusion reached without it.

That conclusion, as before expressed, is that the restrictions in the deed by Marshall to the plaintiff's predecessor in interest ran personally to Marshall, and not to the other lots in the tract, and that the defendants, who claim wholly as lot owners, did not acquire the right to insist upon those restrictions.

[10] The point is made that a suit to quiet title, as this is, is a suit in equity and that the action of the plaintiff in seeking to escape from the restrictions in question is inequitable, and therefore relief in equity should be denied him. This is no justification of the present judgment, which goes further than denying the plaintiff relief, and affirmatively makes his title subject to the restrictions. It would also do the defendants little good to secure now a dismissal of the plaintiff's action, in view of what we have said as to the nonexistence of the restrictions as to the defendants. The plaintiff would be at liberty to use his lots without regard to the restrictions, and the defendants could not prevent him.

But, however this may be, the rule relied upon by the defendants has no application here. It may be very unneighborly and unfriendly for the plaintiff to put his lot to uses which will impair the residential character of the tract; but that is a very different thing from his seeking to clear his title of restrictions which are asserted against it, but which do not in fact exist, and which, so far as the defendants are concerned, never did exist, and that is all the plaintiff is seeking to do in this action.

The lower court found the substantial facts in the case. Upon those facts as found judgment should have been given for the plaintiff. The judgment is therefore reversed, with directions to the lower court to enter judgment for the plaintiff quieting his title as against the defendants.

We concur: SHAW, J.; LAWLOR, J.

PARKER v. KENWORTHY et al.
(L. A. 4914.)

(Supreme Court of California. Aug. 29, 1919.)

Department 1.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by John W. Parker against John F. Kenworthy and another. From a judgment for defendant Kenworthy, plaintiff appeals. Affirmed.

Valentine & Newby, of Los Angeles, for appellant.

Pendell & Gleason, E. W. Sargent, W. G. Cooke, J. F. Keogh, and G. Roy Pendell, all of Los Angeles, for respondent.

OLNEY, J. This is an action between the owners of lots in the same tract as that involved in *Werner v. Graham* (L. A. No. 4952) 183 Pac. 945, this day decided. The dispute is here, as there, as to the reciprocal rights of the present owners of lots in that tract. The material facts are identical. The only differences are: (1) That this is an action by certain lot owners against another, seeking affirmatively to enforce certain restrictions as to the use of the latter's lot, while in *Werner v. Graham* the position of the parties was reversed, and the plaintiff was seeking to free his lot of the claim of the defendants that they were entitled to enforce such restrictions; and (2) that in the present case the trial court held that the restrictions were not in force as between the present lot owners, while in *Werner v. Graham* the trial court held that they were. Our conclusion in *Werner v. Graham* accords with the result reached by the lower court in this action, and necessitates an affirmance of the judgment.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

McGINN v. VAN NESS et al.* (S. F. 8465.)
(Supreme Court of California. June 5, 1919.)

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George W. McGinn against T. C. Van Ness, Jr., and others. From a judgment for plaintiff, defendants, with the exception of D. L. Bienfeld, appealed to the District Court of Appeal, which affirmed (181 Pac. 70), and the appellants apply for hearing in the Supreme Court. Application denied.

Wm. H. Chapman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellants.

Fabius T. Finch, of San Francisco, for respondent.

PER CURIAM. The application for a hearing in this court, after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied, without reference to any question of the correctness of what is stated in the opinion in the paragraph commencing with the words, viz.: "But, even if it were to be assumed that the assessment was defective in the respect claimed," etc.

All concur.

BARNEBEE v. HUNSTOCK. (Civ. 3065.)

(District Court of Appeal, Second District, Division 2, California. Aug. 13, 1919.)

1. APPEAL AND ERROR \Leftrightarrow 612(2)—ON APPEAL FROM ORDER ISSUED AFTER JUDGMENT, JUDGE MUST CERTIFY PROCEEDING.

Where order appealed from is subsequent to the judgment, and arises on a record outside the judgment, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made.

2. APPEAL AND ERROR \Leftrightarrow 840—ON DEFECTIVE TRANSCRIPT, ORDER APPEALED FROM WILL BE AFFIRMED.

On appeal from order denying motion to vacate judgment, where transcript did not comply with Code Civ. Proc. § 953a, the proper procedure for District Court of Appeal is to affirm order appealed from.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Edna I. Barnebee against Robert H. Hunstock. From an order denying motion to vacate judgment against her, plaintiff appeals. Affirmed.

Frank C. Hoyt, of Los Angeles, for appellant.

Charles L. Hardy and G. C. De Garmo, both of Los Angeles, for respondent.

SLOANE, J. The plaintiff in this action appealed from an order of the trial court denying her motion to vacate a judgment against her. The matter is presented at this time on respondent's motion to affirm the order appealed from, on the ground that the record on appeal contains no bill of exceptions, nor reporter's transcript certified by the judge who tried the cause and made the order, as is provided by section 953a of the Code of Civil Procedure.

The record on appeal presented here consists of a clerk's transcript, containing the judgment roll, together with certain papers and records purporting to have been used in the proceedings subsequent to judgment on the motion to vacate. These additional records consist of plaintiff's notice of motion, minutes of the court reciting that "plaintiff's motion to vacate the judgment heretofore entered herein, having been heretofore argued and submitted, is now denied," and notice to clerk to prepare a transcript, which requests that, in addition to the judgment roll, there be inserted therein "a copy of plaintiff's notice of intention to move for vacation of judgment therein, and the proceedings and order of court denying said motion." This transcript is certified by the clerk, but not by the judge.

The grounds of the motion to vacate, as

set out by the notice of motion to vacate, are specifications of the insufficiency of the findings of fact made on the trial to support the conclusions of law and judgment.

[1] The point in controversy is the sufficiency of this transcript. It is conceded that, if the issue presented on the appeal depended upon the judgment roll alone, the clerk's certificate would be sufficient to authenticate the record. But respondent urges that there is no authority of law, under the procedure prescribed by section 953a of the Code of Civil Procedure, to add any portion of the record of proceedings outside the judgment roll without the approval and certification of the judge before whom the proceedings were had. Such seems to be the plain interpretation of this section. After providing for the stenographic reporter's transcript of the trial, which is required to be authenticated by the judge, the section cited goes on to say:

"If the judgment, order or decree appealed from be not included in the judgment roll, the party desiring to appeal shall, on the filing of said notice, specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required, and the same shall be included."

This language clearly refers to the transcript to be presented to and approved and certified by the judge. It is inconsistent with the limitation appellant seeks to place upon it, namely, that—

"The only transcript which the judge is required or authorized to certify is that containing the testimony and other proceedings which are had in the trials of issues of fact."

The language quoted and the decision from which it is taken—and on which appellant relies—arose on the record of an appeal taken upon the judgment roll alone. *Jaques v. Board of Supervisors*, 22 Cal. App. 627, 135 Pac. 686. Where the order appealed from is subsequent to the judgment, and arises on a record outside the judgment roll, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made. *Thompson v. American Fruit Co.*, 21 Cal. App. 338, 131 Pac. 873; *Credit Clearance Bureau v. Weary & Alford Co.*, 18 Cal. App. 467, 123 Pac. 548; *Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749; *Richmond v. Julian Con. Min. Co.*, 176 Cal. 600, 169 Pac. 356.

[2] That an order affirming the order appealed from is the proper procedure on this motion is held on authority of *Hibernia Sav. & Loan Soc. v. Doran*, 161 Cal. 118, 118 Pac. 526, and *Knox v. Schrag*, 18 Cal. App. 220, 122 Pac. 969.

The order appealed from is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

Ex parte AZEVEDO. (Cr. 849.)

(District Court of Appeal, First District, Division 1, California. Aug. 14, 1919.)

1. HOMICIDE \S 354—MURDER IN SECOND DEGREE MAY BE PUNISHED BY IMPRISONMENT FOR LIFE.

Under Pen. Code, \S 190, providing every person guilty of murder in the second degree is punishable by imprisonment for not less than 10 years, it was within the power of the trial court to sentence one convicted of murder in the second degree to imprisonment in the state prison for life.

2. HOMICIDE \S 352—STATEMENT OF COURT IN PASSING SENTENCE MERELY DECLARATION OF OPINION.

Language of trial judge, in passing sentence of imprisonment for life, that he saw no way out of it except to punish defendant for the crime of murder, not of the second degree, but of the first degree, held merely a declaration that in his opinion, based on the evidence, defendant, who had been found guilty of murder in the second degree, merited punishment equal to that fixed for murder in the first degree.

3. HABEAS CORPUS \S 80(3)—UNDUE SEVERITY OF SENTENCE NOT REVIEWABLE.

The complaint of defendant, convicted of murder in the second degree and sentenced to imprisonment for life, that his punishment is more severe than it should have been, is a matter which can be considered only by the proper authorities in the case of commutation of sentence, parole, or pardon, and not on defendant's application for writ of habeas corpus to secure his release on the ground that, convicted of murder in the second, he was in reality sentenced for murder in the first, degree.

In the matter of the application of Antone Azevedo for writ of habeas corpus. Application denied.

A. Q. Lomba, of Oakland, for petitioner.

WASTE, P. J. The petition on behalf of Antone Azevedo for a writ of habeas corpus discloses that he is now confined in the state prison at San Quentin, having been convicted of murder in the second degree. But one point is raised by the application.

The jury, by their verdict, found the defendant guilty of murder in the second degree, and recommended the defendant to the mercy of the court, yet he was sentenced to undergo imprisonment for life. In pronouncing sentence the trial court, after a review of the testimony, said to the prisoner:

"I see no way out of it, Azevedo, except to punish you by imprisonment for the crime of murder, not of the second degree, but of the first degree; and it is therefore the judgment of the court, Azevedo, that you be taken hence and confined in the state prison at San Quentin for the period of your natural life."

The point made by the petitioner is that the court exceeded its jurisdiction, and in reality sentenced the defendant for murder in the first degree.

[1] There is no merit in the contention.

"Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years." Pen. Code, \S 190.

It was therefore within the power of the trial court to impose upon defendant the punishment pronounced. All the proceedings were in due and proper form. The commitment recites that—

"Whereas, said Antone Azevedo has been duly convicted in this court of the crime of murder in the second degree, it is therefore ordered, adjudged, and decreed that said Antone Azevedo be imprisoned in the state prison of the state of California for the term of his natural life as a punishment in said case."

[2] The language of the judge, in passing sentence, amounted to no more than a declaration that in his opinion, based on the evidence in the case, which he had just reviewed, and which related to the killing of defendant's wife, the defendant merited punishment equal to that fixed for murder in the first degree.

[3] The defendant's complaint amounts only to a counter plea that his punishment is more severe than it ought to have been. That is a matter which can only be considered by the proper authorities in the case of an application for commutation of sentence, parole, or pardon. *People v. Huff*, 72 Cal. 117-119, 13 Pac. 168.

The application for the writ is denied.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

In re GRAHAM'S ESTATE. (Civ. 2909.)

(District Court of Appeal, First District, Division 2, California. Aug. 13, 1919.)

1. APPEAL AND ERROR \S 604(1)—QUESTIONS OF FACT NOT REVIEWED WHERE EVIDENCE IS NOT IN RECORD.

On appeal from judgment roll alone, where there is no evidence before appellate court, court will not review findings on questions of fact.

2. WILLS \S 90—WHEN CODICIL REFERS TO LAST WILL.

Codicil, not specifically referring to any will, must be taken to refer to the last executed will.

3. WILLS \S 90—REFERENCE TO WILL BY CODICIL OR ATTACHMENT TO IT UNNECESSARY.

A codicil to an unrevoked will need not definitely refer to or be physically attached to such will.

4. WILLS ~~\$\$\$~~—MEANINGLESS PROVISION OF CODICIL DISREGARDED.

A provision in a codicil, not specifically referring to any will, revoking a bequest revoked by the last executed will, will be disregarded as meaningless, having nothing upon which to operate; but such provision does not invalidate the remainder of the codicil.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

In the matter of the estate of Margaret Graham, deceased. From an order and judgment admitting will to probate, contestants appeal. Affirmed.

Peter J. Crosby, of Oakland, and Samuel M. Samter, of San Francisco, for appellants.

F. A. Berlin, of Oakland, and L. R. Weinmann, of Alameda, for respondent.

LANGDON, P. J. This is an appeal from an order and judgment of the superior court for the county of Alameda, admitting to probate as the last will of Margaret Graham, deceased, two certain documents hereinafter described. The facts of the case are:

Margaret Graham died on July 9, 1917, leaving as her only heirs at law the appellants Bridget Pollock, Sarah Burns, and Mary Wall, sisters, and appellants Eva Schutte and Lillie Terwilliger, nieces, daughters of a deceased sister. Her estate was valued at about \$9,000. She had previously executed three testamentary documents—two wills and a codicil. The two wills were executed on the same day—May 17, 1917—one in the morning and the other in the afternoon. The codicil was executed on June 25, 1917. The will executed in the morning and the codicil were filed for probate on July 12, 1917, and later, on November 13, 1917, an amended and supplemental petition for probate was filed, which stated that two wills and a codicil had been left by deceased, set out the second will, as well as the first will and codicil, and asked the court to admit to probate such of the documents as might be determined to be valid wills of the deceased. A contest was filed by the appellants upon several grounds, all of which were decided against the contestants, and the second will and the codicil were admitted to probate as constituting the last will of deceased.

[1] There were a number of grounds of contest, but as the appeal is taken upon the judgment roll alone, and no evidence is before us, we may not review the findings upon the questions of fact presented by the contest, and the condition of the record invites our consideration only to the question of law as to the correctness of the action of the trial court in admitting to probate the instrument entitled "Codicil to My Last Will." It is appellants' contention that the second will alone should have been admitted to probate, that it appears upon the face of the codicil that it

was not a codicil to such will, and that it was therefore improperly admitted to probate.

The relevant facts with respect to these several documents are: The documents were all executed with proper formalities. In the first will the testatrix directs her executor to pay \$500 to Rev. Father Galvin, \$300 to Annie Fortman, \$500 to St. Joseph's Church, \$500 to the same church for prayers, \$200 to R. B. Tappan, and the residue of the estate is devised to Maria Anderson, of San Francisco. By this will all former wills are revoked. By the second will the testatrix bequeathed \$500 to Father Galvin, \$200 to R. B. Tappan, \$300 to Annie Fortman, \$500 to St. Joseph's Church, and \$500 to the same church for prayers, and by this instrument no disposition is made of the residue of her estate. All former wills are expressly revoked by this second will, and the statement is made:

"I give nothing to my relatives, because of their neglect of me."

It will be observed that the substantial difference in the two wills is that in the first will Maria Anderson is named as residuary legatee, while in the second the residuary estate is not devised at all. The other document admitted to probate is entitled "Codicil to My Last Will." It bequeaths \$50 each to the three sisters of the testatrix, who are appellants here, and then proceeds as follows:

"I declare this to be a codicil to my last will. I strike out my bequest in my will to Maria Anderson—the residuary legatee. I strike out my bequest to Mrs. Annie Fortman, and make her the residuary legatee. I give her the residue of my estate."

[2] The contention of appellants is that this instrument was intended as a codicil to the first will, which had been expressly revoked by the second will, because it refers to and revokes the residuary bequest to Maria Anderson, who is named only in the first, and not in the second, will. In all other respects it might apply equally to the second as to the first will. Appellants contend that said codicil should not have been admitted as a codicil to the second will; that the second will should have been admitted to probate alone, and that, as said second will did not dispose of the residue of the estate, as to such residue the testatrix died intestate. The trial court has concluded that the codicil did not refer to the first will in a sufficiently specific manner to republish said will. Obviously, appellants are not complaining of this holding, because, if the first will had been republished by the codicil, the appellants would have had no interest in the residuary estate. Since the codicil did not specifically refer to the first will, nor specifically refer to any other will in existence, it must be taken to refer to the last executed will. A codicil must re-

fer to some will, and, if no express will is mentioned, it will be taken to refer to the will last in date. Woerner on Administration, vol. 1, p. 90, § 47; *Crosbie v. Macdoul*, 4 Ves. Jr. 610, 615.

[3, 4] It is not necessary, in order to support the judgment of the trial court, that this codicil should contain sufficient reference to the second will to republish said second will, because said second will was never revoked and required no republication. Exact and definite reference or physical attachment thereto becomes unnecessary. The provision in the codicil revoking the bequest to Maria Anderson may be disregarded, under well-established rules of construction. *Matter of Estate of Wood*, 36 Cal. 75, 81. It becomes meaningless, because it has nothing upon which to operate. This does not invalidate the remainder of the document, however. In all other particulars the two documents are harmonious and may be construed together. Section 1320, Civ. Code. The ruling of the trial court, and the operation of the two documents standing together, seem to be entirely consistent with the intent of the testatrix as it appears from the documents in evidence. The holding of the trial court is also in accord with the rule that a construction favorable to testacy rather than to intestacy should be indulged wherever possible.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

LANKTREE v. LANKTREE. (Civ. 2900.)

(District Court of Appeal, First District, Division 2, California. Aug. 13, 1919.)

1. PLEADING §214(1)—ON APPEAL FROM ORDER SUSTAINING DEMURRER, FACTS ALLEGED IN COMPLAINT ARE BINDING.

On appeal from order sustaining demurrer to complaint, facts alleged in complaint are binding upon both parties and court.

2. CONTRACTS §111 — NOT TO CONTEST DIVORCE AGAINST PUBLIC POLICY.

Husband's agreement to refrain from contesting wife's divorce suit, in consideration of wife's agreement to make settlement of property rights, held contrary to public policy.

3. DIVORCE §56—DENIED WHERE COLLUSION APPEARS.

Under Civ. Code, § 111, subd. 2, and section 114, divorce must be denied where collusion appears.

4. DIVORCE §165(3)—ON COLLUSION DECREE SHOULD BE VACATED.

If court has not lost jurisdiction, a collusive divorce decree should be set aside on suggestion, and may be set aside by court of its own motion.

5. DIVORCE §165(3)—COLLUSIVE DECREE IS FINAL AS TO BOTH PARTIES IN ABSENCE OF FRAUD.

Where a collusive divorce decree has become final, equity will not interfere at the instance of either party, in absence of showing of coercion, imposition, or fraud upon complaining party.

6. DIVORCE §165(3) — COLLUSIVE DECREE WILL NOT BE SET ASIDE, AFTER TIME FOR APPEAL, FOR HUSBAND'S MISREPRESENTATIONS AS TO PROPERTY.

Divorce decree, secured by wife pursuant to husband's agreement not to contest suit, in consideration of wife's settlement of property rights, will not be set aside after time within which to appeal and to move under Code Civ. Proc. § 473, has elapsed, upon wife's complaint that husband misrepresented valuation of his property and that he did not desire to marry another; the wife herself having been at fault in procuring collusive decree.

7. EQUITY §65(3)—AMENDMENT TO BILL TO SET ASIDE COLLUSIVE DECREE OF DIVORCE DENIED.

In wife's action to have divorce decree set aside, where complaint shows wife at fault in having procured collusive decree, court, in sustaining demurrer to complaint, will not permit amendment of complaint changing allegations regarding her conduct; wife not having come into court with clean hands.

8. EQUITY §65(1)—PARTIES TO FRAUDULENT TRANSACTION LEFT WHERE FOUND.

Equity will leave parties to fraudulent transaction where they have placed themselves.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Harriet C. Lanktree against Joseph B. Lanktree. From a judgment entered on an order sustaining without leave to amend, a general demurrer to her complaint, plaintiff appeals. Affirmed.

McWilliams & Hatfield, of San Francisco, for appellant.

W. J. Burpee and Donahue & Hynes, all of Oakland, for respondent.

BRITTAIN, J. The plaintiff appeals from a judgment entered upon an order sustaining, without leave to amend, a general demurrer to her complaint.

[1] For the purposes of this decision, the facts alleged in the complaint are binding upon both parties and the court. The question is not one of fact, but of law. If the plaintiff's allegations are true, is she entitled to relief? At the instance of a wife who alleges she has procured a collusive decree of divorce, will a court of equity set it aside because she also alleges in substance that she bartered her marital rights for a smaller sum than she might have exacted, if the other party to the collusive agreement had not misrepresented the amount of his property?

In the briefs authorities are not cited, nor is there any serious argument upon the legal effect of the plaintiff's allegations in regard to her having procured the collusive decree. The argument on one side is upon the policy of the law to uphold the marital relation; on the other, upon the principle that, to warrant a court of equity to set aside a former judgment, extrinsic fraud must be shown. The determination of the larger question concerning the fraud which the plaintiff avers she practiced upon the court renders unnecessary lengthy consideration of the other matters argued in the briefs.

[2-4] The plaintiff alleged that the parties were married in 1881 and continued to live together as man and wife for 36 years; that early in 1917 the husband requested his wife to enter into an agreement with him for the settlement of their property rights and for the wife to institute a divorce suit, which he should refrain from contesting; and that the plaintiff refused to consent to this agreement. Such an agreement is contrary to public policy. When collusion appears the divorce must be denied. Civ. Code, § 111, subd. 2; Civ. Code, § 114; *Deyoe v. Superior Court*, 140 Cal. 482, 74 Pac. 28, 98 Am. St. Rep. 73. If the court has not lost jurisdiction, such a decree should be set aside on suggestion, and may be set aside by the court of its own motion. *Reh fuss v. Reh fuss*, 169 Cal. 91, 145 Pac. 1020.

Subsequently the plaintiff alleged that the husband engaged in a series of acts and statements of a cruel nature, as a result of which the plaintiff suffered physical and mental breakdown, and that while in this condition she was induced to make the very agreement she had before rejected, which she in terms describes in her complaint as "said collusive agreement for the securing of a decree of divorce from the defendant." It is further alleged that pursuant to this agreement the parties entered into a lengthy contract, a copy of which is appended to the complaint in the present suit. Among many other matters it provided for certain money and property to be given by the husband to the wife. Two days after its date, it is alleged, in further pursuance of the prohibited oral agreement, the plaintiff commenced her action for divorce, in which the defendant defaulted, and the plaintiff procured the interlocutory decree in her favor. There was no appeal, and the time to appeal and to move under section 473 of the Code of Civil Procedure elapsed. The interlocutory decree became a final judgment at the expiration of 6 months. Nothing remained to be done in the original suit but to enter a formal decree of divorce. No action was taken by the plaintiff in the divorce suit, but on the day of, or the day after, the expiration of the year from the date of the interlocutory decree, the present suit was commenced.

The plaintiff further alleged that the defendant falsely represented to her that he did not desire to marry another, and that in connection with the written agreement for property to be delivered to her he falsely represented the amount of his property. The plaintiff seeks to have the alleged collusive decree of divorce vacated.

[5] Where a collusive decree has become final, courts of equity will not ordinarily interfere at the instance of either party. To warrant such action there must be a showing of coercion, imposition, or fraud upon the party complaining. *Bancroft v. Bancroft*, 173 Pac. 579, L. R. A. 1918F, 1029. Even though the alleged cruelty of the husband was such as to amount to coercion by which the plaintiff was induced to enter into the oral agreement to procure a collusive divorce, that coercion could not have acted upon her when she was represented by counsel, as she must have been to carry the prohibited bargain into effect. If she had told her attorneys or the court that she had been coerced into making the bargain, she might have been fully protected in regard to her marital rights. If she had sought a divorce because of her husband's cruelty, she might have had full disclosure made in regard to his property.

The only allegation of imposition or fraud in regard to the original agreement was the alleged statement that the husband did not desire to marry another. It is unreasonable to suppose the wife's will was so weakened by the husband's alleged cruelty that she consented to the agreement, but would have had strength to resist the bargain if this statement had not been made. The substance of the appellant's claim is that in the property settlement, after the alleged oral bargain and in pursuance of it, the husband deceived her in regard to the amount of his property, whereby she was induced to accept a ranch valued at \$12,000, \$250 in cash, and \$40 per month so long as she remained unmarried during his lifetime, and an additional \$35 per month for one year. The plaintiff alleged the husband represented that this agreement would be fair and equitable for her, and that it would leave him practically penniless and bankrupt. So long as she believed she was getting all it was possible for him to give, she was satisfied. She commenced a collusive suit, she fraudulently procured the interlocutory decree, she was willing to take the benefits of the decree, and she rested under it until it became final.

[6-8] The case does not appear to be one of equitable cognizance. The allegations of the complaint are not sufficient to move a court of equity to reopen a matter finally adjudicated. *U. S. v. Turockmorton*, 98 U. S. 61, 25 L. Ed. 93. If the plaintiff had been without fault, and the facts had warranted it, deficiencies in the complaint might have been supplied by amendment; but the plaintiff was not free from fault. Her affirmative al-

legations regarding her own conduct cannot be changed by any proper amendment. By her own statements it appears her hands are not clean. *Gunter v. Laffan*, 7 Cal. 588. The agreement which the plaintiff alleges she made is one of the kind described by the Supreme Court in the case of *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229:

"It was a contract which contemplated the perpetration of a fraud upon a court of justice, and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power."

Equity will leave parties to fraudulent transactions where they have placed themselves. *Mitchell v. Cline*, 84 Cal. 400, 24 Pac. 164.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

NISSEN v. EHRENPFORT et al. (Civ. 2848.)

(District Court of Appeal, First District, Division 1, California. Aug. 8, 1919.)

1. ALTERATION OF INSTRUMENTS §20—ALTERATION OF NOTE, CHANGING ITS MEANING, AVOIDS IT.

The alteration of a negotiable instrument, by which its meaning and effect is changed, avoids the instrument as to any nonconsenting party thereto.

2. GUARANTY §54 — ALTERATION OF NOTE, CHANGING RATE OF INTEREST, DISCHARGES GUARANTOR.

Alteration of note, obligating maker to pay 7 per cent, instead of 6, as originally agreed to, without guarantor's consent, discharged guarantor's liability, under Civ. Code, § 2819, notwithstanding section 2820, providing that creditor's void or voidable promise does not alter obligation or suspend or impair creditor's remedy against principal, within former statute, providing that such alteration of obligation or impairment of remedy exonerates guarantor.

3. PRINCIPAL AND SURETY §101(1) — DOCTRINE THAT AGREEMENT TO DISCHARGE SURETY MUST BE VALID DOES NOT APPLY TO ALTERATION OF INSTRUMENT.

The doctrine that the agreement by which an existing contract is changed must be valid and binding in order to discharge the surety has no application to a case where the agreement is by way of alteration of the original instrument.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by James B. Nissen against G. W. Ehrenpfort and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Ross & Ross, of Redwood City, for appellant.

Reed, Nusbaumer & Bingaman, of Oakland, for respondent Ehrenpfort.

KERRIGAN, J. The plaintiff, as the assignee of the National Bank of San Mateo, brought suit against the defendants upon five promissory notes executed by defendant Lindeman in favor of said bank, and indorsed as guarantor by defendant Ehrenpfort. Lindeman answered, setting up that in a proceeding in bankruptcy he had been duly discharged from the payment of his indebtedness represented by said promissory notes. Judgment was rendered against him for the amount due thereon, but its execution was perpetually stayed. Defendant Ehrenpfort answered, and among other defenses pleaded that since the delivery of said promissory notes they had been materially altered by said National Bank of San Mateo without his knowledge or consent, by virtue of which alteration he had been discharged from liability upon said notes. The trial court found in accordance with this plea and rendered judgment in his favor. The plaintiff appeals from such judgment.

It is an undisputed fact in the case that the payee of said notes, through one of its officers, and at a time when said notes were overdue, wrote upon the margin of each of them, with the consent of their maker, Lindeman, but without the knowledge or consent of Ehrenpfort, the words, "Int. from Feb. 20, 1916, 7%. O. K.," and that Lindeman indicated his concurrence in said alteration by placing thereafter his initials. By the terms of the promissory notes as originally executed they bore interest at the rate of 6 per cent. only.

[1] It is well settled, not only in this state, but wherever the law merchant prevails, that the alteration of a negotiable instrument by which its meaning and effect is changed avoids the instrument as to any nonconsenting party thereto. Dealing with this subject in his work on Negotiable Instruments (6th Ed., vol. 2, § 1373), Mr. Daniels says:

"Any change in the terms of a written contract which varies its legal effect and operation, whether in respect to the obligation it imports or as to its force as matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change; and the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation, even in the hands of a bona fide holder, and whether made with fraudulent intent or not."

"The alteration may consist in changing (1) its date, or (2) the time or (3) place of payment, or (4) the amount of principal or (5) interest to be paid. * * * And the alteration may be effected by adding to the instrument some new provision, or by substituting one provision for

another, or by obliterating or subtracting from it some provision incorporated in it." *Id.* § 1375.

Numerous authorities are cited by the author in support of the law as thus stated. The same doctrine is stated in almost identical terms in volume 3 of *Ruling Case Law*, at pages 966, 977, 1100, and 1113.

The rule, as it relates to a guarantor, has been incorporated into our statute law by section 2819 of the Civil Code, which provides:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

As said in *Driscoll v. Winters*, 122 Cal. 65, 54 Pac. 387, this is but a restatement of the common law rule.

[2] There can be no doubt that the writing of the words above mentioned upon the promissory notes upon which this action is based is such an alteration as is referred to in the authorities cited. The words in themselves, if written upon a separate piece of paper, would be meaningless as affecting any obligation of the maker of these notes. They acquire significance only when read in connection with the promise to pay the principal sum in said notes named, and their effect is, and was intended to be, that from the date mentioned Lindeman was obligated to pay to the Bank of San Mateo 7 per cent. interest, instead of 6, and such obligation arose from substituting those words in place of the words relating to the rate of interest appearing in the notes, so that each note thereafter constituted an obligation to pay its principal sum and 7 per cent. interest, instead of its principal sum and 6 per cent. interest.

Several cases are cited by the appellant, holding that a notation similar to that above set forth, when indorsed on the back of the note, is not such an alteration as to avoid it; but we think such cases are not in point, or, if they may be so considered, are against the great weight of authority.

The appellant refers us to section 2820 of the Civil Code, providing that—

"A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section" (section 2819, Civ. Code, hereinbefore quoted).

[3] We think it clear that this section of the Code has no application to the facts of the present case. It refers to cases in which the promise or agreement of the creditor is for any reason invalid or not enforceable against him. In such cases it is held that

the obligation of the pre-existing contract, as to which the subsequent promise or agreement is made, is not altered, and consequently that the guarantor is not exonerated. The doctrine that the agreement by which an existing contract is changed must be valid and binding in order to discharge the surety has no application to a case where the agreement is by way of alteration of the original instrument. *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517, 518. See, also, *Driscoll v. Winters*, 122 Cal. 65, 54 Pac. 387; *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21, 45 Pac. 12.

The appellant also discusses the question as to whether the payment of interest in advance, as found by the trial court, implies a promise of forbearance on the part of the creditor, thus impairing his remedy, and also the effect of an indefinite extension of time of payment; but in view of the conclusion we have reached that the guarantor was released by the alteration of the promissory notes on which he was otherwise liable, it is unnecessary to follow the appellant in the discussion of those questions.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

KRENWINKEL et al. v. HENNE et al.

SUCK v. SAME.

(Civ. 2981.)

(District Court of Appeal, Second District, Division 2, California. Aug. 8, 1919.)

1. MECHANICS' LIENS \S 277(6)—ON FAILURE TO ANSWER DEFENDANT ESTOPPED TO RAISE QUESTION OF VARIANCE.

In actions to foreclose mechanics' liens, defendants, having failed to answer, and thus to put in issue all material allegations of the complaint, particularly those setting forth the contents of the liens, thus having admitted the truth of the allegations, held estopped to raise the question of variance between the claim of lien and the proof.

2. MECHANICS' LIENS \S 157(1)—STATEMENT OF PRICE IN FIRST CLAIM NOT A VARIANCE FROM SECOND CLAIM FOR REASONABLE PRICE.

Under Code Civ. Proc. § 1187, as amended in 1911, in actions to foreclose mechanics' liens, the statement in the second claims of lien that there was no contract price, and that the reasonable price was being charged for the work done, held not a fatal variance from the first claims of lien, stating the contract was agreed upon and was payable on completion.

3. MECHANICS' LIENS \S 75(1)—OWNER SILENT IN FACE OF IMPROVEMENT WORK RESPONSIBLE THEREFOR.

Under Code Civ. Proc. §§ 1187, 1192, one who stands by and sees another improve his

property without putting him on notice of the true ownership of the property, must be held responsible for the value of the improvements, not being an innocent party under the conditions.

4. MECHANICS' LIENS \Rightarrow 132(1) — CONTRACTORS WORKING WITH OWNER'S CONSENT HAVE 90 DAYS TO FILE CLAIMS.

Under Code Civ. Proc. §§ 1187, 1192, where contractors did work on a building with the knowledge, consent, and permission of the owners, no notice of completion of the work having been filed, the contractors had 90 days within which to file their claims for lien.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Consolidated actions by Fred A. Krenwinkel and others against Jane Louise Henne and others, and by Leo Suck against Jane Louise Henne and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Walter M. Campbell and Campbell & Moore, all of Los Angeles, for appellants.

G. C. De Garmo and Robert Whitson, both of Los Angeles, for respondents.

THOMAS, J. These two actions, brought for the foreclosure of mechanics' liens against defendants and appellants, were consolidated in the superior court and tried as one. The liens claimed were for labor done and materials furnished in making certain alterations and improvements in a storeroom in the Henne building occupied by Naumann & Schill, Inc., as tenants of the defendants and appellants, who were the owners.

Each lien claimant was an original contractor, and all the work done and materials furnished was at the instance of said tenants, and without the actual knowledge of appellants. The evidence was conflicting as to the knowledge of the employes of R. A. Rowan & Co., as shown and admitted to be the agent of appellant for the collection of rents and care of the building. Each of these respondents, except Suck, filed two claims, the first one in each case being filed within 60 days after completion of their contract, and the second within 90 days after completion, but more than 60 days thereafter. No notice of the completion of any of the work was filed in the recorder's office. Respondent Suck alleged that he was employed by appellants Jane Louise Henne and Jane Louise Henne, as guardian of the person and estate of Christian Henne, a minor, through their agent, Naumann & Schill, Inc., to do certain work and to furnish certain materials. Appellants, by their joint answer to each complaint, deny specifically any knowledge upon their part of any of said alterations or improvements until the completion thereof, and deny, for lack of information or belief, the allegations with reference to the contract for the work and performance thereof. Naumann

& Schill, Inc., allowed default to be taken against it.

Upon the consolidation of the cases as aforesaid, the trial of the issues thus presented was had, and the court found in favor of the plaintiffs and respondents here. Findings were thereafter filed, and judgment entered foreclosing the liens. The defendants, appellants here, appeal "from so much of the judgment entered in the above-entitled consolidated actions on the 11th day of March, 1916, as affects in any manner the interests of the said defendants, and of each of them, in and to the real property described therein, and particularly from so much of said judgment as enforces liens in behalf of each of said plaintiffs against said real property and against the interests of each of these defendants therein."

Appellants urge the following points of law as bases for the reversal of the said judgment: That the court erred (1) in admitting in evidence the claims of lien because of a variance between the claims of lien and the allegations of the complaint and the testimony offered in support thereof, in that the claims of lien state an agreed price for the work etc., whereas, as alleged and proven and found by the court, no price for the work was agreed upon; (2) in admitting in evidence the second claims of lien in said cases, because the same were recorded more than 60 days after the completion of the work; and (3) in admitting in evidence the claim of lien of respondent Suck because of a material variance between the statements of the claim of lien to the effect that the work was done by and for the appellants, whereas the allegations of the complaint and the evidence offered in support thereof are to the effect that the work was done for Naumann & Schill, Inc., a tenant of appellants. These may be narrowed down to two points: (1) Error of the court in the admission of evidence, and (2) a material variance between the allegations and the proof. We are unable to agree with appellants on the points raised or either of them.

[1] As to the latter contention, we think the appellants, having failed to answer and thus put in issue all the material allegations of the complaint, particularly those which set forth the contents of the liens, and by such failure having admitted the truth of the allegations, are estopped to raise the question of variance between the claim of lien and the proof. By such failure the appellants, as a matter of law, admitted that respondents' liens contained a statement of the terms, time given, and conditions of the contract entered into between plaintiffs and said Naumann & Schill, Inc., and the claims of lien introduced, therefore, are not vulnerable to the objection that they are at variance with the proof. This applies to all respondents.

[2] In the first claims of lien filed by re-

spondents it was stated that the contract was agreed upon and was payable upon the completion of the contract, while in the second it was stated that there was no contract price, and that the reasonable price was being charged for the work done. Appellants contend that this constitutes a fatal variance. But does it? Respondents admit that such would be the case under section 1187 of the Code of Civil Procedure as it formerly read, but not as amended in 1911. Respondents contend, and we think correctly so, that "before being amended the section required the lien claimant to state 'the terms, time given, and conditions of his contract'; but in 1911 the Legislature amended this section by providing that the lien should contain a statement of 'the price, if any, agreed upon for the same, and when payable, and of the work agreed to be done, and when the same was to be done, if agreed upon.' It is apparent that the Legislature by this amendment was seeking to simplify the preparation of claims of lien, and to relieve the lien claimant of the burden of setting out the nature and terms of the contract under which he was employed on the building, and requiring instead a statement of the price he was to receive for his work. In the absence of any particular agreement the law fixes the compensation at the reasonable value thereof, and when respondents stated in their lien claims that the price agreed upon was a certain definite amount, and that this was the reasonable value of such services, they were stating the facts correctly. There is a wide difference between a statement of the 'terms, time given, and conditions' of a contract and the 'price.'" Appellants admit that the claims of lien first filed were filed in time. As to them the only point urged was that of variance. This objection has now been ruled upon. The contention is without merit. *Jarvis v. Frey*, 175 Cal. 687, 166 Pac. 997.

[3, 4] This, therefore, brings for our consideration the claims of lien filed after the 60-day period, but within 90 days after the completion, which are admitted to be in due form, but which appellants claim were not filed within time. So far as this point is concerned, sections 1187 and 1192 of the Code of Civil Procedure, we think, control. These sections must be read together. When so read and construed, is there any room for doubt as to the intent of the Legislature? We think not. In our opinion there is no question of knowledge by the "owner" before us for decision. The court finds as a fact

"that all of the work described in plaintiffs' complaints and hereinafter described was done by and with the knowledge, consent, and permission of the defendants herein." This finding is not attacked. There is no question, then, that the evidence supports the finding. Hence, in the light of the two sections above referred to and the record before us, we think that one who stands by and sees another improve his property, without putting him on notice, must be held responsible for the value of such improvements. Under such conditions the owner is not an innocent party. There is no principle or authority, we think, for the contention of appellants that the terms "owner" or "reputed owner" refer to anything but the owner of the fee. To vitalize appellants' contention here would be to make the court vulnerable to the charge of being guilty of having enacted "judicial legislation"—the reading into the act of something entirely foreign to the minds of the legislators at the time the said statutes were enacted.

Respondents ask: "Under these conditions, why should one who has contributed his labor toward the construction of a building, at the request of one whom he possibly believes to be the owner, be entitled to only 60 days as to the owner, and 90 days as to the reputed owner, for filing his lien?" Is not the answer obvious? Section 1192, *supra*, places the noncontracting owner in the position of a party to the contract, in that it creates a conclusive presumption that the work was done at his instance and request. This works no hardship upon him, as he must be advised as to what is being done in the way of improving his property before the presumption arises. Appellants argue: "Manifestly, then, the owners could not be expected to file a notice of completion. Nor could they be estopped by a state of facts of which they knew nothing." We question the soundness of this argument, as it seems to us obvious that, if the owners knew nothing of the improvements, their interests could not be subject to lien. In view of the court's finding that the work was done as already set forth, and no notice of completion having been filed, respondents would have 90 days within which to file their claims. It follows, then, that the second claims for liens, filed by respondents, were filed within the statutory time.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

ROYAL INDEMNITY CO. v. MIDLAND COUNTIES PUBLIC SERVICE CORPORATION. (Civ. 2772.)

(District Court of Appeal, First District, Division 2, California. Aug. 12, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. ELECTRICITY §14(2) — POWER COMPANY MUST MAKE GUY WIRES SAFE UNDER EXISTING CIRCUMSTANCES.

The duty of an electric power company was not absolutely to insulate or otherwise make safe its guy wires in any particular manner, but to make them safe under all the exigencies offered by the surrounding circumstances.

2. ELECTRICITY §14(2)—PRECAUTIONS TO BE TAKEN TO RENDER GUY WIRES HARMLESS.

In reaching conclusion as to whether a power company was negligent in not guarding against the breakage of guy wires at the top as well as at the bottom, the jury should consider the nature of the country in which the pole was situated, the occupations of the persons living thereabouts, and the usual precautions taken under similar circumstances.

3. ELECTRICITY §19(13)—INSTRUCTIONS IN ACTION FOR INJURIES BY DANGEROUS GUY WIRES SUFFICIENT.

In an action against a power company to recover by subrogation for damages for personal injuries received by another than plaintiff, plaintiff being a workmen's compensation insurer and having paid the loss, instructions held to cover the point that in determining the company's negligence, in relation to its maintenance of a pole and high-power wires, the jury should consider the surrounding circumstances, etc.

4. ELECTRICITY §19(5) — EVIDENCE SUFFICIENT TO SHOW NEGLIGENCE IN MAINTENANCE OF GUY WIRE.

Evidence held to justify finding that defendant electric power company should have anticipated that the guy wire supporting a pole carrying high-power wires might be subjected to sufficient strain, by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire, and a consequent sagging, and should have insulated such wire so as to avoid injury to one working on the land.

5. ELECTRICITY §19(5)—EVIDENCE SHOWING REASON TO ANTICIPATE INJURY THROUGH BREAKING OF GUY WIRE.

In view of the physical conditions of the place where the pole was situated, and the use to which the land was put, that of farming, jury held justified in finding that defendant electric power company had reason to anticipate injury to one working on the land near the base of the pole when a horse straddled a guy wire and struggled in being backed off, causing the strands of the wire to break.

6. ELECTRICITY §18(1)—CONTRIBUTORY NEGLIGENCE.

One working in a barley field at the foot of a pole of an electric power company held

not guilty of contributory negligence in attempting to back a horse off a guy wire to the pole which such horse had straddled, the action resulting in a breaking of the strands of the wire and a consequent shock to the person through the horse.

7. MASTER AND SERVANT §401—PLEADING SUFFICIENT TO ENFORCE SUBROGATION OF INSURER TO RIGHTS OF INJURED EMPLOYÉ.

Allegations that plaintiff by its policy of insurance insured one and his employé, and that policy was written under the terms of the Workmen's Compensation, Insurance and Safety Act, held to carry with it an implied allegation that plaintiff was an insurance carrier entitled to be subrogated to the rights of an injured employé against party causing injury.

8. PLEADING §37 — OMISSION OF IMPLIED ALLEGATION IMMATERIAL.

Omission of an allegation necessarily implied from other allegations is immaterial.

9. MASTER AND SERVANT §405(6)—RIGHT TO SUBROGATION BY WORKMEN'S COMPENSATION INSURER SHOWN BY EVIDENCE.

Evidence of plaintiff, insurance carrier under the Workmen's Compensation Act, held sufficient to show that a lawful claim had been made by an injured employé and paid by plaintiff, to entitle it to be subrogated to employé's rights against party causing injury.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Royal Indemnity Company, a corporation, against the Midland Counties Public Service Corporation, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.

Everts & Ewing and M. K. Wild, all of Fresno, for respondent.

LANGDON, P. J. This is an appeal from a judgment rendered on a verdict of a jury in favor of the plaintiff in the sum of \$13,000. The plaintiff claims to be subrogated to the rights of one A. J. Bellah to recover for personal injuries alleged to have been received by him by reason of the negligence of the defendant. The injured man was a farm hand and was in the employ of one Max Flentge at the time of the accident. It is claimed by the plaintiff that the employer and employé were within the provisions of the Workmen's Compensation Act, and that the plaintiff was the insurance carrier of the employer and paid the claim of the employé and in consequence succeeded to his rights against the defendant.

[1-4] The facts of the case, in so far as they involve the merits, are as follows: The defendant was a public service corporation engaged in the business of generating and transmitting electricity in the county of

Fresno and elsewhere. It had a line of poles running along the county highway into the town of Coalinga, on which poles ran the high-power lines of the company. The pole involved here was situated on the land leased and cultivated by the employer and along the line of the county road about 8 or 10 feet inside the line. It was guyed by wires running from a point near the top of the pole to the ground on either side. Some of the wires on this pole were dead, but the lower wires, with which we are concerned here, were carrying a load of 10,000 volts of electricity. The guy wires were insulated at a point where, had they broken near the ground and fallen in a perpendicular line from the top of the pole, the insulation would have been below the lowest live wire and the electricity could not have traveled down their length to the injury of any one upon the ground. On the day of the accident, A. H. Bellah, the injured man, was working in company with another man, Wagner, in mowing around the edge of a field of barley. He had a team of horses, as also had his companion. Desiring to eat their luncheon at the place where they found themselves at the noon hour, they unhitched their horses and allowed them to graze, and retired themselves to the shade of the wagon to rest. One of Bellah's horses was a "smorting" colt, and he hitched it to an older horse. The older horse in some way got astraddle of the guy wire of the defendant. Bellah attempted to back it off of the wire. There is conflicting testimony regarding the amount of strain put upon the wire by the horse during Bellah's attempt to release it. One witness testified that the horse was plunging and kicking, but Bellah testified that he was not plunging. But, at any rate, while Bellah was attempting to push and back the horse off of the wire, and had placed the bit in its mouth and was holding on to the ring thereof, several of the strands of the guy wire became detached from the top of the pole, causing the guy wire to sag and come in contact with a live wire at a point below the insulation; the electricity was conveyed down the guy wire into the body of the horse, which was killed by the shock, and Bellah, who was holding on to the bit, received a severe shock which threw him violently to the ground, and as a result he has sustained very serious and permanent injuries. It appears that, when the strands in the guy wires became loosened and it sagged against the live wire, said guy wire remained at approximately the same angle from the pole as it had been originally placed, and the insulation was not, while it was held at such an angle, below the lowest live wire. The plaintiff insists that a breakage or pulling loose of the strands of the guy wire where it was attached to the pole should have been antici-

pated by the defendant, and that it was its duty to have so insulated the guy wire that, under any conditions which would cause a sagging of the wire, the insulation would nevertheless be at a point below a place of possible contact with the live wires. Appellant argues that there is no absolute duty upon defendant to insulate its guy wires in any particular manner, but that it is possible for the guy wires to be made so strong and to be placed so firmly in their position at a safe distance from the live wires that insulation would be unnecessary; in other words, that the relative positions of the wires themselves may furnish insulation by means of the intervening air. This is tacitly admitted by the respondent, who contends, however, that whether in the particular case the porcelain insulation was necessary and its absence negligence was a question of fact which was submitted to the jury under proper instructions, and that the jury has found by its verdict that the defendant was guilty of negligence in not insulating the guy wires at a point below the live wires in the same manner in which said guy wire was insulated at a point above the lowest live wire. Our conclusion is in agreement with this contention of the appellant. The duty of the appellant was not an absolute duty to insulate or make the wires safe in any particular manner. Its duty was to make the wires safe under all the exigencies offered by the surrounding circumstances. The strands of the guy wire were obviously either insufficient in strength or insufficiently attached to the pole to retain the guy wire at the proper angle from the live wires under the circumstances presented. Perhaps it was impracticable to make them sufficiently strong or sufficiently securely attached, but, if so, then appellant should have guarded against their breakage. Appellant realized this duty in guarding against breakage at the bottom, and yet it is apparent that the wire gave way more easily at the top than at the bottom when subjected to pressure from the bottom, the point at which it would seem most likely that pressure would be exerted. It therefore appears that this possibility should also have been anticipated and guarded against.

True, in reaching this conclusion the jury should take into consideration the nature of the country in which the pole was situated, the occupations of the persons living thereabouts, the usual precautions taken by electric companies under similar circumstances, and such matters. *Fairbairn v. Amer. River Electric Co.*, 170 Cal. 115, 148 Pac. 788. The jury was instructed, however, in a manner which we think covered this matter. It was instructed at the request of defendant that the owner or operator of an electric plant is not an insurer against injury to other persons; that it has done all

the law requires it to do if it has exercised the care in the matter of the construction and maintenance, operation, and inspection of its plant necessary so that the same will not be a source of danger or injury to persons lawfully in the pursuit of their business or pleasure; and that the care which the law exacts from any corporation engaged in operating such an instrumentality is always in proportion to the degree of danger reasonably to be apprehended from the use of the means employed. The jury has followed this instruction, we must presume, and has found that the danger of these strands breaking above or becoming detached from the pole was a danger reasonably to be apprehended. The jury had before them the testimony of Rudolph W. Van Norden, a consulting engineer, who stated that he was familiar with the usual custom of equipment, erection, and maintenance of power pole lines carrying high-tension currents, such as the lines of the defendant; that he was familiar with the construction of guy wires used in connection with such equipment; that there are ways and methods known to electrical men, especially electrical engineers, to guy poles in such a way that there is no danger to persons or property at the foot of the guy wire; and that methods of properly insulating wires were generally known to people skilled in the business before the 21st of April, 1916; that the danger of contact with a guy on which there is a circuit such as the circuit in this case, carrying 10,000 volts, would be obviated by inclosing a breaker or insulator in that guy wire at such a point that if contact between the guy wire and the circuit should occur from any cause whatever, the current could not follow down the guy wire and pass through a person in contact with the guy wire; that if the insulator were not at a point where the guy wire could not touch any power wire, so that there would be a continuation of the circuit to the ground, it would cease to be a safety device. It also appears from the record that the pole is located in a field planted with barley, and that the barley was planted right up to the line of the pole. The barley was being cut and horses were being used in connection with the cutting—all of which is a usual and necessary use of the land on which the pole is situated. We think that the jury was justified in concluding that the defendant should have anticipated that the guy wire might be subjected to sufficient strain by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire and a consequent sagging of the wire, and should have insulated its guy wires so as to avoid injury to others in the event of such an occurrence.

[5] Counsel for appellant very ably argues that, even though the negligence of the

defendant in not insulating its guy wires be admitted, yet such negligence was not the proximate cause of the injury to Bellah, and that such negligence would not have caused any injury to Bellah except for an independent intervening cause over which the defendant had no control, which was the struggles of the horse during Bellah's attempt to back him off of the wire, causing a breakage or detachment of the strands of the guy wire. We shall consider some of the authorities relied upon by appellant. In the case of *Polioni v. Ryland*, 28 Cal. App. 51, 151 Pac. 296, the court said, quoting from a federal case:

"An injury that is not the natural consequence of negligence, and which would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated, is not actionable."

It is said in the case of *Bank of Savings v. Murfey*, 68 Cal. at page 462, 9 Pac. at page 847, quoting from *Beach on Contributory Negligence*:

"An act is the proximate cause of an event, when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and directed power producing the result, the *causa causans* of the schoolmen."

Also, quoting from *Cooley on Torts*:

"If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action."

Was the entanglement of the horse in the wire an "independent cause that could not have been anticipated," as said in the federal case; or was it "in the natural order of things under the circumstances," or would the damage "in the ordinary course of events follow from the wrong," as said by our own Supreme Court? Appellant argues that it had no reason to anticipate such a happening. We think, in view of the physical conditions of the country where the pole was situated and the use to which the land was put, the jury was justified in finding that the defendant had reason to anticipate an accident of the general nature of the one that occurred in this case. It is not necessary that the defendant should have anticipated this precise accident. *City of Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897. The question of proximate cause was submitted to the jury under proper instructions.

[6] We cannot agree with the appellant that Bellah was guilty of contributory negligence. He had the right to assume that the guy wire was safe, either by reason of its strength or by reason of proper insulation. He was doing nothing unusual or foolhardy

for a man charged with his duties and performing his work, in assisting the horse in disentangling itself from the wires.

[7, 8] Appellant further contends that the complaint has no express allegation that the plaintiff is an insurance carrier, and that it is only by such an allegation that plaintiff can bring itself within the terms of the law subrogating it to the rights of Bellah. The amended complaint alleges that prior to the 21st day of April, 1916, the plaintiff, by its policy of insurance in writing, did insure the said Max Flentge and his employees at the time of the making of the policy; that said policy was written under and in conformity with the terms of a certain act of the Legislature, designated as the "Workmen's Compensation, Insurance and Safety Act," etc. (St. 1913, p. 279). This allegation, under the law respecting insurance companies, carries with it an implied allegation that the plaintiff was an insurance carrier. The omission of an allegation necessarily implied from other allegations is immaterial. *Richter v. Union Land, etc., Co.*, 129 Cal. 367, 62 Pac. 39.

[9] Appellant also contends that there was a failure on the part of the plaintiff to prove that the policy of insurance which was introduced in evidence had been properly executed by the plaintiff company, and that therefore there was a failure of proof of the allegation that Bellah had made a lawful claim to the insurance company which is necessary, under the compensation act, to work a subrogation of the insurance carrier. The question arose over proof of the making of a lawful claim by Bellah. If it be true that proof of the execution of the policy was insufficient, there is yet sufficient proof that the company ratified its policy and paid the money to Bellah under said policy. Bellah's claim would be a lawful claim whether made under a policy which had been properly issued in the beginning, or which had been defectively executed by the agents of the company and afterwards ratified by said company. In either event the policy would be good, and the claim would be lawful. We think there was sufficient proof that a lawful claim had been made by Bellah and paid by the plaintiff company, to entitle the plaintiff to be subrogated to the rights of the injured man.

The other objections of the appellant we consider to be without merit and to require no discussion here. Counsel for appellant conceded upon the oral argument that if defendant was liable under the law the judgment was not excessive. It therefore appears that substantial justice has been done between the parties.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

TODD v. ORCUTT: (Civ. 2919.)

(District Court of Appeal, Second District, Division 2, California. Aug. 14, 1919.)

1. NEGLIGENCE §85(1)—DEFENSE OF CONTRIBUTORY NEGLIGENCE APPLIES TO CHILDREN.

The defense of contributory negligence may be invoked in actions on behalf of children who are of an age sufficient to exercise discretion for the avoidance of an injury to themselves, the age of discretion depending on the circumstances and the intelligence and capacity of the child.

2. NEGLIGENCE §142—FINDING AS TO CHILD'S CONTRIBUTORY NEGLIGENCE NOT REQUIRED BY PLEADINGS.

Where the complaint on behalf of an infant run down by a motorcar alleged that he was a child of tender years, but did not allege that he was non sui juris in so far as legal accountability for contributory negligence is concerned, no such issue was tendered, and no finding thereon was necessary.

3. INFANTS §102—IN ACTIONS BY GUARDIAN AD LITEM PLEADING MUST ALLEGE AND COURT FIND INFANT'S AGE.

In action by guardian ad litem of an infant, it is proper for the complaint to allege, and the court to find, the age of the infant; for, unless the infancy exists, suit could not be brought by guardian ad litem.

4. APPEAL AND ERROR §931(1)—CORRECT RULE AS TO CONTRIBUTORY NEGLIGENCE OF INFANT PRESUMED APPLIED BY COURTS.

In an action by infant for injuries where the court trying case without a jury found against the infant, it will be presumed on appeal that the court applied the correct rule of law as to contributory negligence.

5. NEGLIGENCE §85(2)—CARE REQUIRED OF CHILD DEPENDS ON AGE AND CIRCUMSTANCES.

A child is only required to exercise the degree of care expected from a child of his age and capacity under like circumstances.

6. NEGLIGENCE §111(1)—GENERAL AVERMENT OF NEGLIGENCE SUFFICIENT.

A complaint charging negligence in general terms is sufficient.

7. TRIAL §404(4)—FINDINGS CONSTRUED AS A WHOLE.

Findings are to be read as a whole, and, if possible, are to be interpreted so as to uphold the general judgment, and, unless there is an irreconcilable conflict between the general and special findings, the general ones will govern.

8. HIGHWAYS §184(6)—MOTORIST NOT CONCLUSIVELY NEGLIGENT THOUGH DRIVING ON WRONG SIDE OF HIGHWAY.

Under the Motor Vehicle Act in force at the time an infant was struck by an automobile (St. 1913, p. 646, § 20), a motorist, though he was driving on the left side of the highway, the right being occupied by the tracks of a trolley, cannot be conclusively presumed neg-

ligent and to have been violating the act, though there was no express finding that it was not practicable for him to drive on the right side of the road.

9. HIGHWAYS \Leftarrow 184(6)—GENERAL AND SPECIAL FINDINGS IN ACTION FOR INJURIES BY AUTOMOBILE NOT CONFLICTING.

In an action on behalf of an infant run down on a highway by a motorcar, *held*, that the general finding that the motorist was not guilty of negligence was not in conflict with a special finding that he was driving on the left-hand side of the road, it being found that the right-hand side was occupied by a trolley line, for it may well be assumed in favor of the general finding that it was not practicable to drive a motorcar on the right-hand side of the road, and so the motorist did not violate the Motor Vehicle Act.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Harold Todd, infant, by I. J. Todd, his guardian ad litem, against W. W. Orcutt. From a judgment for defendant, plaintiff appeals. Affirmed.

Drew Pruitt, John F. Imel, and C. C. Caswell, all of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

FINLAYSON, P. J. A boy nine years of age, brought this action by his guardian ad litem, to recover damages for personal injuries caused by an automobile driven by defendant. The case was tried by the court without a jury. Judgment was given for defendant, and plaintiff appeals therefrom.

The accident occurred on Monte Bella road, which, east of the city limits of the city of Los Angeles, is an extension of Stephenson avenue and runs in an easterly direction from the city limits. It is crossed by Bonnie Beach place. It was at a point 30 to 40 feet east of the easterly line of Bonnie Beach place, and approximately in the center line of Monte Bella road, that defendant's automobile collided with plaintiff. The complaint alleges the negligence in general language, as follows:

"On the 8d day of June, 1915, the defendant * * * operated, guided, ran and conducted said automobile in such a careless, negligent, reckless, wrongful and unlawful manner that said automobile * * * ran into, upon and over the plaintiff."

It also is alleged in the complaint that—

"At the time of said accident, said plaintiff was a child of tender years, and it was without any fault on his part that caused or contributed to said injury."

Defendant, answering, denied the negligence as alleged, and also denied that the injury was without any fault on plaintiff's part contributing thereto. As a special de-

fense, defendant alleged that whatever injuries were sustained by plaintiff were due to his own contributory negligence in running in front of the automobile. In its findings the court found that, at the time of the accident, defendant was operating his automobile "in a proper and careful manner, and without any negligence on his part"; also, that plaintiff "was guilty of negligence which proximately caused his collision with defendant's automobile." The case comes to us on the judgment roll without any bill of exceptions or transcript of the evidence.

[1] Appellant complains of the findings because the court did not specifically find whether or not plaintiff "was *sui juris* and chargeable with contributory negligence which would preclude a recovery of damages for his injury." Every minor is, of course, non *sui juris* in the broad acceptance of the term. But counsel, we assume, by their use of the language just quoted from their brief, intend that the term should be taken in a narrower sense and mean to be understood as claiming that the findings are insufficient merely because the court did not specifically find that plaintiff's age was such that he could not entirely escape all legal accountability.

An infant may be so very young that, like an idiot or a lunatic, no negligence may legally be imputed to him. But not all infants are in that class. "It is," says Mr. Beach, "a question of capacity, and it has been found a very difficult question, and has been, in many cases, a very fruitful source of controversy as to what age is sufficient to constitute an infant *sui juris*. Unless the child is exceedingly young it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid damage, the court will decide it as a matter of law." Beach on Contributory Negligence, § 117. It has been held that a child seven or eight years of age is capable of taking ordinary care of himself, and may be guilty of negligence. *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 385; *Messenger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 295. The rule is that the defense of contributory negligence may be invoked in actions by or on behalf of children who are of an age sufficient to exercise discretion for the avoidance of injury to themselves. The law does not fix this age of discretion. It may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence, and capacity of the child.

[2-5] The complaint here, while alleging that plaintiff was nine years of age at the time of the accident, did not allege that he was non *sui juris*, in so far as legal account-

ability for contributory negligence is concerned. No such issue was tendered, and no such finding was necessary. The complaint does allege, and the answer admits, that at the time of the accident plaintiff was "a child of tender years." It was not necessary nor proper to allege or find that, because plaintiff was a child of tender years, he was not sui juris or chargeable with contributory negligence. It, of course, was proper for the complaint to allege, and the court find, the age of plaintiff. This was necessary in order to show that it was proper for him to appear by a guardian ad litem. But with respect to the question of negligence on his part, his age was only a probative fact, as much so as if, had he been an adult, he were blind or deaf. The ultimate question of fact is: Was he guilty of contributory negligence? And we must assume that, in solving that question, the court applied the correct rule of law, which is that plaintiff was required to exercise the same degree of care, no more and no less, than would be expected from a child of his age, or which children of his years ordinarily exercise under like circumstances, taking into consideration, not only the boy's age, but his capacity for understanding. *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39; *George v. Los Angeles Ry. Co.*, 126 Cal. 357, 53 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184; *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991; *Cahill v. Stone Co.*, 167 Cal. 126, 138 Pac. 712.

[8, 7] Appellant contends that the judgment is not supported by the findings. The basis for this claim is that the details of the accident, as disclosed by the court's findings, show, according to appellant, that respondent was guilty of negligence and that appellant was not. As already pointed out, the complaint charged defendant's alleged negligence in general terms, as, indeed, plaintiff had the right to do. *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Pigeon v. Fuller*, 156 Cal. 691, 105 Pac. 976; *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663. The negligence, thus pleaded, was the ultimate fact. Upon this issue the court found against plaintiff, in a finding that directly traverses the negligence as alleged in the complaint. The court might have stopped with this finding negating negligence on the part of defendant as alleged in the complaint, but it went on and found, in more detail, certain other facts—facts which appellant claims are inconsistent with the court's findings that defendant was not, and that plaintiff himself was, guilty of negligence. Findings are to be read as a whole, and, if possible, are to be interpreted so as to uphold the judgment. And unless there is an irreconcilable conflict between the general finding that defendant was not negligent and the findings as to the particulars upon which appellant relies, the judgment must be affirmed.

[8, 8] The court found that at the place where the collision occurred the street, from curb to curb, is 56 feet wide; that on the south side of the street are two interurban street car tracks; that the most northerly rail is 5 or 6 feet south of the center line of the street; and that "by reason of these said street car tracks and the condition of the street on the south side of said street, the traffic, both east and west along said Stephenson avenue, is confined almost entirely to the northerly half of said street." Defendant was driving in an easterly direction. So that, ordinarily, it would have been his duty to keep to the south of the center line of the street—that is, on the right-hand side of the highway. The court further found that, at the time of the collision, defendant was driving his automobile along the right-hand side "of said traveled portion of said roadway," i. e., along the right-hand side of that portion of the highway that lies to the north of the most northerly rail; that he was operating his automobile in a careful manner; but that plaintiff, while attempting to cross from the north to the south side of the street, suddenly emerged from behind a vehicle, and before defendant was aware of his presence so as to avoid a collision, ran against defendant's automobile and was injured.

It is provided by the Motor Vehicle Act then in force (section 20, Stats. 1913, p. 646), that the driver of an automobile, "wherever practicable, shall travel on the right-hand side" of the highway. The court did not find, in so many words, that it was not "practicable" for respondent to drive on the right-hand side of the road. Appellant contends, therefore, that because the court found that respondent was not driving on the right-hand side of the road, negligence must conclusively be presumed in the absence of a finding expressly declaring that it was not practicable for him to drive to the right of the center line of the street. It does not clearly appear from the findings that respondent's automobile was wholly to the left of the center line of the road. We shall, however, resolve the doubt in appellant's favor and assume that the automobile was wholly to the left of the center line. But even so, the findings do not disclose any irreconcilable conflict between the general finding of an absence of negligence on respondent's part and the more particular details of the accident as disclosed by the other findings. If the court had expressly found that, at this particular place, it was "practicable" for respondent to drive on the right-hand side of the street, there then would have been a basis for the claim of a direct antagonism between the general finding that defendant was not negligent and the other facts found by the court. But the findings do not say that it was practicable for respondent to drive on the right-hand

side of the highway at the place where the accident happened. There is therefore no irreconcilable conflict in the findings of the court. Furthermore, from the facts found it may well be that, at the place where the accident happened, it in fact was not practicable to drive on the right-hand side of the highway, and that it was proper to drive, as the court found respondent did, on the right-hand side of the "traveled portion," i. e., on the right-hand side of that part of the street which lies north of the most northerly of the interurban street car rails. The greater portion of the southerly half of the road seems to have been occupied by the interurban street car tracks. It is possible there were ties between the rails that stood up above the general surface of the road. At any rate, the findings state that it was because of "the condition of the street on the south side," as well as by reason of the presence of the street car tracks, that traffic, both east and west, was "confined almost entirely to the northerly half of said street." If, as is quite possible, there were large ties, above ground, between the rails, almost all of the southerly half of the highway would have been unsuitable for ordinary vehicular travel, and its use by automobiles may not have been practicable. Under such circumstances, negligence cannot be conclusively presumed from the fact that defendant was driving on the right-hand side of that part of the street along which horse-drawn and motor vehicles, going in either direction, ordinarily travel. See *Stohman v. Martin*, 28 Cal. App. 338, 152 Pac. 819.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

DODGE v. CHAPMAN et al. (Civ. 2926.)

(District Court of Appeal, Second District, Division 2, California. Aug. 11, 1919.)

1. LANDLORD AND TENANT §33 — PAROL AGREEMENT IF WITHOUT CONSIDERATION INEFFECTUAL TO MODIFY LEASE.

Checks given by tenants for a reduced amount of rent, and receipts given therefor by the landlord in full payment, were not evidence of any contract on the landlord's part to reduce the rent; the landlord's agreement, therefore, to receive a reduced rent for a limited time, was not in writing, and, being without consideration, was ineffectual to modify the lease.

2. PRINCIPAL AND SURETY §99—SURETIES FOR TENANTS NOT RELEASED BY LANDLORD'S ACCEPTANCE FOR A TIME OF REDUCED RENTAL.

Sureties on the bond of tenants were not released as for any alteration of the tenant's contract by the landlord's act in accepting for several months amounts of rent less than was due under the lease, for which he gave receipts in full.

3. PRINCIPAL AND SURETY §88 — ACCEPTANCE FOR A TIME OF REDUCED RENT NOT DISCHARGE OF SURETIES IN LEASE.

Acceptance by a landlord from his tenants of a reduced rent for several months, for which he gave receipts in full, in no way altered or extended the liability of the sureties on the tenants' bond in the penal sum of \$3,000 to work their discharge.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by S. C. Dodge against J. W. Chapman, W. L. Altenburg, and others. From judgment against plaintiff as to the named defendants, he appeals. Reversed, and case remanded for new trial as to the named defendants.

W. J. Ford and Ford & Hammon, all of Los Angeles, for appellant.

Arthur Wright and George W. Somerville, both of Los Angeles, for respondents.

SLOANE, J. The plaintiff, Dodge, executed a lease of a rooming house property to one Plevros. The lessee was not privileged to assign without lessor's written consent. An agreement was made whereby plaintiff consented to an assignment negotiated by Plevros to the defendants Chas. D. Chapman and Anna E. Chapman, husband and wife, on condition that the Chapmans furnish a bond in the penal sum of \$3,000 for their faithful performance of the conditions of the lease. The Chapmans furnished such bond, with themselves as principals, and the defendants J. W. Chapman and W. L. Altenburg as sureties. The assignment was made by the original lessee, and accepted by the assignees; and the lessor, plaintiff here, indorsed on the lease his written consent to the assignment. The lease was for a term of several years, and the stipulated rent for the period covered by this action was \$485.75 per month, payable in advance. The rent payments were kept up for a considerable time, but ultimately became in arrears in the sum of \$1,863; whereupon the lessor, Dodge, brought this action against the Chapmans, assignees under the lease, and J. W. Chapman and W. L. Altenburg, sureties on the bond. The assignees and principals on the bond, Chas. D. Chapman and Anna E. Chapman, defaulted, but the two sureties answered, setting up against their liability as guarantors, among other defenses, that the plaintiff, lessor, had entered into an agreement with their principals subsequent to the execution of the bond, whereby the obligation for which they were guarantors had been changed, and that they were thereby exonerated from liability thereon. The trial court found against them as to the other defenses, but made a finding in their favor as to exoneration by reason of unauthorized modification of the lease con-

tract. Judgment was for the plaintiff against the defaulting principals, but against him as to the sureties on the bond. From this latter part of the judgment plaintiff appeals.

As the findings were against the respondents on the other grounds of their defense, and they are not appealing, the only question to be considered here is whether the evidence justified the findings of the trial court that they were exonerated from liability as guarantors by a subsequent alteration of the lease contract.

[1, 2] The alleged alteration or modification of the obligations under the lease rests on the following undisputed facts: After the assignees under the lease had been in possession for a few months, they complained to the plaintiff, their lessor, that they were, during the dull summer months, unable to pay the full stipulated monthly rental of \$485.75, and the lessor orally consented to remit from the amount the sum of \$50 per month, for the months of June, July, and August of that year, and to accept \$435.75 for each of these months in full satisfaction of the rentals for that period. This arrangement was made on the 2d of June, 1914, and thereupon the assignees of the lease gave him, their lessor, a check for \$435.75 for the month of June, and he in turn gave them a receipt for the month's rent, designating therein the full monthly rental of \$485.75. This procedure was repeated for the months of July and August, and was continued for two or three months thereafter, when the assignees of the lease defaulted in, and entirely discontinued, the payment of any rent at all, resulting in the arrears of rentals which form the basis of this action. There was no consideration to plaintiff for the reduction of rent granted, and the agreement to make the reduction was not in writing. The trial court found that this agreement was an alteration of the lease contract, and that it was "partly oral and partly written"; but to reach this conclusion the court erroneously, we think, construed the checks given for the reduced amount, and the receipts given therefor in full payment, as being memoranda or writings constituting part of such an agreement. These instruments may be evidence tending to show that the plaintiff received a less amount than the lease called for in full payment of the monthly rental, but they do not evidence any contract to reduce the rent. The receipt, which was the only writing signed by the plaintiff relating to this matter, on its face, in fact, indicates that the full amount of the rents was collected. The checks drawn by the assignees of the lease merely constitute an instrument of payment of a certain sum of money, and have no more evidentiary force than would bank bills received in payment under the same circumstances. The agreement, then, to receive

for a limited time, a reduced monthly rental was not in writing, and was supported by no consideration. As an agreement in modification of the lease, it therefore was without force or effect. There was no period of time, under the lease, when any installment of rent was due and unpaid, that the terms of the lease could not have been enforced for the full amount. In legal effect, then, we have merely this condition: For a period of several months the lessor accepted, without any binding agreement or obligation to do so, a less amount than the lease called for in full satisfaction of the rentals for that period. Conceding that the obligation to pay the stipulated monthly rental was satisfied by these payments, yet the contract was not altered any more than it would have been if the full amount had been paid. It was no concern of the sureties how these payments were made. The landlord could have taken his pay in "chips and whetstones" if he saw fit. He could have given back to his tenants the whole amount of the rents received, had he wanted to, without changing the obligations of the lease.

Section 2819 of the Civil Code provides that "a guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." It might just as reasonably be argued that the acceptance, when due, of the full amount of monthly rentals called for by the lease, "alters" the original obligation of the principal, and "impairs and suspends the rights of the creditor against the principal," as to make such contention as to the acceptance of a partial payment in full satisfaction. Either way it does, in a sense, alter the obligation. It terminates it. But the terms of the contract have not been changed. If the lessor had entered into a binding and enforceable agreement changing the terms of the lease as to the monthly rentals, a different question would be presented. But here the verbal agreement on which the reduced payments were received was invalid. "A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy," within the meaning of section 2819. (Civ. Code, § 2820). The acceptance of a lesser amount in satisfaction of the monthly installment then due was a matter outside of, and entirely independent of, the lease contract. The alleged oral agreement never had any executory force as a contract modifying the lease, however effective the payments may have become after their acceptance in full satisfaction of the rent installments.

Such seems to have been the effect of the ruling of the Supreme Court in *Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203, and in *Estate of McDougald*, 146 Cal. 196, 79 Pac. 875. In the former of these decisions, where it was claimed that the lease was changed by the acceptance of a reduced rent, the court says:

"The finding that there was no change in the terms of the lease in the alleged particular of reducing the rent is sustained by the evidence. Concessions of the kind that were shown by the defendants, when supported by a consideration, are valid to the extent that a lower rent has been tendered and accepted as satisfaction in full of the installments thus paid. They are not sufficient to establish a change in the written contract so as to affect the amount of future installments."

In the case just cited there was also involved the liability of guarantors, as in the case at bar; but the guarantors there did not raise the question of exoneration by the alleged change in the terms of the rentals. That such voluntary reductions in rent do not discharge guarantors is held in the following decisions: *Preston v. Huntingdon*, 67 Mich. 139, 34 N. W. 279; *Dodd v. Vucovich*, 38 Mont. 188, 99 Pac. 296; *Ullmann Realty Co. v. Hollander*, 66 Misc. Rep. 348, 123 N. Y. Supp. 772. The rule contended for by respondents, and laid down by section 2819 of the Civil Code, that any unauthorized alteration in the terms and obligations of the contract secured releases the sureties, and this irrespective of whether or not the sureties are injured or benefited by the change, is conceded. They have a right to stand on the precise contract guaranteed by them, and are bound by no other. But, as already pointed out, the alteration must be one that affects the executory character of the contract.

We find that most of the authorities presented by respondents are not applicable here, for the reason that they deal with a state of facts which show that valid and enforceable alterations in the obligation under consideration had been made. Perhaps the strongest case presented by respondents is that of *Driscoll v. Winters*, 122 Cal. 65, 54 Pac. 387, where the guarantor was exonerated because of a change in the contract for which he had pledged himself, which was for the payment by his principal for 16 three-gallon cans of milk daily for the period of one year. It appears in that case that "the contract was modified to the extent that Winters [the principal] should purchase only 13 cans of milk daily." Just how this change in the obligation of the principal was effected does not appear; but the court finds that the contract was altered in this respect, and we are bound to presume that it was done in such a way as to make a valid and binding change in the terms of the contract. Respondents rely, also, on the rule laid down in *Tuohy v.*

Woods, 122 Cal. 665, 55 Pac. 683; but in that case the creditor gave a written extension, for a valuable consideration, on the liability covered by the guaranty. As against this we find, in the case of *Stroud v. Thomas*, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111, where the surety claimed his discharge by reason of an extension of time of payment of the liability for which he had become a surety, that there was no exoneration of the surety by reason of the fact that the agreement for extension was invalid and unenforceable for want of consideration. The court says:

"The principal defense in the case is that arising upon the extension of time. The court finds that on August 1, 1898, after the note became due, the plaintiff received \$150 on account of overdue interest, and thereupon agreed to extend the time of payment one year, and that the agreement was without consideration. * * * This payment * * * merely satisfied to that extent the debt due, and did not constitute a consideration for the agreement. A promise made without any consideration is not binding. Consequently the agreement for the extension of time was not a valid promise, and would not bind the plaintiff to forbear suit upon the note during the time specified in the agreement."

It is true that the sureties' liability arose here on the original instrument, and was not an independent contract of guaranty; but the principle involved is applicable, as the surety would have been discharged from liability if the agreement extending time to the principal obligor had been enforceable. "An agreement for forbearance founded on an unenforceable agreement, even though carried out by the creditor, will not discharge the surety." *Brandt on Suretyship* (4th Ed.) § 876; 24 Am. & Eng. Enc. of Law, pp. 826, 829; *Halliday v. Hart*, 30 N. Y. 474; *Ingels v. Sutliff*, 36 Kan. 444, 13 Pac. 828.

[3] There is no merit in respondents' argument that the reduction in the rent in this case extended the liability of the sureties. The \$3,000 named in the bond is the amount of the penalty of the bond, and the liability of the sureties extended to any unpaid rents during the term of the lease, not exceeding the aggregate amount of \$3,000. The acceptance of a reduced rent, when taken in full satisfaction of the amount due, in no way changed the liability on the bond. We think the trial court misapprehended the effect, as evidence of a written agreement, of the checks and receipts exchanged between the parties in the reduced payment of the monthly rentals.

Appellant asks for an order directing judgment in his favor against the sureties on his bond. This we cannot do under the findings.

The judgment is reversed, and the case remanded for a new trial as to the defendants J. W. Chapman and W. L. Altenburg.

We concur: FINLAYSON, P. J.; THOMAS, J.

HOLMES et al. v. HALSTID et al.
(No. 9103.)

(Supreme Court of Oklahoma. Sept. 23, 1919.)

*(Syllabus by the Court.)***1. JURY ⇨14(2)—ACTION ON NOTES AND TO FORECLOSE LIEN TRIABLE BY JURY.**

In an action to recover judgment on promissory notes executed by defendants and for foreclosure of mortgage lien, made to secure their payment, where issue is joined as to the indebtedness due, the case is one properly triable before a jury, as provided in section 4993, Rev. Laws 1910.

2. PRINCIPAL AND AGENT ⇨24 — AGENCY QUESTION OF FACT FOR JURY.

Agency, when made an issue, is a question of fact, to be determined, in proper cases, by the jury, from all the facts and circumstances in evidence.

3. APPEAL AND ERROR ⇨1066—TRIAL ⇨250 — ABSTRACT INSTRUCTIONS, NOT APPLICABLE TO ISSUES, HARMLESS ERROR UNLESS MISLEADING.

While it is error for the court to instruct the jury upon questions of law not applicable to the issues involved, or evidence in support thereof, even though the instruction correctly states an abstract proposition of law, yet the giving of such instruction will not afford ground for reversal, unless it is apparent that the instruction was calculated to confuse or mislead the jury, to the prejudice of the losing party.

4. TRIAL ⇨260(1)—INSTRUCTION COVERED BY GIVEN INSTRUCTION PROPERLY DENIED.

It is not error for the court to refuse a requested charge, when the same proposition is covered by the instructions given, and which, taken as a whole, fairly submit to the jury the law applicable to the case.

Error from District Court, Love County; W. F. Freeman, Judge.

Action by Edward R. Holmes and Ralph W. Holmes, a partnership doing business under the firm name of R. E. Holmes & Sons, against L. B. Halstid and S. R. Halstid, his wife, Willard P. Holmes, Mollie L. Jordan, and J. L. Jordan. Judgment for defendants L. B. Halstid and S. R. Halstid, and against defendant Holmes, and plaintiffs bring error. Affirmed.

Hatchett & Ferguson, of Durant, for plaintiffs in error.

H. H. Brown and R. B. Brown, both of Ardmore, for defendants in error Halstid.

SHARP, J. Plaintiffs' action against defendants L. B. Halstid and S. R. Halstid was to recover personal judgment on three promissory notes for the principal sum of \$1,800, and to foreclose a real estate mortgage, given to secure their payment. Defendant Willard P. Holmes was the holder of a junior mort-

gage made by the Halstids contemporaneously with the execution of the mortgage to R. E. Holmes & Sons, and was made a party to the foreclosure proceedings, in order that his right, title, and interest therein might be decreed subject to the plaintiffs' mortgage. The petition also charged that Mollie L. Jordan and J. L. Jordan asserted some right, title, or interest in the premises, and they were made parties defendant in order that such interest, if any, might be foreclosed. Defendant Willard P. Holmes filed his answer and cross-petition against his co-defendants L. B. Halstid and S. R. Halstid, and asked for a personal judgment against them in the sum of \$180, and for a foreclosure of his mortgage. The Halstids answered, admitting the giving of the notes and the making of the mortgage, and charged that they had never received any portion of the loan, and that hence they were not indebted to the plaintiffs in any sum. Defendants also filed a cross-petition against their codefendants Mollie L. Jordan and J. L. Jordan, upon which issue was joined, and also filed their answer or reply to the answer and cross-petition of the defendant Willard P. Holmes, which answer was to the effect that, no consideration having passed to them for the principal loan in favor of R. E. Holmes & Sons, they were not on account thereof indebted to said defendant. Answer was also filed by the Halstids to the cross-petition of the defendants Mollie L. Jordan and J. L. Jordan. At the trial of the foreclosure proceedings by the plaintiffs and defendant Willard P. Holmes, a hearing of the issues joined between the Halstids and the Jordans was continued for the term. The judgment was in favor of the Halstids, and against the plaintiffs and the defendant Willard P. Holmes.

From the adverse judgment, defendant Willard P. Holmes has not appealed, so that the only question presented is: Should the judgment in favor of the Halstids and against the plaintiffs, R. E. Holmes & Sons, be affirmed? The brief of plaintiffs in error contains four principal assignments of error: (1) The case was not properly triable before a jury. (2) The verdict of the jury and the judgment entered thereon is not supported by the evidence. (3) Error in giving instruction No. 7. (4) Error in refusing to give requested instruction No. 4.

[1] Plaintiffs' action was one "for the recovery of money," within the meaning of section 4993, Revised Laws. It was their contention that the Halstids were indebted to them in the sum evidenced by their notes. This was denied by the Halstids, who in effect set up a failure of consideration for the notes, which, if established, entitled them to a verdict. The primary issue was whether, notwithstanding the execution of the notes, defendants were indebted to plaintiffs in any

amount. Such being the nature of plaintiffs' action and of the issue joined, the defendants were entitled to a jury trial as a matter of right. *Sherman v. Randolph*, 18 Okl. 224, 74 Pac. 102; *Maas v. Dunmyer*, 21 Okl. 434, 96 Pac. 591; *Brewer v. Martin*, 40 Okl. 350, 138 Pac. 166; *Hartsog v. Berry*, 45 Okl. 277, 145 Pac. 328.

[2] Was Jesse L. Jordan the agent of the plaintiffs or of the Halstids in procuring the loan? The effect of the jury's verdict sustained defendants' contention that Jordan was not their agent. This conclusion is sufficiently established by the evidence. The application for the loan was made out on a blank form addressed to Willard P. Holmes, of Kansas City, Mo., who was named as Halstid's agent "to negotiate me a loan of \$1,800," in consideration of which Halstid was to pay a commission of \$90 cash and execute two commission notes in the sum of \$90 each. Throughout the application authority was conferred upon Holmes to do numerous things, among which were to perfect the title, procure abstract, pay the taxes, etc. At the conclusion of the application, notwithstanding the power conferred on Willard P. Holmes in the matter of procuring the loan, it was also provided that Jordan should act as the local agent of Halstid in negotiating the loan. To this application Jordan signed the name of L. B. Halstid, adding immediately below the signature the words, "By Jesse L. Jordan, Agent." Jordan testified that he was "getting a loan for Halstid" and also represented the Jennings Investment Company. His testimony in respect to the relationship of the Jennings Investment Company and R. E. Holmes & Sons is as follows:

"Q. Mr. Jordan, do you know what relation the Jennings Investment Company had with R. E. Holmes & Son? A. No, sir; don't know exactly. I understood they represented Holmes; don't know for sure. Q. I will ask you this question: Was this loan made through the Jennings Investment Company? A. Yes, sir. It was made through the Jennings Investment Company. Q. The check they sent you on behalf of R. E. Holmes & Sons was sent you by the Jennings Investment Company? A. Yes, sir; and all the loan papers were made out by them."

The net proceeds of the loan, after deducting various items of expense, was \$1,696, which sum the Jennings Investment Company remitted the Jordan Company September 3, 1914, inclosing its check for \$54 commission. On May 22, 1914, Halstid signed an order, addressed to Willard P. Holmes, authorizing the payment of the net proceeds of the loan to the Jennings Investment Company. This order, it is urged, authorized Jordan to apply the proceeds of the loan in settlement, or partial settlement, at least, of Halstid's indebtedness to him. The foregoing testimony was offered by the plaintiffs, and

of itself, aside from the testimony of the defendants and that of the witness Wicker, who had formerly worked for the Jordan Company, and at the time of the trial was a member of the firm, tended strongly to show that throughout the negotiations Jordan was the agent of the lender, and not of the borrower. He received no commission from the latter, but instead either he or his firm was paid a commission by the former. Halstid was indebted to Jordan (though the amount of the indebtedness was in controversy), and the loan, according to the terms of the application, was procured partly for the purpose of paying the purchase price of the land. This indebtedness Jordan was interested in collecting, and, according to his own testimony, did collect, by keeping the proceeds and crediting Halstid therewith. The fact that Halstid signed an order that the proceeds of the loan should be paid to the Jennings Investment Company did not make Jordan Halstid's agent, or authorize him to keep and apply the money on Halstid's indebtedness, without the latter's consent. This fact was recognized by plaintiffs, who asked Jordan if Halstid authorized him "to pay the taxes and in paying the debt that was due you." To this inquiry Jordan answered in the affirmative, and was then asked:

"Q. Did he give you written authority, or oral? A. Just oral. He was kept posted of all expenses. His wife was with him."

This testimony was flatly contradicted by both Halstid and his wife. The case is one that comes clearly within the rule of agency announced in *Bell v. Riggs*, 34 Okl. 834, 127 Pac. 427, 41 L. R. A. (N. S.) 1111; *Goss v. Sorrell*, 33 Okl. 586, 127 Pac. 435; *Porter v. Wold*, 34 Okl. 253, 127 Pac. 432; *Union Central Life Ins. Co. v. Pappan*, 36 Okl. 344, 128 Pac. 716. The unauthorized insertion by Jordan of his name as Halstid's local agent in negotiating the loan, when in fact he was agent of and represented the Jennings Investment Company, and which company had paid his commission, was evidence sufficient for the jury to find that Jordan was in fact, as he himself testified, the agent of the Jennings Investment Company, and which company directly represented the lender. The question of agency is a question of fact. *Midland Savings & Loan Co. v. Sutton*, 30 Okl. 448, 120 Pac. 1007; *Wrought Iron Range Co. v. Leach*, 32 Okl. 706, 123 Pac. 419; *Iowa Dairy Sep. Co. v. Sanders*, 40 Okl. 656, 140 Pac. 406; *Whitcomb v. Oller*, 41 Okl. 331, 137 Pac. 709; *Central Mortgage Co. v. Michigan State Life Ins. Co.*, 43 Okl. 33, 143 Pac. 175. So, also, is the question of the scope of an agency. *Ricker National Bank v. Stone*, 21 Okl. 833, 97 Pac. 577; *Mullen v. Thaxton*, 24 Okl. 643, 104 Pac. 359; *St. Louis Cordage Mills v. Western Supply Co.*, 54 Okl. 757, 154 Pac. 646.

[3] Instruction No. 7 is complained of as both an incorrect statement of the law, and as an invasion of the province of the jury, and therefore misleading and prejudicial. It is subject to neither of the objections leveled against it. The instruction appears to be almost a literal copy of the sixth paragraph of the syllabus in *Allison v. Crumme*, 166 Pac. 691, and, as stating an abstract proposition of law, is correct. It may be that all of the elements which entered into the agency in that case were not present in the trial below; but that fact alone would not be ground for reversal. Generally speaking, it is error to give an instruction which has no application to the issues involved, or to the evidence in support thereof, although it states a correct principle of law. Yet a cause will not be reversed for the giving of such instruction, unless it is apparent that it was calculated to mislead or confuse the jury, to the prejudice of the losing party. *Payne v. McCormick Harvesting Co.*, 11 Okl. 313, 66 Pac. 287; *Pearson v. Yoder*, 39 Okl. 105, 134 Pac. 421, 48 L. R. A. (N. S.) 334, Ann. Cas. 1916A, 62; *Chickasaw Compress Co. v. Bow*, 47 Okl. 576, 149 Pac. 1166; *Brownell v. Moorehead*, 165 Pac. 408. Supporting this rule, see 38 Cyc. 1621, where in the footnotes cases are cited from courts of last resort of 38 states of the Union, and from the Circuit Court of Appeals for the Eighth Circuit. We cannot say, from an examination of the record, that the giving of this instruction was calculated to mislead or confuse the jury, or that it "probably resulted in a miscarriage of justice." The other instructions given are not seriously complained of. Taken as a whole, the jury were correctly instructed upon the law of agency, which was the controlling question for their consideration and determination.

[4] Finally, it is urged that the court erred in refusing to give requested instruction No. 4. This instruction was to the effect that, even though the jury should find that Jordan was the agent of plaintiffs, or if the money advanced on the loan "was, with the consent of defendants, applied on their indebtedness," then defendants could not complain, and the jury should in that event return a verdict for the plaintiffs. The instruction correctly stated the law; but, upon an examination of instruction No. 8, we find that the requested instruction was given in substance—that is, the jury were told that, if they believed Jordan was plaintiffs' agent, they should find for defendants, *unless* they believed that Jordan received and applied the money in cancellation of the defendants' debt with their consent.

From an examination of the entire record, we are of the opinion that no prejudicial errors were committed in the trial of

the case. The judgment of the trial court is therefore affirmed.

OWEN, C. J., and KANE, RAINEY, FITCHFORD, JOHNSON, McNEILL, and HIGGINS, JJ., concur.

KANOTEX REFINING CO. v. BONIFIELD. (No. 9322.)

(Supreme Court of Oklahoma. July 15, 1919.
Rehearing Denied Oct. 7, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ¶258(20)—PETITION MUST AVER THAT FELLOW SERVANT CAUSING INJURY WAS INCOMPETENT, TO KNOWLEDGE OF MASTER.

In an action by a servant against his master for injuries caused by the negligence of a fellow servant, the petition must aver that the fellow servant was incompetent for or unskilled in the work in which he was engaged, and that the master negligently employed or retained him with knowledge, actual or constructive, of his incompetency or unskillfulness, that the plaintiff was ignorant thereof, and that the injury was caused by the negligence of said servant.

2. MASTER AND SERVANT ¶265(12)—PLAINTIFF MUST PROVE FELLOW SERVANT CAUSING INJURY WAS INCOMPETENT TO KNOWLEDGE OF MASTER.

In an action by a servant against his master for injuries received by the negligence of a fellow servant, the burden is on plaintiff to prove that the fellow servant was incompetent or unfit to perform the work in which he was engaged, and that the master was negligent in employing him, or retaining him after discovering his incompetency or unfitness, and that the injury complained of was the result of or caused by such incompetency or unfitness.

3. MASTER AND SERVANT ¶170, 177—MASTER SELECTING FELLOW SERVANT WITH PRUDENCE NOT LIABLE FOR INJURY FROM HIS NEGLIGENCE.

The law imposes upon a master the duty to exercise reasonable care, such care only as men of reasonable and ordinary prudence exercise, in the selection and retention of servants, and when he has discharged this duty, he cannot be held responsible for injuries resulting from the negligence of the servants so selected, in an action by a servant against him for injuries resulting from the negligence of a fellow servant.

4. APPEAL AND ERROR ¶1001(3)—WHERE THERE IS ENTIRE FAILURE OF EVIDENCE JUDGMENT WILL BE SET ASIDE.

It is the established rule in this state that, where there is any evidence that reasonably tends to support the verdict, it will not be disturbed on appeal; but, where there is an entire failure of any evidence to support the verdict, the verdict and judgment will be set aside.

Commissioners' Opinion, Division No. 2.
Error from District Court, Woodward
County; J. C. Roberts, Judge.

Action by S. Bonifield against the Kanotex Refining Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

H. H. Montgomery, of Bartlesville, and D. P. Marum, of Woodward, for plaintiff in error.

Swindall & Wybrant, of Woodward, for defendant in error.

DAVIS, C. On the 24th day of June, 1915, defendant in error, hereinafter referred to as plaintiff, commenced this action against plaintiff in error, hereinafter referred to as defendant, to recover the sum of \$2,800 as damages alleged to have been suffered by plaintiff while engaged as an employé of defendant.

Defendant is a corporation organized under the laws of Kansas, and as such corporation was engaged in doing business in this state on the date that the injuries complained of were received by plaintiff. On the 28th day of June, 1913, defendant had an oil tank located at Laverne, Okl., on a flat car. The oil tank was about 16 feet long and 8 feet in diameter. Walter Derby and W. O. Freese, who resided at Woodward, Okl., the same town in which plaintiff resided at that time, were going from Woodward to Laverne for the purpose of unloading the oil tank in question. On or about the 25th day of June, 1913, Mr. Freese went to the home of plaintiff to borrow a block and tackle from plaintiff to unload said tank. Plaintiff had a son living at Laverne at that time, and when Mr. Freese disclosed to plaintiff that he was going to use the block and tackle to unload an oil tank at Laverne, plaintiff then informed Mr. Freese that he had a son living there, and plaintiff told Mr. Freese that, if he would take him up to Laverne and bring him back in his automobile, he would assist in unloading the oil tank. Mr. Freese agreed to this proposition. When Mr. Freese and Mr. Derby left Woodward for Laverne, they drove by and took plaintiff in their car to Laverne. On the morning of the 28th, Mr. Freese, Mr. Derby, and plaintiff were engaged in unloading the oil tank.

Curtis Bailey lived at Laverne, where he was engaged in the business of a drayman, and when Mr. Freese and Mr. Derby went to unload the oil tank, they secured the services of Mr. Bailey and his team to do such work as was necessary to be done with a team. It also appears that, in addition to doing a general dray business at Laverne, Mr. Bailey had been for some time a commission agent for defendant. On the morning plaintiff received the injuries, the oil tank had been par-

tially unloaded, and was standing on what is termed the dome. It was necessary to tie a rope to the tank, and then to the wagon of Mr. Bailey. The wagon was located some 25 or 30 feet from the end of the tank. When this was done, plaintiff, Mr. Freese, and Mr. Derby went in between the oil tank and car for the purpose of putting in a beam, so that, when the oil tank dropped, it would not receive such a jar as would likely injure it. While plaintiff was thus located between the car and oil tank, Mr. Bailey started his team. Plaintiff was caught by the oil tank in such a manner as to inflict serious injuries on him.

After the cause had been called for trial, plaintiff requested and was granted permission to file an amended petition. That part of the amended petition which seeks to charge negligence on the part of defendant is as follows:

"And said oil tank, which had been lowered from said flat car and was resting upon the dome or top of said oil tank, and while * * * Freese was placing a beam, or heavy timber, under said tank, and while plaintiff in the discharge of his business and employment was directing the placing of said beam for said defendant, and while the said Bailey well knew that plaintiff was standing between said flat car and said tank, and without notice or warning to plaintiff, and without any fault on the part of plaintiff, and through the negligence and mismanagement of the defendant, in failing to furnish competent and skilled persons and co-employés to assist said plaintiff in performing said work, and through the negligence of defendant, and its agents, servants, and co-employés of said plaintiff, * * * Bailey carelessly, recklessly, wantonly, and negligently, and by reason of his incompetency and want of skill and ability in that particular, started said team, which was so attached to the north end of said oil tank, with great force, and by means thereof said plaintiff was caught and pinned and fastened between the south end of said tank and said flat car so located upon the side track of the Wichita Falls & Northwestern Railway Company, and that as a direct result and by reason of said team being so started by said defendant, its agents, servants, and employés, and coemployés of this plaintiff, and by reason of the incompetency and want of skill of said employé, Bailey, said plaintiff was greatly and permanently injured."

A demurrer was filed to the petition of plaintiff and overruled. After said demurrer was overruled, defendant filed an answer, containing a general denial, and also that said injuries so received were the result of the acts of a fellow servant engaged with plaintiff in the same general undertaking, and employed by the same master, and to accomplish the same general purpose.

On the issue thus formed the cause was tried, and resulted in a verdict and judgment for plaintiff in the sum of \$800. A motion for a new trial was filed and overruled. From the action of the court in overruling

said motion an appeal has been prosecuted to this court.

The only propositions presented by defendant that need consideration are as follows:

"(1) Neither the original petition nor the amended petition state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant, and the demurrer to the amended petition should have been sustained, and the cause dismissed.

"(2) The evidence does not reasonably tend to support the verdict, and under the evidence this court should reverse the case and direct a verdict for plaintiff in error.

"(3) The trial court should have directed the jury to return a verdict in favor of plaintiff in error, defendant below."

[1] In support of the first proposition it is urged by counsel that neither the original petition nor the amended petition states a cause of action. The particular defect pointed out in said petition is that it nowhere charged negligence upon the part of defendant in the employment of Bailey, or negligence in retaining him after his incompetency was discovered, or by the exercise of ordinary care might have been discovered. There seems to be considerable merit in the objection urged by counsel. This is an action by a servant against his master for negligence on the part of a fellow servant. Such are the express allegations of the petition; both were employed by the same master; both were engaged in a common undertaking and to accomplish a common purpose. Hence, if there is any negligence for which the master is liable, it is negligence resulting from the employment of a fellow servant, or negligence in retaining him after his want of skill had been discovered, or might have been discovered by the exercise of ordinary care; or in other words the negligence, for which the master would be liable, under the allegations of the petition herein, would be the failure to exercise ordinary care in the selection of Bailey, a fellow servant of plaintiff.

The rule announced in 28 Cyc. 1393, on this proposition is as follows:

"In an action against a master for injuries caused by the negligence of a fellow servant, based on the theory of the negligence of the master in selecting and retaining in his service an incompetent servant, the declaration or complaint should allege that the servant was incompetent, that the master negligently employed or retained him with knowledge, actual or constructive, of his incompetency, that the plaintiff was ignorant thereof, and the injury was caused by the negligence of such servant."

Judge Thompson, in his work on Negligence (volume 4, § 4905), states the rule in reference to pleading in an action like the instant case, as follows:

"To justify a recovery or damages for any injury caused by the negligence of a fellow servant, it is necessary for the plaintiff to aver and

prove that the fellow servant was incompetent or unfit, and that the master was negligent in employing him, or in retaining him in his service after discovering his incompetency or unfitness, and that the injury complained of was caused by such incompetency."

Labatt in his exhaustive work on Master and Servant (volume 2, par. 1080 [178]), states the rule as follows:

"A complaint which alleges that the master was negligent in selecting the fellow servant whose act caused the injury is not demurrable. On the other hand, a complaint is insufficient which on its face shows that the injury in suit was caused by the act of a fellow servant, unless it avers negligence in respect to the selection or retention of that servant."

See B. & W. R. Co. v. Dailey, 110 Ind. 75, 10 N. E. 631; Lawler v. Androscoggin, 62 Me. 463, 16 Am. Rep. 492; Collier v. Steinhart, 51 Cal. 119; Dow v. Kansas P. R. Co., 8 Kan. 642; Pilkinton v. Gulf, C. & S. F. R. Co., 70 Tex. 226, 7 S. W. 806; Kindel v. Hall, 8 Colo. App. 63, 44 Pac. 781; Southwest Virginia Improv. Co. v. Andrew, 86 Va. 270, 9 S. E. 1015; Kersey v. Kan. City, St. J. & C. B. R. Co., 79 Mo. 362.

There seems to be no exception to the doctrine announced in the cases above cited. That the requirement is fundamental will become apparent when it is remembered that the liability for which the master is answerable is not the specific act of negligence of a fellow servant, but negligence arising from the failure to exercise ordinary care in the selection of competent fellow servants. A servant enters upon the duties of his employment with an implied understanding and agreement that the master will exercise ordinary care in the selection of fellow servants, and when the master has discharged this duty there is no liability, arising in favor of a fellow servant, for injuries resulting from the negligence of a fellow servant, against the master, provided always that the master is liable for injuries resulting from the retention of an incompetent servant, after his incompetency has been discovered, or might have been discovered by the exercise of ordinary care.

The petition in the instant case was fatally defective, in that it failed to allege and charge that defendant was negligent in the selection and employment of Bailey, or failed to exercise ordinary care in the discharge of said duty, or that defendant was negligent in retaining said Bailey in its service after his incompetency had been discovered, or might have been discovered by the exercise of ordinary care.

[2] The second proposition urged by defendant is that the evidence does not reasonably tend to support the verdict. An examination discloses that there is no evidence offered upon the part of plaintiff that even

tends to show that Bailey was not a competent man in the use and management of teams. The evidence upon the part of defendant shows that Bailey had been engaged in the transfer business for a number of years and had been actively in charge of teams, doing all kinds of work that is incident to such business; that this was the first accident that had ever happened in the prosecution of his work. Can it be said that the employment of this man constitutes actionable negligence, for which the defendant is liable? That, when there is a total absence of averment or proof of any act that constitutes negligence on the part of defendant, the defendant must respond in damages for injuries suffered by plaintiff?

"In actions for injuries sustained by reason of incompetent fellow servants, the presumption is that the fellow servant was not incompetent and that the master was not negligent in employing him. Therefore in such action the onus probandi is upon the plaintiff to negative these presumptions, in order to make a prima facie case. To establish negligence in cases of this kind the plaintiff must prove either that the master had undertaken personally to superintend and direct the works, or that the persons employed by him were not proper and competent persons, or that the material was inadequate, or the means and resources unsuitable to accomplish the work. The onus is upon him, and failing to do so he fails to establish negligence." Section 4906, vol. 4, Thomp. on Negligence.

[3] In an attempt to prove that Bailey was an incompetent man for the management and control of a team, several witnesses were examined, and the only fact that they testified to was that Bailey was a man who seemed to work rapidly, and always seemed anxious to get a great deal of work done. We have never understood that this element constitutes any evidence of incompetency, or that it would constitute negligence per se to employ a servant whose most conspicuous quality is that of industry.

The very foundation of plaintiff's right of recovery depended upon proof of the defendant's actual or constructive knowledge of Bailey's unfitness for the purpose for which he was employed; not that Bailey might have acted negligently, for this is not the gist of the action, but that the defendant did not exercise ordinary care in selecting a

competent servant to do the work that Bailey was employed to do. This rule has been aptly stated in the case of *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605, as follows:

"Although McHenry may have been and was guilty of negligence, and that negligence may have caused and did cause the collision which resulted in the injury to the plaintiff complained of, still plaintiff cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of said McHenry or in retaining him in his position; and to establish such negligence on the part of the defendant, not only the incompetency of said McHenry must be shown, but it must be shown that defendant failed to exercise ordinary care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant, or to some agent or officer of defendant having power to remove said McHenry."

In view of the law applicable to this case and the evidence adduced, should the court have directed a verdict in favor of the defendant? If there was any evidence to support the verdict, or if there was any conflict in the evidence, then the rule that obtains in this jurisdiction would require the verdict to stand; but, there being no evidence upon which negligence could be predicated for which the defendant is answerable, it was the duty of the court to have directed a verdict in favor of defendant.

[4] It is a well-established rule in this court that, where there is any evidence that reasonably tends to support the verdict, it will not be disturbed on appeal; but, where there is an entire failure of any evidence to support the verdict, the judgment entered on said verdict will be set aside. *C. D. Osborne & Co. v. White*, 54 Okl. 733, 154 Pac. 653; *Pahlka v. Chicago, R. I. & P. Ry. Co.*, 161 Pac. 544; *Earley v. Johnson*, 58 Okl. 466, 160 Pac. 482.

For the foregoing errors, we recommend that the judgment of the lower court be reversed, and the cause remanded to the district court of Woodward county, with direction to proceed in accordance with the views herein expressed.

PER CURIAM. Adopted in whole.

FEDERAL LIFE INS. CO. v. LEWIS.
(No. 9271.)(Supreme Court of Oklahoma. May 13, 1919.
On Petition for Rehearing, Oct. 7, 1919.)*(Syllabus by the Court.)*

1. INSURANCE ⇐146(3)—AMBIGUOUS LANGUAGE IN LIFE POLICY CONSTRUED FAVORABLY TO INSURED.

Where the meaning of language in a policy of life insurance is ambiguous or susceptible to two different constructions, the same will be strictly construed against the insurer, and that construction adopted which is most favorable to the insured.

2. INSURANCE ⇐362—AGREEMENT BY LIFE INSURER TO PAY PREMIUMS ON DISABILITY OF INSURED CONSTRUED.

In an action on an insurance policy, which contains the provision "that if the insured shall furnish due proof of total permanent disability that he will be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations, the company agrees to pay regularly for the insured the premiums," then in the same section contains the further provision, "if, however, the insured shall recover so as to be able to engage in any gainful occupation during the premium paying period, the company's obligation to pay the premiums shall cease," that said sections are ambiguous and contradictory, but, when construed together, must mean that if the insured is totally disabled, and will probably be so for life, he comes within the provision of the policy requiring the company to pay the premiums.

3. INSURANCE ⇐559(2)—PROOF OF TOTAL DISABILITY OF INSURED WAIVED.

The provision in the insurance policy requiring proof of total disability to be furnished the company within a certain definite time is waived by the company denying liability within such time upon other grounds than failure to furnish proof of total disability.

4. APPEAL AND ERROR ⇐1051(3)—ADMISSION OF PROOF OF AGENCY AT TRIAL HARMLESS ERROR.

Under section 4759 of Revised Laws of 1910 the allegation of any appointment of authority is taken as true, unless the denial of the same be verified by affidavit of a party, his agent or attorney. The plaintiff alleged that a certain party was the agent of defendant, which allegation was undenied, as above required. Evidence was offered on the trial of the cause to establish the agency thus admitted. *Held*, that the reception of the same was not prejudicial error.

Appeal from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Stanley Lewis against the Federal Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. O. Young, of Oklahoma City, for plaintiff in error.

J. K. Wright, of Oklahoma City, for defendant in error.

McNEILL, J. This is an appeal from the district court of Oklahoma county in an action wherein Stanley Lewis was plaintiff and Federal Life Insurance Company was defendant. The parties will be referred to according to the position they occupied in the court below. From a judgment in favor of Lewis, the insurance company has appealed.

The material facts are as follows: Stanley Lewis obtained a life insurance policy from the defendant company, said policy containing the following provision, to wit:

"After premiums shall have been paid for one year and before default in the payment of any subsequent premium, if the insured shall furnish due proof of total permanent disability by bodily injuries or disease, and that he will be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations, the company, by an indorsement in writing upon this policy, will agree to pay annually for the insured the premiums, if any, which shall thereafter become payable during the continuance of such total disability, provided such proof shall be furnished to the company before the insured shall attain the age of 60 years. In any such case the premium so paid shall not be a lien on this policy or charge against the insured, and the cash loans and values of this policy in the same amounts as if the premiums were being paid by the insured. If, however, the insured shall recover so as to be able to engage in any gainful occupation during the premium paying period, the company's obligation to pay the premiums shall cease, and the insured shall resume payment of premiums in accordance with this policy on the first due date following such recovery."

The premiums on the policy were due and payable on the 30th day of September each year. After the policy had been in force and effect for several years, in April, 1915, the plaintiff, Lewis, received a gunshot wound in one hand. The evidence disclosed that for about 14 weeks he was confined to his bed, and then was unable to get out of his bed without the use of a cane. Besides losing several fingers on the left hand, his legs were very weak and unsteady. The doctor stated he was suffering from ataxia tabes dorsalis, considered generally as an incurable disease; his limbs were very weak and trembling, he had practically no control over them, and walked with great difficulty, and several times a strong wind caused the plaintiff to fall.

The evidence disclosed that prior to September 30, 1915, he had a conversation with T. J. Wood, the state agent of the company, in regard to the insurance, and informed the agent that the policy contained the provision

that the company would pay the premium during such time as he was totally disabled; that the agent informed him there was something the matter with his head; that there was nothing wrong with him, and that he did not come under that clause of the policy. The sister of the plaintiff also testified that she had informed Mr. Wood, the state agent, as to his condition. On September 30, 1915, the plaintiff made payment of the insurance by giving a note for part and paying part, and the note was eventually paid, but paid by the plaintiff under protest. There was some correspondence between him and the company in which he advised them he was paying the premium under protest, and after making the payment he filed suit to recover the same back. For the year 1916 the company required certain affidavits as to his condition, which were furnished, and it paid the insurance for that year. The plaintiff below pleaded that he had not furnished any proof of his condition for the year 1915 for the reason the company waived the proof and had denied liability. The defendant company introduced no evidence, and the court instructed the jury to return a verdict for the plaintiff and against the defendant for the amount paid. From said judgment the defendant appeals.

[1] The first assignment of error that the defendant company alleges is that the plaintiff failed to prove that he was totally and permanently disabled, and that he would be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations; that the provision in the policy provided:

"If the insured shall furnish due proof of total permanent disability by bodily injuries or disease, and that he will be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations;"

and the same section further provides:

"If, however, the insured shall recover so as to be able to engage in any gainful occupation during the premium paying period, the company's obligation to pay the premiums shall cease, and the insured shall resume the payment of premiums, in accordance with this policy, on the first due date following such recovery."

The defendant argues that the evidence does not disclose that the plaintiff would be permanently disabled for life, but it is admitted that the company accepted his condition as coming within that provision of the policy, and paid the premiums for the year 1916.

The doctor testified that the disease was considered usually incurable and his condition was very unfavorable. To admit of the technical interpretation of said policy as the defendant company attempts to invoke in the case at bar would make the policy ambiguous and contradictory and meaningless in part. In the first case they have

the provision in the policy that, if permanently disabled, he must be in such a condition that he will be permanently and wholly disabled for life from pursuing any and all gainful occupations. In the same section it provides if, however, he should recover and be able to engage in a gainful occupation, then he should again assume to pay the premiums. The evidence at the trial disclosed that the plaintiff had been disabled up to the time of the trial, which was January 5, 1917, or almost two years after the injury, and at the time of the trial the company had also recognized the fact that he was totally disabled, and had paid the premiums on the insurance policy for the year prior thereto. We think a fair construction of the provisions of the policy, when construed together, must be that if the insured was totally disabled then they should pay the insurance premium. The word "total" disability is construed by this court in the case of *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 Pac. 16, which states as follows:

"Total disability, under the provisions of an accident insurance policy, does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It exists, although the insured may be able to perform a few occasional or trivial acts relating thereto, if he is not able to do any substantial portion of the work connected with his occupation."

We do not think that the company could ask the court to construe the clause that the plaintiff did not come within the provision of this section, when it itself was recognizing him as coming within the provision of the clause, and was paying the insurance at the time of the trial, for the same injuries that he was claiming the benefits therefrom in 1915. The evidence disclosed at the time of the trial he was showing some improvement from his previous condition. The rule as laid down by this court in the case of *Shawnee Life Ins. Co. v. Watkins*, 53 Okl. 188, 156 Pac. 181, is as follows:

"Where the meaning of language in a policy of life insurance, or in the application therefor, is ambiguous or susceptible to two different constructions, the same will be strictly construed against the insurer, and that construction adopted which is most favorable to the insured."

The policy first provides that the insured must prove that he will be totally disabled for life from continuing any gainful occupation. The same section then provides, if he recovers or does assume any gainful occupation, he must then pay his premiums. In this case they are asking us to construe only the first portion of said section, but, by construing them together, we think the liberal construction means "total disability," and that he probably will be so for life. We

think as to this assignment of error there is no merit.

[2, 3] The second assignment of error is that the plaintiff failed to furnish due proof of total permanent disability. The policy contained the provision that if the insured shall furnish due proof prior to the time of default. The accident occurred in April; the premium was not due until September 30th. The plaintiff stated that he talked to the state agent twice during that time, and the agent informed him that he did not come within the clause as provided in the policy. At no time did the agent inform him in regard to the proof necessary, nor what proof was required, nor that the company would furnish blanks to make out his proof thereon, but denied liability, in that plaintiff did not come within that clause. Our court has held in the case of *Oklahoma Fire Ins. Co. v. Wagester*, 38 Okl. 291, 132 Pac. 1071, and *American Nat. Ins. Co. v. Donahue*, 54 Okl. 294, 153 Pac. 819:

"A provision in an insurance policy requiring proof of loss to be furnished the company within a certain definite time is waived by the company denying liability within said time upon other grounds than failure to furnish proof of loss."

The sister of the plaintiff also informed the company as to the condition of the plaintiff, and when the plaintiff demanded of the state agent upon two occasions to fix the policy, to give him the benefit of the total disability clause, the state agent replied that he did not come within the provision of said clause. This was a denial of liability. The defendant claims the cases above cited, *Oklahoma Fire Ins. Co. v. Wagester* and *American Nat. Ins. Co. v. Donahue*, are distinguishable; but in this we cannot agree.

[4] The next assignment is that there is no evidence that T. J. Wood was the state agent of the company. The plaintiff alleged in his petition that T. J. Wood was the state agent, with full power and authority. This was denied, but not under oath. The plaintiff introduced certain evidence to show that Wood was the state manager, and the receipts were signed by Wood as state manager. At the trial of the case the court stated, "I presume you intend to show that Wood is the agent." The attorney for the plaintiff replied, "Yes; but that is admitted, however." To this the company made no objection that they were admitting that Wood was the agent. Defendant admits that the statute which requires the allegation of agency should be denied under oath or the same should be taken as true, but states the fact that the plaintiff, in addition to relying on the denial, introduced certain evidence, and he thereby waived all of his rights under the provision. In this we cannot agree, as stated by this court in the case of *Armstrong*,

183 P.—62

Byrd & Co. v. Crump, 25 Okl. 452, 106 Pac. 855, wherein the court stated:

"The allegation of any appointment or authority is taken as true, unless the denial of the same be verified by affidavit of a party, his agent or attorney. The defendant alleged that a certain party was the agent of plaintiff, which allegation was undenied, as above required. Evidence was offered on the trial of the cause to establish the agency thus admitted. *Held*, that the reception of the same was not prejudicial error."

The defendant relied on the case of *Spaulding v. Thompson*, 159 Pac. 509, but there the court stated:

"But if he raises an issue thereon by introducing evidence to establish the truthfulness of said indorsement, it is too late then to complain if the defendant accepts the issue and attacks the indorsement and plaintiff's evidence substantiating the same with adverse evidence."

There was no evidence to show that Wood was not the state agent, or had no authority; but when plaintiff's attorney in the case below informed the court that it was admitted, the company's attorney did not deny this, or attempt to raise the issue thereon. The holding of the above case is to the effect that in the case at bar, although the defendant company's answer is not verified, still, after the plaintiff had introduced some evidence tending to prove that Wood was the state agent, the defendant company would have had the right then to introduce evidence contradicting that allegation; but in the case where the answer is not verified, and the plaintiff introduced some evidence to support the allegations, and the defendant introduced none, there can be no question, so far as the defendant is concerned, his pleadings neither denied the allegation, and he offered no evidence to deny it, so it must be taken and admitted as true. Section 3464, Revised Laws 1910, is as follows:

"All life insurance companies doing business under the laws of this state shall be required to maintain a general agency within the state, in charge of a resident general agent."

The proof disclosed, and the allegations were, that Wood was the resident and general agent. The pleadings admit this fact, and the evidence supports the fact. Without any evidence to the contrary, there can be no merit in this assignment of error.

The defendant alleges the introduction of immaterial testimony, but this assignment of error is not well taken. The evidence was uncontradicted, and the evidence introduced on behalf of the plaintiff proved the allegations of the petition, and were not even denied. In a case where the court rendered judgment for plaintiff upon the evidence, it cannot be said that the introduction of immaterial evidence could be a proper assignment of error unless the court based its judgment upon the immaterial evidence.

The evidence in this case was uncontradicted. There was no dispute as to the facts in the case, but the only questions presented were, did the defendant waive proof of loss by denying the liability? This fact was undenied, and was not even contradicted in any way or by any inference. Therefore as to that question there was no issue.

The interpretation of the policy was the only other question. That fact was undenied. Although it is true that the doctor stated that, as to whether the plaintiff would ever be able to do any work, he was not positive, but that his disease was considered incurable, so on this question we think there was but one conclusion that could be reached from the evidence, there being no evidence offered on behalf of the defendant, nor was the evidence on behalf of the plaintiff contradicted in any way whatever. The plaintiff having made out his case, no evidence being offered by the defendant, it was not error for the court to render judgment upon the evidence in favor of plaintiff and against the defendant.

SHARP, RAINEY, HARRISON, PITCHFORD, and JOHNSON, JJ., concur.

PER CURIAM. The plaintiff in error, on petition for rehearing, suggests that the court in the opinion should have passed upon the question of the authority of the agent Wood, and not upon the question of whether Wood was the agent, for the reason that the company did not deny that Wood was the agent, but denied his authority. The petition alleges that Wood was the agent, with full power and authority to act. The company in its answer admits he was agent, but denies his authority, but the denial was not verified. The rule adopted by this court as to verification of an answer, in denying either the appointment or authority of the agent, is the same, the court holding that, in order to deny the appointment or authority of the agent, the answer must be verified; otherwise the allegations of agency or authority as alleged in the petition will be taken as true. This court in the case of Chicago, Rock Island & Pacific Ry. Co. v. E. F. Mitchell, 19 Okl. 579, 101 Pac. 850, held in substance:

Where the allegations of the petition set up the authority of the agent, and the defendant denies this authority, and the answer was sworn to by the attorney, but not in compliance with the statute, which provides what is necessary for the attorney to allege before he may verify a pleading, does not bring the denial within the statute, and is not sufficient to raise the issue of authority. The fact that plaintiff may have introduced some evidence in the court below to prove authority, under the cases cited in the opinion, would not be prejudicial error.

The defendant introduced no evidence to show lack of authority; therefore the authority of the agent as alleged in the petition will be taken as true.

The petition for rehearing is therefore denied.

OWEN, C. J., and RAINEY, KANE, JOHNSON, PITCHFORD, and HIGGINS, JJ., concur.

HANSING v. HANSING. (No. 10082.)

(Supreme Court of Oklahoma. Sept. 23, 1919.)

(Syllabus by the Court.)

1. DIVORCE \S 182, 186—PENDING APPEAL APPELLATE COURT CAN ENFORCE PAYMENT OF TEMPORARY ALIMONY.

In an appeal to review a judgment decreeing divorce and awarding permanent alimony, the Supreme Court has authority to enforce the payment of temporary alimony pending appeal, and, on failure to make payment as directed by the court, plaintiff in error may, after being given an opportunity to be heard, be adjudged in contempt, and may be punished therefor as provided by the laws of Oklahoma, and such punishment may include the dismissal of his appeal.

(Additional Syllabus by Editorial Staff.)

2. DIVORCE \S 182—PARTY APPEALING MUST PAY TEMPORARY ALIMONY ADJUDGED PENDENTE LITE.

A party appealing from a judgment of a district court, awarding divorce and permanent alimony, must assume the burden of paying temporary alimony pendente lite, when so ordered by the court.

Error from District Court, Noble County; W. M. Bowles, Judge.

Action for divorce by Anna Hansing against Harry C. Hansing. From a decree granting plaintiff a divorce and permanent alimony, and temporary alimony pending appeal, defendant brings error. Appeal dismissed.

Johnston, Robinson & Rice, of Perry, for plaintiff in error.

H. A. Johnson, of Perry, for defendant in error.

PITCHFORD, J. This is an appeal from a decree of the district court of Noble county, granting defendant in error a divorce and \$1,650 permanent alimony, and, pending appeal, \$25 per month temporary alimony. On July 30, 1918, this court made an order di-

recting plaintiff in error to pay \$50 per month temporary alimony pending appeal, beginning August 1, 1918, payable on the 1st of each month; \$150 attorney's fee, \$40 suit money, and \$125 temporary alimony due under order of the district court; payment of suit money, one-half of attorney's fee, and one-half accumulated alimony to be paid on or before September 1, 1918, and payment of balance not later than October 1, 1918; payments to be made to the clerk of said district court for disbursement.

Plaintiff in error made a first payment of \$50, as directed, on August 1, 1918, and, upon failure to make further payments, application was filed by defendant in error for order to show cause why plaintiff in error should not be punished for contempt. Hearing was had and an answer was filed, alleging inability to pay on account of crop failures, mortgages, and other indebtedness against plaintiff in error's property, and illness of himself and children. This answer is supported by affidavits of other persons familiar with plaintiff in error and his business and family affairs, but the allegations therein as to his ability to pay are generally denied by defendant in error.

[1, 2] A party appealing from a judgment of a district court awarding divorce and permanent alimony must assume the burden of paying temporary alimony pendente lite, when so ordered by the court. *Hunt v. Hunt*, 23 Okl. 490, 100 Pac. 541, 22 L. R. A. (N. S.) 1202; *Kostachek v. Kostachek*, 40 Okl. 744, 124 Pac. 761; *Hartshorn v. Hartshorn*, 155 Pac. 508; *Spradling v. Spradling*, 181 Pac. 148. Judgment is therefore here rendered in favor of Anna Hansing, defendant in error, against the plaintiff in error, Harry Hansing, for the sum of \$600, as alimony from the 1st day of September, 1918, \$125 attorney's fee, and \$40 suit money—total, \$765, for which let execution issue.

Plaintiff in error's disregard for the orders of this court at the time when he is prosecuting an appeal constitutes ground for dismissal of the appeal, and, although mitigating circumstances have been shown for failure to comply therewith, he is nevertheless in indirect contempt of this court, and, having been given an opportunity to be heard thereon, may be penalized therefor.

Plaintiff in error, being in contempt for failure to comply with the order of this court, may be punished as provided by the laws of the state of Oklahoma, and such punishment may include the dismissal of the appeal. *Spradling v. Spradling*, supra. For the reasons stated, therefore, the appeal is hereby dismissed.

All the Justices concur, except HARRISON, J., absent and not participating.

STATE ex rel. WARNER et al. v. FULLERTON, District Judge. (No. 10096.)

(Supreme Court of Oklahoma. Sept. 23, 1919.)

(Syllabus by the Court.)

1. JUDGES \Leftrightarrow 40—MUST MAINTAIN RIGHT OF LITIGANTS TO IMPARTIAL TRIAL BY UNBIASED COURT.

Courts should scrupulously maintain the right of every litigant to an impartial and disinterested tribunal for determination of his rights; and the judges presiding over such courts should be unbiased, impartial, and disinterested in the subject-matter in litigation, and all doubt or suspicion to the contrary must be jealously guarded against, and, if possible, eliminated, if we are to maintain and give full force and effect to the high ideals and salutary safeguards written in the organic law of the state. Section 6, art. 2, Const.

2. JUDGES \Leftrightarrow 49(2) — CRITICISM OF FORMER JUDGMENT BY ANOTHER JUDGE IN CAUSE DISQUALIFIES JUDGE TO SIT IN SUCH SUIT.

The signing of a statement by respondent, before he became district judge, which was, in effect, a criticism of the judgment rendered by the then district judge in the trial of the matter to be retried before respondent, and the expression of an opinion to the effect that the finding of facts made by the court against one of the parties, who is the principal witness for defendants, was untrue, is sufficient to disqualify respondent to sit and act as judge in such suit.

3. JUDGES \Leftrightarrow 51(4) — MANDAMUS \Leftrightarrow 44 — DISQUALIFIED JUDGE WILL BE COMPELLED BY MANDAMUS TO CERTIFY DISQUALIFICATION.

Where a district judge is disqualified to hear and determine a cause pending before him, he should certify his disqualification; and upon refusal to do so, when requested in the manner provided by law, mandamus will lie.

Application by the State, on the relation of Minnie Newman Warner and another, for writ of mandamus to disqualify Hon. S. C. Fullerton, District Judge, of Ottawa County, from proceeding with the trial of a cause brought by plaintiffs to cancel a deed to certain mining land in Ottawa county. Application granted.

Bayard T. Hainer, of Miami, Paul A. Ewert, of Joplin, Mo., and Dyke Ballinger, of Miami, for plaintiffs.

Ray McNaughton, of Miami, for respondent.

OWEN, C. J. A trial of this cause was had before Hon. George C. Crump, sitting as judge of the district court of Ottawa county, but the judgment was set aside and a new trial granted. In announcing judgment, Judge Crump stated the evidence showed the deed to the land in controversy had been procured fraudulently from plaintiffs by James

F. Robinson, one of the defendants and a principal witness. Respondent, who was at the time engaged in the practice of law at Miami, signed a statement, which was, in effect, a criticism of the finding of the district judge, and expressing the opinion that such finding against the defendant Robinson was unwarranted and untrue.

The matter being one of equitable cognizance, the court may hear and determine the cause, judging both the law and facts without a jury. Section 6, art. 2, of the Constitution (section 14, art. 2, Williams' Ann.), provides:

"Right and justice shall be administered without sale, denial, delay, or prejudice."

[1] Courts should scrupulously maintain the right of every litigant to an impartial and disinterested tribunal for the determination of his rights. All are interested in the integrity, independence, and impartiality of the judiciary, the most important and powerful branch of our government. Judges presiding over the courts should be unbiased, impartial, and disinterested in the subject-matter in litigation, and it is of the utmost importance that all doubt or suspicion to the contrary be jealously guarded against, and, if possible, completely eliminated, to the end that we may maintain and give full force and effect to the high ideals and salutary safeguards written in the organic law of the state. *State ex rel. Mayo v. Pitchford*, 43 Okl. 105, 141 Pac. 433; *Yazoo & M. V. R. Co. v. Kirk*, 102 Miss. 41, 58 South. 710, 884, 42 L. R. A. (N. S.) 1172, Ann. Cas. 1914O, 968.

In the case of *Chenault v. Spencer*, 68 S. W. 128, 24 Ky. Law Rep. 141, it was held reversible error for the trial judge not to certify his disqualification, when it was made to appear he had criticized the judgment of the Court of Appeals, affecting plaintiff's right of recovery, and had made the statement that plaintiff had no right, legal or equitable, to the land in controversy before him.

[2] Respondent having signed and published a statement criticizing and controverting the finding of facts on which the judge, who formerly tried the case, based his judgment, and which finding of facts was material in the trial, it is not difficult to understand how plaintiffs feel they cannot have a fair and impartial trial before respondent. The question is not so much whether respondent himself feels he will be able to give plaintiffs a fair and impartial trial, as whether what he said and his actions in publishing the statement preclude reasonable men from feeling that a fair and impartial trial can be had before him and that he is disinterested in such litigation.

[3] Timely request, as provided by law, was made to respondent to disqualify to sit and act as judge in the matter in the district court, and, respondent having refused to certify his disqualification, application for writ of mandamus was properly made, and the writ will lie.

Respondent, therefore, should forthwith certify his disqualification to try the matter in controversy, and, upon his failure to do so, writ of mandamus will be issued.

KANE, PITCHFORD, JOHNSON, McNEILL, and HIGGINS, JJ., concur.

KERLEY v. HOEHMAN et al. (No. 7643.)

(Supreme Court of Oklahoma. July 25, 1916. Rehearing Denied June 19, 1917. Second Petition for Rehearing Denied Sept. 23, 1919.)

(Syllabus by the Court.)

1. DEATH ~~§~~11, 38—LIMITATIONS NOT EXTENDED BY FRAUDULENT CONCEALMENT OF CAUSE OF DEATH.

Section 5281, Rev. Laws 1910 (section 4313, St. 1893), creates a right of action for damages for death by wrongful act which did not exist at common law, and which does not obtain in the absence of such act. The limitation of two years prescribed in the act in which such action must be commenced is a condition imposed upon the exercise of the right of action granted, and this time is not extended by reason of the fraudulent concealment of the cause of death.

2. DEATH ~~§~~38—TIME FOR BRINGING ACTION FOR WRONGFUL DEATH IS A CONDITION OF LIABILITY.

The time fixed for the commencement of an action unknown to the common law, by statute which creates or permits the action, is a condition of the liability and action thus created, and not a statute of limitation. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition to the liability and of the action which it permits.

Commissioners' Opinion, Division No. 4. Error from District Court, Caddo County; Will Linn, Judge.

Action by Arthur P. Hoehman and Minnie A. Hoehman against W. W. Kerley. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions to sustain demurrer to petition and dismiss the action.

A. J. Morris, of Anadarko, for plaintiff in error.

Bond, Melton & Melton, of Chickasha, for defendants in error.

EDWARDS, C. For convenience the parties will be referred to as plaintiffs and defendant, according to their position in the lower court.

The record discloses: That the plaintiffs are husband and wife and parents of Robert Hoehman, deceased. That defendant is a practicing physician and was the attending physician at the birth of said Robert Hoehman, a normal healthy child, born July 6, 1911. That a few days after the birth of said Robert Hoehman the defendant, as a physician, had prescribed for one Hoops, a cousin of the plaintiff Arthur P. Hoehman. The said Hoops was a young man, about grown, who lived near and on the same farm as the plaintiffs. That on the 20th day of July, the plaintiff Arthur P. Hoehman went to the office of the defendant, paid him for his services as attending physician at the birth of said Robert Hoehman, and the defendant then inquired about the boy, meaning the cousin, Hoops, the inquiry, however, being understood by the plaintiff Hoehman as referring to his infant son, Robert Hoehman, and the plaintiff Arthur P. Hoehman thereupon answered in substance that the boy was suffering from stomach trouble, and asked the defendant to give him something for the trouble, and thereupon the defendant wrote and gave to the plaintiff Arthur P. Hoehman a prescription, believing that the same was intended for the cousin, Hoops. The plaintiff had the prescription filled at a drug store, returned home, and some time in the afternoon was about to administer a dose of the medicine to the infant; but, the medicine appearing to him to be laudanum, before administering same he called up the defendant by telephone and inquired if it would be all right to give the medicine, as it looked like laudanum. The defendant answered, in substance, that if the prescription was filled as given by him it would be all right. The plaintiff then gave the infant a dose of the medicine, and later, observing that the child appeared to be turning purple in color and was very ill, again called up the defendant and requested his presence. The defendant went to the farm occupied by the plaintiffs, but, on arriving there, first went to the house of Hoops, still believing that he was the person for whom he had been called upon to prescribe. There, finding Hoops apparently well, he inquired who had called him, and was then directed to the house of the plaintiffs. Upon reaching the house of plaintiffs, he found the infant child very ill from the effects of the medicine prescribed, and from the effects of which it died during the night following. There is some controversy as to exactly what occurred when the defendant arrived at the house and during his attendance there; but it is uncontroverted that he poured out the medicine which had been prescribed and used the bottle as a container or measure for other medicines then administered by him. On the

following morning, the defendant went to the druggist who had filled the prescription and substituted another prescription for the one which he had given plaintiff the day before, and the former prescription was withdrawn from the files but retained at the drug store. After the death of the child, the plaintiff Arthur P. Hoehman called at the drug store for a copy of the prescription and was given a copy of the one which had been substituted by the defendant. This substitute prescription plaintiff had filled and later analyzed, and from the analysis believed that the prescription was not, within itself, dangerous, but had been incorrectly compounded. The evidence is somewhat controverted, yet it appears that it was some 18 months later before he learned the real facts as to the change in prescription. It was considerably more than two years from the death of the child until this suit was instituted.

The amended petition sets out the circumstances substantially as stated, and alleges that no administrator has been appointed, and sets out the concealment of the cause of the death as a reason for bringing the suit after two years. Damages in the sum of \$20,000 are prayed. A demurrer was filed by the defendant, overruled, and exceptions saved and an answer by way of general denial then filed. The evidence supports the allegations of the petition as to the manner and cause of death. It is also admitted by the defendant that the death of the infant child was caused from administering the medicine as prescribed. Judgment was for the plaintiff in the sum of \$1,000. Motion for a new trial was filed, overruled, and exceptions saved, and in due time the defendant prosecutes his appeal to this court.

[1, 2] The question to determine, then, is whether or not this action, being an action for wrongful death, instituted more than two years after the cause of action accrued, can be maintained. The action is based upon section 5281 of the Revised Laws of 1910, which is as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Under this section of the law the defendant contends that the limitation, being contained in that section of the law which gives the right of action, is not the usual statute of limitations which operates against the remedy, but is a limitation upon the very right itself, and that no excuse for delay in com-

commencement of the action for more than two years will avail.

The plaintiff, on the contrary, contends that the right of action is given by section 7, art. 23, of the Constitution, which reads:

"The right of action to recover damages for injuries resulting in death shall never be abrogated and the amount recoverable shall not be subject to any statutory limitation"

—and that the sentence in section 5281, supra, which provides that the action must be commenced within two years, is nothing more than a statutory limitation and is no part of the right of action, and such fixing of the time can only be construed as a statute of limitation.

From an examination of the Constitution and statutes, we believe it is clear that the Constitution does not create the right of action, but merely continues the right which had before the adoption of the Constitution been created by statute and was at the time of the adoption of the Constitution a part of the statute law.

Upon the question of whether or not the limitation expressed in this section of the statute is a limitation upon the right to maintain the action as contended by defendant, or is the usual statutory limitation, we find the authorities to uniformly hold that it is a limitation upon the very right itself. The general rule upon this subject is expressed as follows:

"Inasmuch as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy but is of the right of action itself." *Tiffany on Death by Wrongful Act* (2d Ed.) § 121.

"It seems that provisions in the statutes authorizing actions for wrongful death which limit the time within which the actions should be brought are not properly statutes of limitation as that term is generally used. They are qualifications restricting the rights granted by the statutes, and must be strictly complied with. As the statutes confer a new right of action, no explanations as to why the suit was not brought within the specified time will avail unless the statutes themselves provide a saving clause." *A. & E. Ency. of Law* (2d Ed.) 875.

"Where the statute, giving a right of action for death by wrongful act, limits the time within which such action must be brought to a certain designated period, and contains no saving clause, an action, sought to be brought after the expiration of such period, is barred, and no excuse will be recognized for such delay." 13 Cyc. 339.

This statute was adopted from Kansas and has several times been before the Supreme Court of that state. In the case of *Rodman v. Mo. Pac. Ry. Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704, the court holds:

"Section 422 of the Civil Code creates a right of action for damages for death by wrongful act which did not exist at common law, and which does not obtain in the absence of such

act. The limitation of two years prescribed in the act in which such action must be commenced is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action, as provided in section 23 of the Civil Code."

The courts of other states having a statute in substance the same as the section under consideration, except generally for a difference in the time within which the suit is to be brought, likewise hold that the limitation is upon the right to maintain the action and that no excuse for not bringing the action within the time fixed by the statute, will avail.

In *L. & N. Ry. Co. v. Chamblee*, 171 Ala. 188, 54 South. 681, Ann. Cas. 1913A, 977, it is said:

"This period of two years is of the essence of the newly, by the statute, conferred right of action, and the plaintiff has the burden of affirmatively showing that his action was commenced within the period provided. It is not a limitation against the exercise of the remedy only."

In *Taylor v. Iron Co.*, 94 N. C. 525, the court holds:

"This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."

In *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 818, 26 S. E. 431, the court says:

"But here the cause of action did not exist at common law, but is created by statute. The bringing of the suit within two years from the death of the person whose death has been caused by wrongful act is made an essential element of the right to sue, and it must be accepted in all respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse. Therefore, strictly speaking, it is not a statute of limitation."

To the same general effect are the following cases: *Barker v. Ry. Co.*, 91 Mo. 86, 14 S. W. 280; *Williams v. Quebec S. S. Co.* (D. C.) 126 Fed. 591; *Western Coal Mining Co. v. Hise et al.*, 216 Fed. 338, 132 C. C. A. 482; *Anthony v. Ry. Co.*, 108 Ark. 219, 157 S. W. 394; *Gulledge v. Ry. Co.*, 147 N. C. 234, 60 S. E. 1134, 125 Am. St. Rep. 544; *Poff v. Telephone, etc., Co.*, 72 N. H. 164, 55 Atl. 891; *In re Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 80 L. Ed. 358.

In *Partee v. St. L. & S. F. Ry. Co.*, 204 Fed. 970, 123 C. C. A. 292, 51 L. R. A. (N. S.) 721,

a case appealed to the Circuit Court of Appeals from the Eastern District of Oklahoma, involving a construction of section 5945 of the Compiled Laws of 1909, being the same as section 5281 of the Revised Laws of 1910, except for omitting the limitation upon the amount of the recovery as contained in the laws of 1909, the Circuit Court of Appeals construes this particular section, cites many authorities in support thereof, and holds (syllabus):

"The time fixed for the commencement of an action unknown to the common law, by act of Congress or statute which creates or permits the action, is a condition of the liability and action thus created, and not a statute of limitations.

"A special statute upon a particular subject and a general law must stand together, the one as the law of the specific subject and the other as the general rule, unless it clearly appears that it was the intention of the Legislature to modify or repeal one or the other."

The cause of action accrues at the death for which the recovery is sought. *Tiffany*, § 122, note; *Kennedy v. Burrier*, 36 Mo. 128. There would seem then to be no question but that the limitation imposed by section 5281, *supra*, is absolute; that the right of action is tendered on the condition that suit be commenced within two years; that no excuse for failure to bring the suit within that time will avail.

It follows that the action must be reversed and remanded, with directions to the lower court to sustain the demurrer to the petition and dismiss the action.

PER CURIAM. Adopted in whole.

HOWE v. TIGER. (No. 10826.)

(Supreme Court of Oklahoma. Sept. 30, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §519—AGREED STATEMENT OF FACTS, NOT PART OF RECORD, NOT REVIEWABLE.

An agreed statement of facts, not being a part of the record, unless made so by bill of ex-

ceptions or case-made, cannot be considered on error, although a copy of it is attached to the transcript of the record.

2. APPEAL AND ERROR §519—"RECORD" PROPER DOES NOT INCLUDE AGREED STATEMENT OF FACTS.

The "record" proper in a civil action does not include an agreed statement of facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Record.]

Error from District Court, McIntosh County; H. L. Melton, Judge.

Action by Lena Hall Tiger against Mrs. R. D. Howe to cancel a deed and remove cloud from title. Judgment for plaintiff, and defendant brings error by transcript. Dismissed.

R. D. Howe, of Eufaula, for plaintiff in error.

Jno. W. Porter, of Muskogee, for defendant in error.

PER CURIAM. [1] This is an appeal by transcript, without bill of exceptions or case-made. A motion to dismiss the appeal was filed by defendant in error. The case was tried on an agreed statement of facts, and judgment rendered for plaintiff canceling a deed under which the defendant claimed title to the land in controversy. The assignments of error require a consideration of the agreed statement of facts on which the case was tried. It was held in the case of *Brown v. Capital Townsite Co.*, 21 Okl. 586, 96 Pac. 587, that an agreed statement of facts, not being a part of the record, unless made so by bill of exceptions or case-made, cannot be considered on error, although a copy of it is attached to the transcript of the record.

[2] The "record" proper in a civil action does not include an agreed statement of facts. *Callahan v. Callahan*, 47 Okl. 542, 149 Pac. 135; *So. Surety Co. v. Turnham*, 58 Okl. 583, 160 Pac. 468; *Williams v. Kelly*, 176 Pac. 204.

Therefore the motion to dismiss must be sustained, and it is so ordered.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

NIELSEN v. REBARD. (No. 2297.)

(Supreme Court of Nevada. Nov. 4, 1919.)

1. APPEAL AND ERROR §193(9)—OBJECTION MADE FIRST TIME ON APPEAL.

An objection that complaint utterly failed to state a cause of action may be raised for the first time on appeal.

2. PLEADING §408 — FAILURE TO STATE CAUSE OF ACTION.

An objection that the complaint utterly fails to state a cause of action may be raised at any time.

3. TROVER AND CONVERSION §13—OBJECT OF ACTION.

Trover is an action, not to recover the specific thing, but to recover the value of the property wrongfully converted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trover.]

4. REPLEVIN §10—POSSESSION BY DEFENDANT NECESSARY.

To enable a plaintiff to recover in replevin, the specific property must be in the possession of the defendant at the commencement of the action.

5. SPECIFIC PERFORMANCE §70—NOT APPLICABLE TO CORPORATE STOCK.

Shares of corporate stock cannot be recovered in an action for specific performance, unless they possess peculiar and unusual value.

Appeal from District Court, Esmeralda County; J. Emmet Walsh, Judge.

Action by Fred H. Nielsen against Nellie Richardson Rebard, as administratrix of the estate of Frank P. Richardson, deceased. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Augustus Tilden, of Reno, for appellant.

A. Grant Miller, of Reno, and Thompson & Thompson, of Goldfield, for respondent.

COLEMAN, C. J. By this action plaintiff seeks to recover the possession of specific stock, and of dividends earned thereon. Judgment was entered in the trial court as prayed, from which, as well as from an order denying a new trial, an appeal is taken.

[1, 2] It is contended in this court that the amended complaint does not state a cause of action, as to which it is said, by counsel for respondent, that this point, not having been made in the trial court, should not now prevail. It is a well-recognized rule that, while courts do not look with favor upon objections of this kind when made for the first time in the appellate court (*Omaha National Bank v. Kiper*, 60 Neb. 37, 82 N. W. 102; *Phoenix v. Gardner*, 13 Minn. 433 (Gil. 396); *Smith v. Dennett*, 15 Minn. 86 (Gil. 59); *Donellan v.*

Hardy, 57 Ind. 399). yet, if the complaint utterly fails to state a cause of action, the point may be raised at any time (*Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313; *Van Doren v. Tjader*, 1 Nev. 390, 90 Am. Dec. 498). In fact our Code expressly provides that all objections to a complaint may be waived, except as to the lack of jurisdiction and the failure of the complaint to state a cause of action. Rev. Laws 1912, § 5045. It is incumbent upon us to determine the question presented.

The amended complaint, in brief, alleges that on November 23, 1914, and for a long time prior thereto, Frank P. Richardson was engaged in the stock brokerage business in Goldfield, and while so engaged acted in behalf of customers in buying and selling stock upon the Goldfield and San Francisco Stock Exchanges, and in so doing was governed by the rules of such exchanges and the customs of brokers of Goldfield; that on the date mentioned said Richardson died intestate in the town of Goldfield. It is further averred that long prior to the date of his death the deceased had established the custom with his patrons of buying mining stocks for them upon the payment of one-third or one-half of the purchase price thereof, and depositing the said stock in his safe, the balance of the purchase price to be paid at the date of the sale of such stock, or at such times as it might be withdrawn from said safe; that the deceased had established a custom in said business, with his customers, of buying mining stocks for them and paying therefor in full, and placing the same in his safe for such purchasers, the purchasers making no payment in cash at the time, but depositing an equal amount of stock in the same company as security for the amount due upon the purchases, permitting the customers to pay the amount due, with interest, at the time of such sale or withdrawal of the stock; that such customs were the ones prevailing among the stockbrokers of Goldfield at the time.

It is further alleged that on the 10th day of October, 1914, plaintiff purchased of the said Richardson 1,000 shares of the capital stock of the Jumbo Extension Mining Company, at the price of 39 cents per share, and paid in full therefor; that on October 22, 1914, pursuant to the established custom, as alleged, the deceased purchased for plaintiff 1,000 shares of the capital stock of the Jumbo Extension Mining Company at the price of 40 cents per share, on account of which plaintiff made no cash payment, but as security for the purchase price thereof deposited with the deceased the 1,000 shares purchased by plaintiff on October 10, 1914. It is further alleged that it was the custom of the deceased and other brokers in Goldfield, at the time of purchasing stock for patrons, in cases in which it was not paid for, to fix a limit

for the payment of the balance due on such contracts; that on November 22d it was agreed between the plaintiff and deceased that the plaintiff should be given until demand therefor in which to pay for the stock, or until it should be sold, and that no demand had been made.

It is further alleged in the complaint that on November 23, 1914, a special administrator was appointed as administrator of said estate and that on December 21st regular letters of administration were issued to appellant, who thereupon duly qualified, and that in pursuance thereof she came into possession of 12,100 shares of the capital stock of the Jumbo Extension Mining Company, and all of the property and assets of the said estate. It is further alleged that plaintiff filed with the clerk of the court, within the time allowed by law, his claim against said estate for the delivery of 2,000 shares of the capital stock of the Jumbo Extension Mining Company, and for a designated sum on account of dividends earned on said stock. It is further alleged that defendant, as such administratrix, refused to deliver to plaintiff said stock; that the estate of deceased is solvent; that plaintiff was served with notice of the rejection by the administratrix of the said claim, and that the time had not elapsed in which to bring this action; that the said Jumbo Extension Mining Company had declared certain dividends upon its capital stock, and that plaintiff is entitled to recover the dividends earned by said 2,000 shares of stock less the sum due on the stock purchased October 22d.

[3, 4] In our opinion, the amended complaint does not state a cause of action. It is not even claimed by respondent that the action is one of replevin or trover. Trover is an action not to recover the specific thing

but to recover the value of the property wrongfully converted. 21 Ency. P. & P. 1012. There is no attempt to recover damages in the action; and it has been held that, to enable a plaintiff to recover in replevin, the specific property sought to be recovered must be in possession of the defendant at the time of the commencement of the action (Gardner v. Brown, 22 Nev. 156, 37 Pac. 240), and there is no allegation in the complaint to the effect that defendant had possession of such stock at the time the action was commenced.

[5] The only theory upon which it is urged by the counsel for respondent that the complaint states a cause of action is that it is within the rule established by the case of Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084. From a reading of that case, it seems that it was one in the nature of specific performance, prosecuted under a provision of the Civil Code of that state. We have no such provision in our Civil Code, and it is a well-established rule in this jurisdiction that shares of stock cannot be recovered in an action for specific performance unless they possess peculiar and unusual value (State v. Jumbo Ex. M. Co., 30 Nev. 198, 94 Pac. 74; Oliver v. Little, 31 Nev. 476, 103 Pac. 240; Robinson M. Co. v. Riepe, 40 Nev. 121, 161 Pac. 304), of which there is no allegation in the complaint in this action.

It is clear that unless the complaint states facts sufficient to entitle plaintiff to a decree compelling defendant to convey the stock claimed, there can be no sufficient allegation showing a right to dividends thereupon.

The complaint failing to state a cause of action, it is ordered that the judgment and order appealed from be reversed.

SANDERS and DUCKER, JJ., concur.

Ex parte VAN FLEET. (No. A-2565.)

(Criminal Court of Appeals of Oklahoma. Oct. 14, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §144—AFTER AFFIDAVIT FOR CHANGE OF VENUE JUSTICE WITHOUT JURISDICTION.

Where one charged before a justice of the peace was arrested and brought before the justice, and filed an affidavit for a change of venue because he believed that he could not have a fair trial before the justice, the justice's duty was thereafter purely ministerial, and under Rev. Laws 1910, § 6149, he could only enter a proper order transferring cause to another justice, and was without jurisdiction to render judgment or issue order of commitment.

Petition by F. M. Van Fleet for writ of habeas corpus. Petitioner ordered discharged from custody.

A. C. Towne, of Miami, for petitioner.
The Attorney General, for respondent.

PER CURIAM. In this proceeding the petitioner, F. M. Van Fleet, presented to this court a verified petition, averring that he is unlawfully imprisoned in the county jail of Ottawa county by the sheriff of said county. It is further averred: That on October 12, 1915, one H. L. Herbert filed a complaint before J. L. Speer, a justice of the peace, charging that affiant was about to commit a breach of the peace. That petitioner was arrested and brought before said justice of the peace, and filed an affidavit for change of venue, which was denied. Thereupon the petitioner demanded a trial by jury, which was refused. That over the objection of petitioner the case was tried, and said justice of the peace made an order requiring petitioner to give bond in the sum of \$300 to keep the peace and to appear at the next term of the district court of Ottawa county, and in default of such bond he stand committed to the county jail. That petitioner is unable to give bond, and is now being illegally and unlawfully held under said commitment by said sheriff. Copies of the complaint and affidavit for change of venue, the judgment, and order of commitment are attached to said petition. That he made application for writ of habeas corpus to the district court of said county, and the same was denied.

An order to show cause was entered and issued, and upon the return day, the parties appearing by counsel, the case was argued and submitted. Thereupon it was ordered by the court that petitioner be discharged; the court holding that upon the filing of a proper affidavit for a change of venue, as was

done in this case, it was the duty of said justice to transfer the case to another justice of the peace; that under section 6149, Rev. Laws, in a criminal proceeding, when the defendant files an affidavit that he has reason to believe and does believe that he cannot have a fair and impartial trial before the justice of the peace, his duty in the case thereafter is purely ministerial, and he can only enter a proper order transferring the cause to another justice of the peace, as the statute provides, and for this reason the court was without jurisdiction to render the judgment or issue the order of commitment thereon.

RINGER et al. v. WILKIN et ux.

(Supreme Court of Idaho. July 1, 1919. Rehearing Denied Sept. 26, 1919.)

1. APPEAL AND ERROR §339(2)—TIME TO APPEAL FROM REFUSAL TO GRANT CHANGE OF VENUE.

Under the provisions of Comp. Laws, § 4807, an appeal from an order refusing to grant a change of the place of trial must be taken within 60 days after the order is made and entered upon the minutes of the court, or filed with the clerk.

2. EVIDENCE §113(8)—PRICE PAID NOT EVIDENCE OF MARKET VALUE.

The price paid for property is not evidence of its market value.

3. EVIDENCE §113(10)—COST OF EXCAVATING CELLAR AND CONSTRUCTING BUILDINGS NOT EVIDENCE OF MARKET VALUE OF LAND.

Proof of the cost of excavating a cellar and constructing buildings is not competent as proof of the market value of real estate of which they form a part.

4. EVIDENCE §501(7)—TESTIMONY OF WITNESS NOT KNOWING MARKET VALUE OF LAND AND BUILDINGS INCOMPETENT.

Where the question is as to the market value of land and buildings as a whole, evidence of a witness who expressly states that he does not know market value, but estimates value as he would in adjusting fire insurance losses, is incompetent.

5. BROKERS §102—INSTRUCTION THAT VENDOR IS LIABLE FOR FRAUDULENT REPRESENTATIONS OF BROKER ERRONEOUS.

An instruction that the owner of real estate is responsible for the fraudulent representations of a broker with whom the real estate is listed for sale, notwithstanding the owner gave no instructions to the broker to make the fraudulent representations, and notwithstanding the owner did not know the fraudulent representations were being made, is erroneous.

6. BROKERS §100—REPRESENTING ADVERSE INTERESTS WITH KNOWLEDGE OF PRINCIPALS.

Where a real estate broker acts for two parties with adverse interests in effecting an exchange of lands, with the knowledge and consent of both, neither principal is liable to the other for the tortious acts of the broker, in the absence of collusion or direct participation of one of the principals in the tortious acts of the agent.

Appeal from District Court, Nez Perce County; Wallace N. Scales, Judge.

Action for deceit by Emma Ringer and C. O. Ringer, her husband, against George W. Wilkin and Lila J. Wilkin, his wife, and A. H. Diddock. Verdict and judgment for plaintiff Emma Ringer against George W. Wilkin and Lila Wilkin, and against plaintiff C. O. Ringer, and in favor of defendant A. H. Diddock, and defendants George W. Wilkin and Lila J. Wilkin, his wife, appeal. Reversed, with instructions to dismiss the action as to defendant Lila J. Wilkin.

J. F. Allshie, of Coeur d'Alene, and A. S. Hardy, of Grangeville, for appellants.

S. O. Tannahill, of Lewiston, for respondents.

RICE, J. The respondents, wife and husband, alleged in their complaint that they exchanged certain real estate in the city of Lewiston for certain farm lands in Idaho county, belonging to appellants George W. Wilkin and Lila J. Wilkin, his wife. It was alleged that certain representations were made by the appellants, and A. H. Diddock, a real estate broker, who was joined as defendant, concerning the Idaho county land, by which respondents were induced to and did make the exchange of property, and that such representations were known by appellants, and defendant Diddock, to be false and fraudulent. This action was for damages resulting from the fraudulent representations. The trial resulted in a verdict in favor of respondent Emma Ringer, and against the appellants George W. Wilkin and Lila J. Wilkin. The jury found against C. O. Ringer, the husband of Emma Ringer, and in favor of Diddock. Judgment was entered accordingly. From the judgment, George W. Wilkin and Lila J. Wilkin have appealed.

[1] When the appellants Wilkin first made their appearance in the action, they moved for a change of venue to Idaho county, the place of their residence. The motion was denied, and the denial is here assigned as error. The action of the court in this regard is not subject to review. No appeal was taken from the order of the court within 60 days from the time the order was made and entered on

the minutes of the court, as required by C. L. § 4807.

In the deed of conveyance executed by appellants for the Idaho county land there was a misdescription, in that the property was described as being located in section 1 of a certain township, instead of section 21. It had been admitted by respondents in the pleadings that the misdescription had been made by mistake. Respondents were permitted to prove the condition of the property described in the original deed, and, over objection of appellants, to state the location of the land. This was error, since under the pleadings the alleged misrepresentations were not directed to this land, and its location or condition was wholly immaterial.

[2] Respondent Mrs. Ringer became the owner of the Lewiston property, about 18 months before the transaction here in controversy occurred, by means of a trade or exchange of properties with one Dr. Alley. Over objection of appellants, she was permitted to testify as to the valuation placed upon the Lewiston property in the previous trade with Alley. Witness Alley was also permitted, over objection, to testify as to the valuation of this property in his trade with Mrs. Ringer. The reception of this testimony was error. Not only was the time of the exchange too remote for testimony with respect to the transaction to be relevant, but the evidence was not competent. The price paid for property is incompetent as evidence of its market value. *Mattern v. Alderson et al.*, 18 Cal. App. 590, 123 Pac. 972; *Wichita Falls, etc., Co. v. Wyrick* (Tex. Civ. App.) 147 S. W. 730; *Texarkana, etc., Co. v. Neches Iron Works*, 57 Tex. Civ. App. 249, 122 S. W. 64; *Galliers v. Chicago, B. & Q. R. Co.*, 116 Iowa, 319, 89 N. W. 1109.

[3] On direct examination of witness Booth, called on behalf of respondents, he was permitted to state that he had made an estimate of the cost of construction of the dwelling house upon the Lewiston property. Over objection of appellants, the witness was permitted to answer the following question:

"Q. I will ask you, Mr. Booth, if you know the value of that house on the 20th day of April, 1915? * * * A. The figures that I have made, \$3,900."

After argument by counsel, the record contains the following:

"The Court: Gentlemen, the court has ruled on this, and there is no use to go into what your figures show. Tell the value of that house, Mr. Booth, on the 20th day of April, 1915.

"A. The cost of that house would be \$3,900, and contractor's profit \$395, making a total of \$4,485."

This witness, in the course of his examination, was also permitted to answer the fol-

lowing question, over objection of appellants that it was incompetent and immaterial:

"Q. Taking into consideration the changes or improvements that they have made there, I will ask you to state what in your opinion was the value of the barn on the 20th of April, 1915? A. About \$350."

And again the witness was permitted, over objection, to answer the following questions:

"Q. What in your judgment would you say that cellar was worth on the 20th day of April, 1915? * * * A. I have the foundation and basement together at \$1,500.

"The Court: I do not care what they cost, but what was it worth?

"A. That is the only way I can tell what a thing is worth. Figure up so many yards of excavation, so many perch of rock, etc.

"Mr. Ailshie: I move to strike all that on the ground that it doesn't establish value.

"The Court: Mr. Booth, do you know the value of that house and lot on the 20th day of April, 1915?

"A. You mean the selling value?

"The Court: Yes.

"A. No, sir.

"Q. I will ask you, Mr. Booth, if building material is more expensive now, and whether or not it would cost more to build that house now, than it would have on the 20th day of April, 1915.

"Mr. Ailshie: Objected to as incompetent and an attempt to show value by comparisons, which is not admissible, and on the further ground that the witness says he doesn't know the market value of the property on the 20th day of April, 1915.

"The Court: Answer the question."

The action of the court in permitting the witness to answer these questions was error. The issue, for the proof of which the testimony was offered, was the market value of the property conveyed to appellants by respondents on the 20th day of April, 1915. This property consisted of certain lots upon which the buildings and cellar were located. Manifestly the cost of the buildings and the cost of excavating the cellar do not tend to prove market value. In cases where it is impossible to prove market value of property, such evidence might be admissible as tending to prove actual value. Moreover, evidence to be competent and material on this issue must tend to prove the market value of the property as a whole. Proof cannot be directed to the value of the different portions of the property segregated from the remainder. *Devou v. City of Cincinnati*, 162 Fed. 633, 89 C. C. A. 425; *Sloan v. Baird*, 12 App. Div. 481, 42 N. Y. Supp. 38, affirmed 162 N. Y. 327, 56 N. E. 752. See, also, *Sutherland on Damages*, vol. 2 (4th Ed.) §§ 445-448, on proof of value generally.

[4] Upon cross-examination, after this wit-

ness had stated that he did not know anything about market values, and that the only way he arrived at values was by figuring as he would in adjusting fire insurance losses, appellants moved to strike the evidence of the witness as to the value of the property, on the ground that it was not directed to the market value. The motion was denied. This motion should have been granted, and refusal to grant it was error.

[5] Among the instructions to the jury is found the following:

"You are instructed, gentlemen of the jury, that if the defendants George W. Wilkin and Lila J. Wilkin, his wife, employed and authorized the defendant A. H. Diddock to exchange their property and in pursuance of that authority A. H. Diddock induced the plaintiffs to exchange the property of plaintiffs for the property of defendants George W. Wilkin and Lila J. Wilkin, and said A. H. Diddock made false and fraudulent representations about the property of the said defendants George W. Wilkin and Lila J. Wilkin, his wife, upon which plaintiffs relied, and which induced them to exchange their property for the property of the said defendants Wilkin and wife, then the defendants George W. Wilkin and Lila J. Wilkin would be responsible for that fraud, notwithstanding there were no instructions given to said defendant A. H. Diddock by the defendants George W. Wilkin and Lila J. Wilkin, his wife, which authorized him to make fraudulent representations, and notwithstanding the defendants George W. Wilkin and Lila J. Wilkin did not know that the said A. H. Diddock practiced those fraudulent representations. Employing him as agent, or as their agent, to do that thing, they became responsible for the methods which their agent adopted in doing that thing."

This instruction was error. The rule adopted by this court in relation to the liability of an owner of property for fraudulent representations made by a broker, in effecting a sale or exchange thereof, will be found in the recent case of *Dellwo v. Petersen*, 32 Idaho, —, 180 Pac. 167.

[6] The court refused to give the following instruction requested by appellants:

"I instruct you that where the same party acts as agent for each of two principals, with their knowledge and consent, both are bound by his acts, and neither can recover from the other for any statements or representations made by him to the other, and that, where an agent is acting for each of two principals, neither principal is liable to the other for his acts. And I instruct you that if you find from the evidence in this case, by a preponderance of the evidence, that the defendant Diddock was acting as agent for the defendant George W. Wilkin, and was at the same time acting as agent for the plaintiff Emma Ringer in respect to the transactions alleged in the complaint, and that she had knowledge that he was so acting for the defendant Wilkin, then the defendant Wilkin would not be liable for any

acts or representations of the defendant Diddock."

Respondents denied that defendant Diddock was their agent, but in view of the fact that there was evidence produced at the trial tending to prove that he was the agent of respondents and appellants, with their knowledge and consent, and that there was a failure of proof to show fraudulent collusion between Diddock and appellants this instruction was pertinent and should have been given. Where an agent is acting for two parties with adverse interests with respect to the same transaction, with knowledge and consent of both, each is charged with notice of that of which the agent becomes cognizant during the progress of the negotiations. As a general rule, it is true, also, that neither principal is responsible for the tortious acts of an agent so situated; but this rule is applicable only in the absence of collusion or direct participation of one of the principals in the tortious acts of the agent. *Pine Mountain Iron & Coal Co. v. Bailey*, 94 Fed. 258, 36 C. C. A. 229; *Vercruysse et al. v. Williams*, 112 Fed. 206, 50 C. C. A. 486; *In re Cotton Mfrs.' Sales Co. (D. C.)* 209 Fed. 629; *Hess v. Conway*, 92 Kan. 787, 142 Pac. 253; *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 75; *Austin v. Rupe* (Tex. Civ. App.) 141 S. W. 547; *Blair v. Baird*, 43 Tex. Civ. App. 124, 94 S. W. 116.

At the close of the trial, the appellants Wilkin moved for a directed verdict, on the ground that there had been no substantial evidence introduced showing or tending to show that any false or fraudulent representations or misrepresentations had been knowingly made by or on the part of appellants, and that there was no evidence of any nature which would tend to prove that appellants caused respondents to forego the ordinary methods of investigation to learn the condition of the property, or persuade them from making the necessary inspection and examination. The motion should have been granted as to appellant Lila J. Wilkin on the first ground suggested. The record is entirely silent as to any representations made by her in regard to the transaction. How-

ever, we think the court did not err in refusing to grant the motion as to appellant George W. Wilkin.

The last specification in the brief of appellants to the effect that the evidence is insufficient to support the verdict, raises the same question as is presented by the motion for a directed verdict. In the case of *Dellwo v. Petersen*, supra, it was held that, in order to hold the principal for the fraudulent representations made by a real estate broker, it is necessary to be able to trace some connection between the principal and the agent with regard thereto, and thereby charge the former with responsibility for what the agent may have said or done.

In this case there is evidence to the effect that Wilkin gave the real estate agent a description of the property owned by him, which property it was proposed to exchange for the property of respondents. It further appears that Wilkin also informed the agent that he had no personal knowledge of the condition of the property, that he had never seen the same, and that the description he had furnished was the same as that given him by an agent of the former owner of the property. Respondents admit that the real estate broker informed them that he had no personal knowledge of the property, and that the description he gave them was that furnished by Wilkin; but they deny that he also informed them that Wilkin did not claim to have any personal knowledge of the condition of the property. In that state of the evidence, we do not think the appellant George W. Wilkin was entitled to a directed verdict, for by furnishing the description to the broker it may at least be inferred, that he authorized the broker to furnish the same to respondents, and in such a manner that respondents might rely thereon, so that the question of his responsibility was one for the jury.

The judgment is reversed, with instructions to dismiss the action as to Lila J. Wilkin. Costs awarded to appellants.

MORGAN, C. J., and BUDGE, J., concur.

**STOREY v. UNITED STATES FIDELITY
& GUARANTY CO. OF BALTI-
MORE, MD.**

(Supreme Court of Idaho. Sept. 20, 1919.)

**1. ATTORNEY AND CLIENT §86—STATUTORY
REGULATION OF STIPULATIONS RELATES TO
THOSE EXECUTED IN PENDING ACTION.**

Comp. Laws, § 3998, subd. 1, refers to stipulations and agreements concerning the conduct and management of an action pending at the time the stipulation was made.

**2. ATTORNEY AND CLIENT §86, 101(1)—ATTORNEY HAS NO POWER TO COMPROMISE OR
RELEASE PENDING ACTION.**

An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, but has not power to compromise or release the cause of action itself.

**3. ATTORNEY AND CLIENT §101(1)—ATTORNEY HAS NO POWER TO SETTLE ANOTHER
CAUSE OF ACTION.**

An attorney employed to prosecute or defend in one action has no authority, by virtue of such employment, to compromise or settle another cause of action.

**4. ATTORNEY AND CLIENT §108—RATIFICA-
TION OF UNAUTHORIZED ACT OF ATTORNEY.**

Ratification by a client of the unauthorized act of his attorney cannot be inferred, in the absence of knowledge of all the material facts on the part of the principal.

Appeal from District Court, Ada County;
Carl A. Davis, Judge.

Action by Charles Storey against the United States Fidelity & Guaranty Company of Baltimore, Md. Judgment for plaintiff, and defendant appeals. Affirmed.

S. L. Hodgkin, of Twin Falls, and J. T. Pence, of Boise, for appellant.

Martin & Martin, of Boise, for respondent.

RICE, J. On May 22, 1911, Charles Storey, the respondent herein, obtained a judgment in the district court against Elias Marsters in the sum of \$2,871.67. To enforce his judgment, he caused a writ of execution to issue and to be placed in the hands of the sheriff, who levied upon certain real property and advertised it for sale. Thereupon Addie Marsters, wife of the judgment debtor, caused a writ of injunction to issue out of the district court, restraining Storey and the sheriff from selling the property levied upon; she claiming that it was her separate property and not liable to execution for her husband's debts. A trial was had, and a decree entered dissolving the injunction. Addie Mar-

sters thereupon perfected an appeal of the injunction action to this court. While this appeal was pending, C. F. Koelsch, attorney for Elias Marsters, made overtures to Martin & Martin, attorneys for Storey, for settlement of the judgment against Marsters. Thereafter, with the consent of his wife, Marsters paid the judgment and caused her appeal to be dismissed.

After payment of the judgment, and dismissal of the appeal, Storey brought action against appellant on the injunction bond for the recovery of attorney's fees expended by him in procuring dissolution of the injunction. Appellant answered, denying the allegations of the complaint, and alleging affirmatively that its obligation on the bond, if any was incurred, was waived by means of a compromise made between the attorneys for Storey and Marsters, which resulted in the payment of the judgment against Elias Marsters and dismissal of the Addie Marsters appeal.

Upon the trial of the action, Mr. Koelsch testified that prior to the payment of the judgment by Mr. Marsters he had a conversation with T. L. Martin, of the firm of Martin & Martin, attorneys for Storey, in substance as follows: That he said to Mr. Martin, "If I can get Mr. Marsters to pay the judgment, will you hold him any further, or will you hold him on the injunction bond?" To which Mr. Martin replied: "We ought to; but, if you see that the judgment is paid, we will drop that." It is not contended that Storey had previously authorized Mr. Martin to make any such agreement. Upon motion of respondent, the foregoing testimony, as well as all other testimony relating to the conversation or agreement between Mr. Koelsch and Mr. Martin, was stricken by the court. Judgment was entered for the plaintiff. The appeal is from the judgment.

[1] Respondent contends that evidence of the alleged agreement or stipulation, waiving the right of action on the injunction bond, was not admissible, because not reduced to writing and filed in court, and invokes the protection of C. L. § 3998, which is as follows:

"An attorney and counselor has authority:

"1. To bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise.

"2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment."

We think that subdivision 1 of the section quoted has no application to the alleged agreement in this case. The alleged stipulation or

agreement was not made in this action, but in another independent action. This action was not commenced at that time. This statute has reference to stipulations concerning the conduct and management of the action itself, made during the pendency of the action, and has no reference to stipulations or agreements between counsel with reference to matters not involved in the pending litigation.

But, aside from the statute, the attorney had no authority to bind his client in the matter of the release of his right of action on the bond. The record is silent as to whether the relationship of attorney and client existed at the time the alleged agreement was made with reference to the matter involved in this suit.

[2] The rule generally accepted in this country is to the effect that an attorney has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, but has no power to compromise or release the cause of action itself. *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72; *Tobler v. Nevitt*, 45 Colo. 231, 100 Pac. 416, 23 L. R. A. (N. S.) 702, 132 Am. St. Rep. 142, and note, 16 Ann. Cas. 925; *Bigler v. Toy*, 68 Iowa, 687, 28 N. W. 17; *Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 31 L. R. A. (N. S.) 523, and note, 137 Am. St. Rep. 549; *Pomeroy v. Pres-*

cott, 106 Me. 401, 76 Atl. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574, and note; *Thornton on Attorneys at Law*, vol. 1, § 215.

[3] If this principle be true when applied to causes of action involved in litigation, there can be no question that an attorney employed to prosecute or defend in one action has no authority, by virtue of such employment, to compromise or settle another cause of action. *Marbourg v. Smith*, 11 Kan. 554.

[4] There is no evidence in the record that respondent ratified the unauthorized agreement of his attorney. It is true that he received the proceeds of the judgment, but he received no more than was due thereon. The record shows that he had no knowledge of any agreement to waive his right of action on the bond. Ratification by conduct cannot be inferred, in the absence of knowledge of all the material facts on the part of the principal. *U. S. v. Beebe*, 180 U. S. 843, 21 Sup. Ct. 371, 45 L. Ed. 563; *Findlay v. Hildenbrand*, 17 Idaho, 403, 105 Pac. 790, 29 L. R. A. (N. S.) 400.

The court committed no error in sustaining the motion to strike the testimony with reference to the alleged stipulation or agreement.

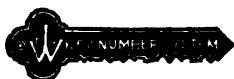
We find no reversible error in the record. The judgment is affirmed. Costs awarded to respondent.

MORGAN, C. J., and BUDGE, J., concur.

END OF CASES IN VOL. 183

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INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digests, the Key-Number Series and
Prior Reporter Volume Index-Digests

ABANDONMENT.

See Criminal Law, ¶1178; Injunction, ¶118; Municipal Corporations, ¶865; Vendor and Purchaser, ¶86, 191, 296, 334, 336.

ABATEMENT AND REVIVAL.

See Pleading, ¶93.

IV. TRANSFER OR DEVOLUTION OF TITLE, RIGHT, INTEREST, OR LIABILITY.

¶41 (Okl.) An action to quiet title does not abate by transfer of any interest of plaintiff pending the action.—Cushing v. Newbern, 183 P. 409.

¶47 (Okl.) If plaintiff has transferred his interest pending his action to quiet title, action may be continued in name of original party, or court may allow transferee to be substituted in action under Rev. Laws 1910, § 4695.—Cushing v. Newbern, 183 P. 409.

ACCOUNT.

See Action, ¶50; Attorney and Client, ¶144; Equity, ¶39; Executors and Administrators, ¶315; Joint Adventures, ¶4; Jury, ¶14; Limitation of Actions, ¶65; Lis Pendens, ¶26; Partnership, ¶327; Pleading, ¶330.

ACCOUNT, ACTION ON.

See Limitation of Actions, ¶53, 183, 197.

ACCOUNT STATED.

See Trial, ¶404.

¶1 (Cal.) The theory upon which an action of account stated is allowed is that transactions have occurred between parties from which the relation of debtor and creditor has arisen, that one or both have rendered or made statements specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a sum is due from him on such account, together with express or implied promise to pay the same.—Bennett v. Potter, 183 P. 156.

Originally an account stated could exist only when the accounts were mutual, or where there was more than a single item, but it has now become settled there can be an account stated where but a single item is included or referred to therein.—Id.

¶3 (Cal.) There can be no account stated where there have been no previous transactions between the parties from which the relation of debtor and creditor could arise.—Bennett v. Potter, 183 P. 156.

¶4 (Cal.) An account stated may be shown by proof of an oral agreement as to the amount

183 P.—63

due, although no writing is exhibited at the time.—Bennett v. Potter, 183 P. 156.

¶7 (Cal.) Account stated cannot become a substitute for an action of debt upon a written promise in writing, the written promise being a higher evidence of the debt, and the debtor being already bound thereby, and there being no uncertainty to be settled which would constitute a consideration for a new oral promise to pay.—Bennett v. Potter, 183 P. 156.

ACKNOWLEDGMENT.

See Chattel Mortgages, ¶61, 85, 90; Vendor and Purchaser, ¶231.

ACTION.

See Abatement and Revival; Animals, ¶100; Dismissal and Nonsuit.

I. GROUNDS AND CONDITIONS PRECEDENT.

¶1 (Okl.) One cannot maintain a claim for damages based upon his own wrong, or caused by his own neglect.—Hejduk v. Snyder, 183 P. 923.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

¶48(2) (Wash.) Where an apartment house owner assaulted a grocer making a delivery to a tenant, and prevented his making the delivery, the grocer could not in one complaint ask damages for the assault and battery and also that the owner be enjoined from interfering with his use of the common ways in the building, as such two causes of action cannot be said to arise out of the "same transaction" within the meaning of Rem. Code 1915, § 296.—Konick v. Champneys, 183 P. 75.

¶50(7) (Okl.) In an action for cancellation of an oil and gas lease, and where an accounting of oil and gas produced pending the litigation is ancillary, all parties producing and purchasing such oil and gas with notice may be joined in a supplemental bill for accounting.—Probst v. Bearman, 183 P. 886.

ADJOINING LANDOWNERS.

See Boundaries; Fences, ¶6.

ADMINISTRATION.

See Executors and Administrators.

ADMIRALTY.

I. JURISDICTION.

¶20 (Wash.) Amendment to Judiciary Act Oct. 6, 1917 (U. S. Comp. St. 1918, §§ 991 (3), 1233) giving federal courts jurisdiction over all civil causes of admiralty and maritime jurisdiction, saving to claimants the rights and

remedies under the Workmen's Compensation Law of any state, does not abolish admiralty or common-law remedies for maritime injuries, but merely gives injured employé additional remedy of state compensation act, where it affords a remedy.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

Stevedore injured in hold of steamship may sue employer at common law notwithstanding amendment to federal Judiciary Act of Oct. 3, 1917 (U. S. Comp. St. 1918, §§ 991 (3), 1233), giving federal courts jurisdiction over all civil causes of admiralty and maritime jurisdiction, and saving to claimants the rights and remedies under the Workmen's Compensation Act of any state, the Workmen's Compensation Act of this state being inapplicable to such injury.—*Id.*

ADMISSIONS.

See Appeal and Error, ¶768, 823.

ADOPTION.

See Bastards, ¶13; Evidence, ¶291; Parent and Child, ¶2; Wills, ¶734.

¶20 (Cal.) Adoption establishes legal relation of parent and child, including obligation of parent to support child.—*In re Ballou's Estate*, 183 P. 440.

¶21 (Wash.) Under Rem. & Bal. Code, §§ 1341, 1699, an adopted sister is entitled to inherit along with the natural brothers and sisters of one dying without issue, husband, wife, father, or mother.—*In re Masterson's Estate*, 183 P. 93.

ADVERSE POSSESSION.

See Boundaries, ¶46; Waters and Water Courses, ¶151, 152.

I. NATURE AND REQUISITES.

(F) Hostile Character of Possession.

¶66(1) (Cal.App.) In action to quiet title by one claiming by adverse possession, question of whether or not plaintiff's original entry was by virtue of an agreement for a boundary line has no bearing upon the character of his adverse possession up to such line.—*Doyle v. Bradshaw*, 183 P. 185.

(G) Payment of Taxes.

¶94 (Cal.App.) Failure to pay taxes where none are levied does not defeat a claim of adverse possession under Code Civ. Proc. § 325.—*Elliott v. McIntosh*, 183 P. 692.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶113 (Cal.App.) In ejectment, deeds and mortgages covering lots adjoining the one in dispute, merely what they purported to be, and not admissions against interest on the part of plaintiff's predecessor, held inadmissible.—*Elliott v. McIntosh*, 183 P. 692.

AFFIDAVITS.

See Appeal and Error, ¶553, 1024, 1054; Highways, ¶30; Indictment and Information, ¶135.

AGENCY.

See Principal and Agent.

ALTERATION OF INSTRUMENTS.

See Guaranty, ¶54; Principal and Surety, ¶101.

¶20 (Cal.App.) The alteration of a negotiable instrument, by which its meaning and effect is changed, avoids the instrument as to any nonconsenting party thereto.—*Nissen v. Ehrenfort*, 183 P. 956.

ALTERNATIVE METHOD.

See Appeal and Error, ¶757.

ANCILLARY PROCEEDINGS.

See Jury, ¶14.

ANIMALS.

See Carriers, ¶215-228; Constitutional Law, ¶237; Criminal Law, ¶519; Damages, ¶131; Justices of the Peace, ¶144; Municipal Corporations, ¶604, 605, 625; Pleading, ¶35; Replevin, ¶72.

¶2 (Cal.App.) Dogs constitute property of their owners, and are recognized as having pecuniary value, depending on their market value, or some special or pecuniary value to their owners, to be ascertained by reference to their usefulness or other qualities.—*Roos v. Loesser*, 183 P. 204.

¶69 (Cal.App.) The owner of a leopard, knowing it was untamed, vicious, and dangerous, was bound to so guard it as absolutely to prevent occurrence of injury to others through such vicious acts as it would naturally be inclined to commit.—*Opelt v. Al. G. Barnes Co.*, 183 P. 241.

¶70 (Cal.) Actual notice to the owner or keeper that a dog is vicious is not necessary; notice to or knowledge of his wife while she was with his knowledge in custody or control of the dogs, or to his agent in such control, being sufficient.—*Smith v. Royer*, 183 P. 660.

¶71 (Cal.App.) If one injured by an animal, wild, vicious, and dangerous to the knowledge of its owner, imprudently or negligently placed himself in a position to be attacked, or by his own negligence contributed to his injury, the owner may be exonerated.—*Opelt v. Al. G. Barnes Co.*, 183 P. 241.

¶72 (Cal.) The harbinger and keeper of a dog known by him to be vicious is responsible for injury caused by it, regardless of ownership.—*Smith v. Royer*, 183 P. 660.

Where defendant was the head of a family having possession and control of a house and premises, and suffered or permitted to be kept thereon the dog which attacked and personally injured plaintiff, the fact that plaintiff's son, who was away at school at the time of the injury, testified to his own ownership of the dog, did not present a conflict with other testimony showing that defendant kept and harbored the dog.—*Id.*

¶74(5) (Cal.) In a personal injury action, where evidence showed that plaintiff was attacked by certain dogs answering description of those defendants had harbored on the ranch for two or three years prior to such injury, it cannot be urged that there was no evidence showing that the dogs harbored by defendants were the dogs which attacked plaintiff.—*Smith v. Royer*, 183 P. 660.

In an action for personal injury resulting from the attack by defendant's dogs, evidence held to show that defendant's wife was in charge of the premises and had control of the dogs, that defendant was the head of the household, with authority over the premises superior to that of his wife and foreman, and that they had knowledge of the dogs' viciousness, which must be imputed to defendant.—*Id.*

In an action for personal injuries resulting from an attack by defendants' vicious dogs, evidence held to present no substantial conflict on the question of defendants' liability, based on knowledge of the dogs' viciousness.—*Id.*

¶74(5) (Cal.App.) Evidence held to sustain finding that plaintiff, a boy of 10½ years, injured at a circus by a leopard reaching out a paw between bars of its cage, when he went within the guard rope, failed to use ordinary care.—*Opelt v. Al. G. Barnes Co.*, 183 P. 241.

¶74(8) (Cal.App.) It cannot be said as matter of law at what age a boy would be possess-

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

ed of such intelligence, foresight, and judgment as to be charged with negligence in getting inside the guard rope, close to the cage of a leopard in a circus.—*Opelt v. Al. G. Barnes Co.*, 183 P. 241.

§81 (Cal.App.) The owner of a dog is liable for injuries caused by it only if it is vicious and he has notice thereof.—*Roos v. Loeser*, 183 P. 204.

That a dog on the street killed by another vicious dog is not licensed, as required by ordinance, does not prevent recovery for its death; absence of the license not contributing to the attack.—*Id.*

§82 (Cal.App.) Knowledge by servant in charge of master's dog of its vicious character will be imputed to the master.—*Roos v. Loeser*, 183 P. 204.

§100(1) (Okla.) The proceeding provided by Rev. Laws 1910, §§ 153, 154, relating to restraining of stock for trespassing, and permitting a justice of the peace to assess the damages, is a "special proceeding" before the justice, as defined by section 4645, and is not an "action," as defined by section 4644.—*Hejduk v. Snyder*, 183 P. 923.

ANTICIPATORY BREACH.

See Sales, §409.

APPEAL AND ERROR.

See Certiorari; Courts, §212; Criminal Law, §1023-1186; Exceptions, Bill of; Justices of the Peace, §144; Limitation of Actions, §130; Mandamus, §4; Pleading, §34, 214; Prohibition, §3.

For review of rulings in particular actions or proceedings, see also the various specific topics.

III. DECISIONS REVIEWABLE.

(E) Nature, Scope, and Effect of Decision.

§103 (Cal.) An order denying a motion to strike out parts of the complaint is not appealable under Code Civ. Proc. § 963.—*California Portland Cement Co. v. Boone*, 183 P. 447.

§110 (Cal.App.) An order denying motion for new trial is not appealable.—*Nadeau v. Lynch*, 183 P. 278.

§110 (Cal.App.) An order denying motion for new trial made January 13, 1917, is not an appealable order in view of Code Civ. Proc. § 963, as amended by St. 1915, p. 209, and an appeal therefrom must be dismissed.—*Saylor v. Taylor*, 183 P. 843, 845.

IV. RIGHT OF REVIEW.

(B) Estoppel, Waiver, or Agreements Affecting Right.

§154(1) (Okla.) An act of defendant, whereby he recognizes the validity of a judgment against him, operates as a waiver of his right to prosecute an appeal therefrom, or to bring error to reverse it.—*Home Builders' Lumber Co. v. White*, 183 P. 725.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

§169 (N.M.) Laws 1917, c. 43, § 37, dispenses with formal exceptions to trial rulings, but does not authorize Supreme Court's determination of an issue not raised and passed upon in district court.—*Blacklock v. Fox*, 183 P. 402.

§171(1) (Cal.App.) An action tried in lower court on the theory that the relation between plaintiff and defendant was that of agent and principal, the theory that the relation of the parties was that of purchaser and vendor will not be considered on appeal.—*United States Farm Land Co. v. Darter*, 183 P. 696.

§171(3) (N.M.) Where a material fact omitted from a complaint is fully litigated without objection as if it had been put in issue by pleadings, it is duty of Supreme Court on appeal to treat complaint as having been properly amended in aid of the judgment.—*Springer v. Wasson*, 183 P. 398.

(B) Objections and Motions, and Rulings Thereon.

§187(3) (Wash.) Surety on contractor's bond cannot complain of failure to make contractor a party to an action on the bond as required by bond where court made order that contractor be made party defendant, which order was complied with, and an unsuccessful effort was made to get service on him, and where, though contractor was called as a witness by the surety, surety did not insist that contractor be joined as party to the action.—*Columbia Security Co. v. Aetna Accident & Liability Co.*, 183 P. 137.

§193(5) (Cal.App.) The objection that complaint against an executor states no cause of action, because not alleging presentation of claim against estate, as required by Code Civ. Proc. § 1502, cannot be made for the first time on appeal.—*Burmester v. McNear*, 183 P. 832.

§193(9) (Nev.) An objection that complaint utterly failed to state a cause of action may be raised for the first time on appeal.—*Nielsen v. Rebard*, 183 P. 984.

§195 (Cal.App.) Where defendant insurance company amended its answer, so as to allege false representations by insured without objection by plaintiff, and evidence was received on the issue without objection, the point that the incontestable clause of the policy eliminated such defense cannot be first raised on appeal.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

§203(3) (Cal.App.) Court's action in requiring 9 year old child, called by plaintiff as a witness, to be withdrawn without an examination as to whether she was mentally capable of receiving an impression and truthfully relating it, where not objected to, will be presumed to have been acquiesced in by plaintiff; such act not being deemed excepted to under Code Civ. Proc. § 647.—*Exposito v. United Railroads of San Francisco*, 183 P. 576.

§209(1) (N.M.) The Supreme Court on appeal will not determine whether there is sufficient evidence to support a finding of the court or its judgment, unless such question is submitted to and has been decided by trial court by some proper proceeding calling for a decision.—*Blacklock v. Fox*, 183 P. 402.

§231(2) (Cal.App.) In an action against executors, the objection in the trial court that no proper, or any foundation has been laid, either for the suit, or the cause of action, or the testimony, or the evidence, is too general to require review of the objection that the complaint states no cause of action, because it does not allege compliance with Code Civ. Proc. § 1502, requiring proof of filing or presentation of claim.—*Burmester v. McNear*, 183 P. 832.

§233(1) (N.M.) Whether there is material evidence to support a finding may be raised in any appropriate manner, as by demurrer to evidence, motion for nonsuit, or dismissal, or by objection or exception for want of sufficient evidence to support finding; the essential thing being that trial court's attention be called to fact of error in finding and pointing out the error.—*Blacklock v. Fox*, 183 P. 402.

§240 (Or.) Where no application to set aside the order of confirmation of sale of real property was made, and there was no attempt to call the lower court's attention to want of service on defendants of motion to confirm as violating the court rules, and there being no action in the lower court raising and reserving this or other questions, the review is limited to jurisdictional questions and sufficiency of pleadings.—*Roseburg Nat. Bank v. Camp*, 183 P. 665.

(C) Exceptions.

⇒269 (Wash.) Where appellant did not except to a judgment on the ground that it did not provide for interest, and that question was apparently not raised below, it will not be considered upon appeal.—*Petersen v. Pacific American Fisheries*, 183 P. 79.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

⇒339(2) (Idaho) Under Comp. Laws, § 4807, an appeal from an order refusing to grant a change of the place of trial must be taken within 60 days after the order is made and entered upon the minutes of the court or filed with the clerk.—*Ringer v. Wilkin*, 183 P. 986.

(D) Writ of Error, Citation, or Notice.

⇒422 (Cal.App.) Where plaintiff's notice of appeal conformed precisely to the requirements of Code Civ. Proc. § 941b, and required no amendment, her motion to amend the notice to embody a notice to the clerk, requesting the transcript of the testimony required by section 953a, under which plaintiff had intended to perfect her appeal, was properly denied.—*Chapuis v. Pesante*, 183 P. 247.

⇒428(1) (Cal.App.) Where the person who desired to serve defendant's notice of appeal proceeded to the office of the clerk of the court, and arrived there about the time the office closes, and after searching for a deputy returned to find the office closed, so that she slipped the notice under the door, there was no legal filing of the notice as of that day, the deputy clerk having placed the filing mark on the notice the next day; delivery being essential to "filing."—*W. J. White Co. v. Winton*, 183 P. 277.

(E) Entry, Docketing, and Appearance.

⇒434 (Cal.App.) Where appellants filed no points and authorities in support of their appeal and did not appear at the calling of the calendar to make oral argument, the judgment should be affirmed.—*Collins v. John Roberts Co.*, 183 P. 829.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

⇒461 (N.M.) In view of Laws 1917, c. 43, §§ 15, 17, relating to costs and supersedeas bond, a bond conditioned as a supersedeas bond may be sufficient as a cost bond, where, by its terms, there is an undertaking to pay all costs that may be adjudged against the appellant in the Supreme Court.—*Rogers v. Herbst*, 183 P. 749.

⇒465(1) (N.M.) Where the amount of the judgment is for a fixed sum, a supersedeas bond, under Laws 1917, c. 43, § 17, must be double the amount of such judgment, and a bond for a less amount does not have the effect of superseding the judgment.—*Rogers v. Herbst*, 183 P. 749.

⇒468 (N.M.) Where an appeal is taken by three parties, against whom a joint and several judgment was rendered, and only one of such appellants files a cost or supersedeas bond, the other appellant cannot join therein, or file a new bond after time limited by statute for giving of such bonds, and appeal as to defaulting appellant will, on motion, be dismissed.—*Rogers v. Herbst*, 183 P. 749.

⇒479(1) (Wash.) A supersedeas should always be allowed where the delay occasioned by appeal may be met by money award, and should be granted upon plaintiff's appeal from a nonsuit in an action where it had garnished money due defendant.—*State v. Superior Court for King County*, 183 P. 74.

⇒487 (Wash.) Where the court enters a nonsuit without fixing a supersedeas bond as prescribed by Rem. Code 1915, § 1722, plaintiff is powerless to retain control over garnished money, so that it will be available in case ap-

peal is successful.—*State v. Superior Court for King County*, 183 P. 74.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

⇒499(3) (Cal.App.) Although a bill of exceptions does not afford insufficiency of evidence to sustain the findings and judgment, as required by Code Civ. Proc. § 648, no specifications are necessary to enable the reviewing court to consider errors of law in the rulings of the trial court on defendant's objection to the introduction of evidence, motion to strike them from the record, and for nonsuit on the ground of irrelevancy and immateriality, in the absence of proper foundation.—*Western California Land Co. v. Welch*, 183 P. 169.

⇒502(4) (Cal.App.) A copy of notice of intention to move for new trial incorporated in the transcript, but not made a part of the judgment roll or a part of the bill of exceptions, cannot be considered as a part of the record on appeal from order granting the motion.—*Cormond v. United Railroads of San Francisco*, 183 P. 218.

(B) Scope and Contents of Record.

⇒519 (Ok.) An agreed statement of facts, not being a part of the record, unless made so by bill of exceptions or case-made, cannot be considered on error, although a copy of it is attached to transcript of record.—*Howe v. Tiger*, 183 P. 983.

The "record" proper in a civil action does not include an agreed statement of facts.—*Id.*

⇒529(1) (Wyo.) Record on appeal certified to by clerk as containing true copy of judgment "entered in Journal 4, at page 4," and containing the original paper signed by court, preceded by statement that it was entered by court, "which judgment is as follows," and having upon it notation that it was entered upon the court journal, held to identify such writing as that entered on journal as the judgment.—*Kendrick v. Healey*, 183 P. 37.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

⇒553(1) (Cal.App.) Where an appeal is taken on typewritten transcript pursuant to Code Civ. Proc. § 953a, the trial court's certificate that certain notices and affidavits in transcript are correct and were considered in connection with "other testimony" held insufficient to present such other testimony for appellate court's consideration.—*Nadeau v. Lynch*, 183 P. 278.

⇒555 (Wash.) Where the statement of facts has been stricken, the only question open for consideration is whether the findings support the judgment.—*Evans v. Rublee*, 183 P. 83.

(F) Making, Form, and Requisites of Transcript or Return.

⇒605 (Wyo.) Certificates of judge and clerk to record on appeal are not a part of the "record," within Sess. Laws 1917, c. 32, § 6, as amended by Sess. Laws 1919, c. 15, requiring "whole record to be paged and numbered consecutively."—*Kendrick v. Healey*, 183 P. 37.

(G) Authentication and Certification.

⇒612(2) (Cal.App.) Where order appealed from is subsequent to the judgment, and arises on a record outside the judgment, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made.—*Barnebee v. Hunstock*, 183 P. 951.

⇒612(3) (Wyo.) That certificate of judge to record was dated prior to certificates of clerk did not affect appeal; it being sufficient, under statute requiring record to "be certified to by the judge and clerk," that each certifies record to be true and correct within time for filing it, without regard to order in which they make certificates.—*Kendrick v. Healey*, 183 P. 37.

⇒612(5) (Wyo.) Clerk's certificate that "foregoing transcript is a true and correct transcript of all the testimony offered at the trial of the above-entitled cause," held sufficient compliance with Sess. Laws 1917, c. 32, § 5, requiring transcript to be certified to "as containing all the testimony offered at the trial"; the words used being an exact equivalent of words of statute.—Kendrick v. Healey, 183 P. 37.

(H) Transmission, Filing, Printing, and Service of Copies.

⇒624 (Wyo.) Order extending time for filing of record on appeal held to include extension of time for preparing and filing transcript of the testimony, under Sess. Laws 1917, c. 32, §§ 4, 5, and section 6 as amended by Sess. Laws 1919, c. 15.—Kendrick v. Healey, 183 P. 37.

Order extending time for filing of record may be made in chambers during vacation of court, and becomes effective upon the signing by judge within the original 70 days from the date of entry of judgment, even if not entered on the journal for some time thereafter.—Id.

(I) Defects, Objections, Amendment, and Correction.

⇒640 (Cal.App.) On appeal from order denying motion to vacate judgment, where transcript did not comply with Code Civ. Proc. § 953a, the proper procedure for District Court of Appeal is to affirm order appealed from.—Barnebee v. Hunstock, 183 P. 951.

⇒640 (Wyo.) Requirement that record be paged and numbered consecutively, under Sess. Laws 1917, c. 32, § 3, as amended by Sess. Laws, 1919, c. 15, is not jurisdictional for noncompliance with which appeal could be dismissed.—Kendrick v. Healey, 183 P. 37.

⇒649 (Wyo.) Record on appeal may, on proper showing and seasonable application, be withdrawn for amendment in accordance with the facts; but application to withdraw must definitely set forth specific amendment sought to be made, and must make it appear to court that amendment will cure substantial defect.—Kendrick v. Healey, 183 P. 37.

⇒654 (Wash.) Appellant, to secure relief under Rem. Code 1915, § 1730—8, from failure to serve abstract of record and statement of facts in compliance with sections 389, 393, must make an application to Supreme Court for leave to supply record, accompanying his application with the showing of excuse, and must obtain an order from Supreme Court, granting him leave so to do, which order may be made with or without terms.—Swanson v. Stubb, 183 P. 91.

⇒656(1) (Wyo.) Failure, through oversight, to number page in record, as required by Sess. Laws 1917, c. 32, § 6, as amended by Sess. Laws 1919, c. 15, can be cured, in Supreme Court without withdrawing record, by giving page number of preceding page and one-half, as 409½.—Kendrick v. Healey, 183 P. 37.

(K) Questions Presented for Review.

⇒684(2) (Cal.App.) Refusal of trial court to grant plaintiff's motion for jury trial in forma pauperis and denial of his motion for a continuance cannot be declared erroneous, where entire evidence on which the trial court acted is not presented to appellate court.—Nadeau v. Lynch, 183 P. 278.

⇒694(1) (Cal.) In the absence of a record showing the evidence, special findings of the jury are conclusive on appeal.—Nahhas v. Browning, 183 P. 442.

⇒694(1) (Cal.App.) On appeal from judgment roll alone, where there is no evidence before appellate court, court will not review findings on questions of fact.—In re Graham's Estate, 183 P. 952.

⇒709 (Cal.App.) Refusal of trial court to grant plaintiff's motion for jury trial in forma pauperis cannot be declared erroneous, where entire evidence on which the trial court acted is not presented to appellate court.—Nadeau v. Lynch, 183 P. 278.

(L) Matters Not Apparent of Record.

⇒714(5) (N.M.) A statement of a material fact in briefs of both parties, admitted to have been of stipulation in trial of case in district court, will be treated as a stipulated fact in Supreme Court, although not appearing in transcript.—Springer v. Wasson, 183 P. 398.

⇒714(6) (Cal.App.) Neither a stipulation as to the correctness of the transcript nor the certificate of the trial clerk that the papers in the transcript are true copies of the originals can supply what the law requires should be made to appear in the bill of exceptions.—Cormond v. United Railroads of San Francisco, 183 P. 218.

XI. ASSIGNMENT OF ERRORS.

⇒744 (Wyo.) The serving of specifications of error prior to filing of record on appeal was not ground for dismissal of appeal.—Kendrick v. Healey, 183 P. 37.

XII. BRIEFS.

⇒757(1) (Cal.App.) Where an appeal is taken under the alternative method, it is incumbent upon appellant to point out in the record the matter he relies upon to support his points.—Flickinger v. McKesson, 183 P. 195.

⇒757(1) (Cal.App.) Where a case is appealed on a typewritten transcript under Code Civ. Proc. § 953c, the brief must accurately present those portions of the record necessary for a decision.—Noyes v. Huffman, 183 P. 284.

⇒757(1) (Cal.App.) Where a case is appealed under the alternative method, court will not refer to portions of the record not printed in the brief but merely indicated by reference to pages of typewritten transcript.—Schultheiss Bros. Co. v. Steinberg, 183 P. 347.

⇒757(1) (Cal.App.) It is appellant's opening brief, and not his closing brief, in which, under Code Civ. Proc. § 953c, should be set out the portions of the record desired to be called to the court's attention.—Gustafson v. Wasson, 183 P. 352.

References to pages of the transcript do not satisfy requirement of Code Civ. Proc. § 953c, that the portions of the record desired to be called to the court's attention be set out in the briefs.—Id.

⇒757(1) (Cal.App.) Under Code Civ. Proc. § 953c, in filing briefs on appeal taken under the alternative method, both parties must print such portions of the record as they desire to call to the attention of the court, as in support of a contention that denial of defendant's motion for nonsuit was erroneous.—Schaad v. Barceloux, 183 P. 716.

⇒757(1) (Cal.App.) On an appeal under the alternative method, where a lengthy typewritten reporter's and clerk's transcript is presented as the record, appellant is only required to print in his brief such portions of the record as are needed to fairly and lucidly present the points upon which he relies.—McAuliff v. McFadden, 183 P. 870.

⇒757(2) (Cal.App.) Appellant's claim that material facts are admitted by the answer cannot be determined, where the pleadings are not printed in full in the briefs, since a careful comparison of the entire complaint with the entire answer is required.—McAuliff v. McFadden, 183 P. 870.

⇒757(3) (Cal.) The point of insufficiency of evidence to support finding cannot be considered; the appeal being based on a typewritten transcript, and the evidence not being printed in the brief, as required by Code Civ. Proc. § 953c.—Silverstin v. Kohler & Chase, 183 P. 451.

⇒757(3) (Cal.App.) Under the rule of Code Civ. Proc. § 953c, where an appeal is taken under the alternative method with a typewritten transcript of 289 pages, the District Court of Appeal should not be expected to explore, unaided by a statement in the briefs, such a volume of evidence to determine whether a find-

ing of fact by the trial court was supported by evidence.—*Walberg v. Underwood*, 183 P. 254.

☞757(3) (Okl.) Assignment of error in excluding evidence to prove defenses would not be considered, where counsel did not comply with Supreme Court rule 25 (165 Pac. ix), requiring party complaining of exclusion of evidence to set out in brief full substance of testimony and his specific objection thereto.—*Jackson v. Levy*, 183 P. 505.

☞766 (Cal.App.) For failure to comply with Code Civ. Proc. § 953c, and court rule 8 (176 Pac. ix), as to setting out in briefs portions of record desired to be called to court's attention, with index thereof, brief should be disregarded.—*Arthur v. Feterman*, 183 P. 307.

☞768 (Cal.App.) Where appellants' brief conceded the complaint in a claim and delivery case, sustained the judgment if there was sufficient evidence of plaintiff's right of possession, any error the trial court made, in a finding without evidence to sustain it, that defendants had taken the property from plaintiff's possession without his consent, is cured.—*Harmon v. Keogh*, 183 P. 201.

☞773(2) (Okl.) Where no briefs are filed as required by Supreme Court rule 7 (47 Okl. vi; 165 P. vii), the appeal will be dismissed for want of prosecution.—*Blanlot v. Carbon Coal Co.*, 183 P. 880.

☞773(4) (Cal.App.) Where no argument is presented for or against an appellant, judgment will be affirmed as to him.—*Schultheiss Bros. Co. v. Steinberg*, 183 P. 347.

☞773(4) (Cal.App.) Where appellants filed no points and authorities in support of their appeal and did not appear at the calling of the calendar to make oral argument, the judgment should be affirmed.—*Collins v. John Roberts Co.*, 183 P. 829.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

☞781(6) (Okl.) Where plaintiff in error enters into a written agreement of settlement of the judgment below, and such agreement is brought to attention of Supreme Court by proper motion, the appeal will be dismissed.—*Home Builders' Lumber Co. v. White*, 183 P. 725.

☞782 (Cal.App.) An appeal from an order denying a motion for new trial will be dismissed, when at the time the order was made there was no right of appeal from such order.—*McManaman v. Vickery*, 183 P. 229.

☞801(4) (Cal.App.) Ruling of the Supreme Court denying respondent's motion for dismissal of the appeal on the ground the transcript was not filed within the time prescribed by Supreme Court Rule 2 (176 Pac. vi), because it appeared the transcript was filed within 40 days after actual settlement of the bill of exceptions, cannot be considered as determinative of the merits of the appeal or the right of the appellate court to consider the bill of exceptions on final hearing; there being a question as to whether it was properly settled.—*Rossi v. Scott, Magner & Miller*, 183 P. 263.

XV. HEARING AND REHEARING.

☞823 (Cal.App.) It is not necessary to reverse a case because the record does not contain sufficient evidence of a fact of which there is no possible doubt; respondent's counsel asserting that it would have been proven by abundant evidence, if questioned in the lower court, which statement appellant must be deemed to have admitted by failure of his counsel to deny.—*Wangenheim v. Garner*, 183 P. 670.

☞830(1) (Nev.) Rehearings in the Supreme Court are not granted as a matter of right, and are not allowed for the purpose of reargument, unless there is reasonable probability that the court may have arrived at an erroneous conclu-

sion.—*Pershing County v. Sixth Judicial Dist. Court*, 183 P. 314.

☞833(5) (Cal.) A written order for a rehearing in bank, made within 30 days after the decision in department, as prescribed by Const. art. 6, § 2, is not invalidated because erroneously dated a day later, or because not marked as filed by the clerk until after the 30-day period.—*In re McNamara's Estate*, 183 P. 552.

☞835(2) (N.M.) On appeal, a party must present all questions in his original brief which he desires the court to consider, and he will not be permitted to present new points in a petition for rehearing.—*Ellis v. Citizens' Nat. Bank of Portales*, 183 P. 34.

☞835(2) (Utah) The alleged unconstitutionality of a statute cannot be considered upon a rehearing application, where the point was not raised below nor assigned as error on appeal.—*Pingree Nat. Bank of Ogden v. Weber County*, 183 P. 334.

XVI. REVIEW.

(A) Scope and Extent in General.

☞837(11) (Ariz.) In a personal injury action, where there was an agreement establishing the relation of independent contractor, and parol testimony was admitted practically without objection for the purpose of showing what was done under the contract, and that the real contract was one of employment, such evidence must be considered in determining the appeal, regardless of its competency.—*Swansea Lease, Inc. v. Molloy*, 183 P. 740.

☞837(11) (Cal.App.) On appeal from order granting plaintiff new trial on ground of insufficiency of evidence to sustain judgment for defendant, court will consider all the evidence, including that improperly admitted over defendant's objection.—*Globe Grain & Milling Co. v. Drenth*, 183 P. 285.

☞843(2) (Cal.App.) On an appeal in personal injury action, it is not necessary to determine whether plaintiff was still a passenger of defendant carrier, when injured while on its tracks, where plaintiff was guilty of such negligence proximately causing his injuries as must prevent his recovery.—*Trulsson v. Southern Pac. Co.*, 183 P. 686.

☞856(5) (Cal.App.) Where an order granting a new trial stated, "The motion of plaintiff for a new trial herein is hereby granted, upon the grounds specified in the notice of intention filed herein, except upon the grounds of insufficiency of evidence, as to which grounds said motion is denied," the question of the sufficiency or insufficiency of the evidence to justify the verdict for defendant cannot be considered on appeal.—*Luckie v. Diamond Coal Co.*, 183 P. 178.

☞867(2) (Cal.App.) On appeal from an order granting a new trial, the appellate tribunal will consider, not the correctness of the opinion of the lower court uttered upon granting the new trial, but the propriety of the order.—*Clohan v. Kelso*, 183 P. 349.

☞867(3) (Cal.App.) The overruling of a general demurrer to a complaint cannot be considered where the appeal is only from an order denying a motion for new trial, in which the sufficiency of the complaint was not an issue.—*Hale v. Kennedy*, 183 P. 723.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

☞873(1) (Cal.) Order of trial court relieving appellants from effect of failure to have bill of exceptions engrossed within ten days after original proceeding, although made after the expiration of the six-month period limited by Code Civ. Proc. § 473, was not void; and, where no appeal was taken therefrom, is conclusive on appeal from the judgment.—*Doyle v. Bradshaw*, 183 P. 185.

(C) Parties Entitled to Allege Error.

☞877(1) (Cal. App.) Defendant, appealing from order granting plaintiff a new trial for in-

sufficiency of evidence to sustain judgment in favor of defendant, cannot object that evidence was improperly admitted in favor of plaintiff. —*Globe Grain & Milling Co. v. Dreath*, 183 P. 285.

(E) Presumptions.

—907(2) (Cal.App.) Where plaintiffs in an ejectment suit offered a deed in evidence which was objected to as being irrelevant, and defendants introduced another deed without disclosing its contents in the bill of exceptions, it will, on appeal, be presumed that such deed, if its terms were shown, establishes a foundation for plaintiff's claim. —*Western California Land Co. v. Welch*, 183 P. 169.

—907(4) (Cal.App.) The law will presume, where the extent and nature of the evidence in an ejectment suit is not sufficiently set forth in the bill of exceptions to show the contrary, that there was competent and sufficient evidence before the court to sustain its rulings and findings. —*Western California Land Co. v. Welch*, 183 P. 169.

—916(4) (Cal.App.) Though the complaint in the judgment roll offered by plaintiff in evidence is in printed form containing a printed verification, the presumption should prevail on appeal that the court had for good cause permitted a copy of the complaint to be substituted for the original as allowed by Code Civ. Proc. § 1045, in view of the recitations of regularity in the order for publication of summons and the judgment in proper form. —*Shattuck v. Palmer*, 183 P. 259.

—918(1) (Cal.App.) Order overruling defendant's motion to strike plaintiff's amended complaint must be presumed to have been justified by the facts, in the absence of anything in the record to the contrary, and if at the hearing of the motion it appeared that the amended complaint was filed as of course, under Code Civ. Proc. § 472, and not by leave of court, some memorial to such effect should have been incorporated in the bill of exceptions; otherwise regularity of proceedings will be presumed. —*Schaad v. Barceloux*, 183 P. 716.

—920(5) (Cal.App.) On appeal every presumption is in favor of the regularity of an order of a chancellor appointing a receiver. —*Davies v. Ramsdell*, 183 P. 702.

—930(1) (Okl.) In a cause arising under the federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623), based on negligence of defendant's employees in charge of train, plaintiff's testimony, after a verdict in his favor, must be assumed to be true. —*St. Louis & S. F. Ry. Co. v. Fraser*, 183 P. 478.

—931(1) (Cal.) In determining whether there is evidence to support findings, Supreme Court will resolve all conflicts in the evidence in favor of findings. —*Post v. City and County Bank*, 183 P. 802.

—931(1) (Cal.App.) In an action by infant for injuries where the court trying case without a jury found against the infant, it will be presumed on appeal that the court applied the correct rule of law as to contributory negligence. —*Todd v. Orcutt*, 183 P. 963.

—931(8) (Wash.) Where a term used in findings is capable of two constructions, it will be given that meaning which supports the judgment. —*Evans v. Rublee*, 183 P. 83.

—931(9) (Cal.App.) When the record presents a judgment without findings, the presumption in its favor is that findings were waived, which presumption appellant must overthrow by embracing in his record on appeal an affirmative showing by bill of exceptions, statement, or other appropriate method that findings were not made. —*Hutton v. Newhouse*, 183 P. 276.

—933(4) (Cal.App.) Where the evidence is such that it would have sufficiently supported findings in favor of the party against whom decision was given, and the trial court grants

a motion for new trial made upon various grounds, including insufficiency of evidence, without in terms excluding such ground in its order, it will be presumed, on appeal, in favor of such order, that the court changed its opinion as to the effect of the evidence and reached a conclusion favorable to the party moving for new trial. —*Clohan v. Kelso*, 183 P. 349.

On appeal from an order granting a new trial for insufficiency of evidence, the presumption is against the findings of the jury and not in their favor. —*Id.*

—934(1) (Cal.App.) That the judgment was correct must, in the absence of satisfactory showing to the contrary, be assumed by the appellate court. —*Gustafson v. Wasson*, 183 P. 352.

(F) Discretion of Lower Court.

—959(2) (Cal.) Rulings on requests to file new pleadings will not be disturbed on appeal, except for an evident abuse of discretion. —*Slankard v. Wagon*, 183 P. 562.

—965 (Cal.App.) The granting or denial of motion for change of venue for convenience of witnesses will be disturbed only when an abuse of discretion is clear. —*Ryan v. Inyo Cerro Gordo Mining & Power Co.*, 183 P. 251.

—981 (Cal.App.) Denial of a motion for new trial for newly discovered evidence is left largely to discretion of court below and its judgment is rarely interfered with by an appellate tribunal. —*Nadeau v. Lynch*, 183 P. 278.

—981 (Cal.App.) Discretion of trial court in excusing defendant for not producing witnesses at trial to show that his cattle were not present at such a time that they could have committed the trespass complained of held not to be interfered with on appeal. —*Leach v. Klein*, 183 P. 703.

—983(2) (Okl.) Discretion of court as to amendment or correction of judgment will not be interfered with by an appellate court, unless abused. —*Co-wok-ochee v. Chapman*, 183 P. 610.

(G) Questions of Fact, Verdicts, and Findings.

—987(4) (Okl.) In civil action, where the parties under Rev. Laws 1910, § 4903, are not entitled to trial by jury as of right, and where sufficiency of the evidence is challenged, it is Supreme Court's duty to consider and weigh all the evidence, and if trial court's judgment is not clearly against the weight thereof, it will be sustained. —*Turben v. Douglass*, 183 P. 881.

—991 (Cal.App.) What was the capacity of a child of tender years to exercise care in avoiding a particular danger, and whether he comported himself with the care and prudence due from one of his years and experience, is a question of fact for the triers thereof, and not for the court on appeal. —*Opelt v. Al. G. Barnes Co.*, 183 P. 241.

—996 (Cal.App.) The jury had the right to draw its own inferences from the testimony. —*Exposito v. United Railroads of San Francisco*, 183 P. 576.

—999(1) (Cal.App.) Jury's conclusion upon jury question cannot be disturbed by Court of Appeals. —*McClure v. Southern Pac. Co.*, 183 P. 248; *Scherrer v. Same*, *Id.* 250.

—999(3) (Cal.App.) Where reasonable minds may draw different conclusions on the question of negligence, the issue is for the jury, and its finding conclusive. —*Randolph v. Hunt*, 183 P. 358.

—1001(3) (Okl.) Where there is any evidence that reasonably supports the verdict, it will not be disturbed on appeal; but where there is an entire failure of evidence to support the verdict, it and the judgment will be set aside. —*Kanotex Refining Co. v. Bonifield*, 183 P. 971.

—1002 (Cal.App.) Verdict is conclusive on appeal as to disputed facts, where evidence is conflicting. —*Fatta v. Catalano*, 183 P. 224.

⇒1002 (Cal.App.) A jury's finding on conflicting evidence is conclusive.—*Gousse v. Lowe*, 183 P. 295.

⇒1002 (Cal.App.) Jury's finding cannot be disturbed on appeal, on a mere conflict in the evidence.—*Martinelli v. Bond*, 183 P. 463.

⇒1002 (Wash.) Where there is a serious conflict in the evidence, verdict will not be disturbed on appeal.—*Anderson v. Rucker Bros.*, 183 P. 70.

⇒1002 (Wash.) Where there is such a conflict in the evidence as to make the question one for the jury, Supreme Court will not disturb conclusion of jury, notwithstanding that it may believe them to be in error.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

⇒1005(3) (Cal.App.) Order denying motion for new trial is conclusive on appeal as to disputed facts, where evidence is conflicting.—*Fatta v. Catalano*, 183 P. 224.

⇒1005(3) (Wash.) In an action for services under a contract of hiring, where the evidence on the points was in direct conflict, the questions whether plaintiff was hired at all, and whether he was bound by the receipt which he admitted he had signed, were of fact, and verdict approved by the trial judge will not be disturbed.—*Swafford v. Carnation Lumber & Shingle Co.*, 183 P. 92.

⇒1008(1) (Nev.) A finding based upon undisputed facts or the construction of a written instrument is not binding upon appeal.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

⇒1008(2) (Okla.) In action to recover realty, tried to the court without a jury, its findings upon disputed questions of fact will be given the same weight and effect as the verdict of a jury, and, where reasonably supported by the evidence, will not be disturbed on appeal.—*Gray v. McKnight*, 183 P. 489.

⇒1008(3) (Nev.) A finding based on the construction of a written instrument is not binding on appeal.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

⇒1009(1) (Okla.) A proceeding under Rev. Laws 1910, § 5207, to vacate a default judgment for unavoidable casualty preventing a defense, being an equitable case, it is within the province of the Supreme Court to weigh all the evidence, and from the facts and circumstances introduced to determine the weight thereof.—*McLaughlin v. Nettleton*, 183 P. 416.

⇒1009(4) (Okla.) In actions of purely equitable cognizance the Supreme Court will not disturb trial court's findings of fact, unless they are against the clear weight of the evidence.—*Winemiller v. Page*, 183 P. 501.

⇒1010(1) (Cal.App.) Court's finding as to negligence of automobile driver in personal injury action, where there is evidence to sustain it, will not be disturbed on appeal.—*Webster v. Motor Parcel Delivery Co.*, 183 P. 220.

⇒1010(1) (Cal.App.) Findings of fact in an action tried to the court are conclusive on appeal, where the evidence is such that different inferences might reasonably have been drawn therefrom.—*Avery v. Avery*, 183 P. 453.

⇒1010(1) (N.M.) The trial court's findings of fact will not be disturbed on appeal, where he heard the witnesses testify, if such findings are supported by substantial evidence.—*Springer v. Wasson*, 183 P. 398.

⇒1010(1) (Okla.) Where there is competent evidence reasonably supporting the verdict and the instructions fairly state the law on the issue raised by the pleadings and the evidence, the judgment on the verdict will not be disturbed by the Supreme Court.—*Wallingford v. Alcorn*, 183 P. 726.

⇒1010(1) (Or.) In a suit to reform a deed, finding of trial judge, who heard and saw the witnesses, that there was a mistake, should not be disturbed, the contrary evidence consisting only of a few suspicious circumstances.—*Welch v. Johnson*, 183 P. 776.

⇒1011(1) A finding based upon a substantial conflict in the evidence will not be disturbed upon appeal.

—(Cal.) *Berger v. Bright*, 183 P. 541; (App.) *Crist v. Fife*, Id. 197; *Seelye v. Southern California Canning Co.*, Id. 667; *Hale v. Kennedy* Id. 723.

(Nev.) *Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

⇒1011(1) (Cal.App.) Action of trial court in refusing to set aside judgment on ground of mistake, inadvertence, surprise, and excusable neglect cannot be disturbed, when based upon conflicting evidence.—*Nadeau v. Lynch*, 183 P. 278.

⇒1011(1) (Cal.App.) It was the province of the court to weigh and determine the value of the conflicting evidence.—*Williamson v. Williamson*, 183 P. 301.

⇒1024(2) (Cal.App.) On appeal from an order appointing a receiver on plaintiff's application, where there is any conflict in the affidavits, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also facts which may reasonably be inferred or presumed from direct and positive statements.—*Davies v. Ramsdell*, 183 P. 702.

⇒1024(3) (Cal.App.) Where there was a direct conflict between the verified complaint and affidavits presented by plaintiffs and affidavits of one of the defendants, as to whether parties joined as defendants, who resided in the county where action was brought, were joined for any purpose other than to lay the venue in that county, denial of motion for change of venue will not be disturbed.—*Mitchell v. Kim*, 183 P. 368.

⇒1024 (5) (Cal.App.) An order of the lower court based on conflicting affidavits must be sustained on appeal.—*Doyle v. Bradshaw*, 183 P. 185.

(H) Harmless Error.

⇒1036(3) (Or.) In a suit to reform a deed by striking out the clause obligating purchaser to pay a note and mortgage, purchaser's grantors, as well as their mortgagee, should be made parties; but, on mortgagee's appeal from a judgment for purchaser, the cause need not be remanded for failure to make grantors parties, where they, as witnesses for plaintiff, testified that he did not agree to assume the note and mortgage, which estops their denial thereof.—*Welch v. Johnson*, 183 P. 776.

⇒1039(4) (Cal.App.) That complaint for death made only an imperfect allegation that plaintiff suffered pecuniary loss therefrom, not having been objected to at the trial, but the answer having denied the suffering of any damage by the death, and evidence having been introduced on the theory of the fact being properly in issue, was not prejudicial.—*Ward v. Southern Pac. Co.*, 183 P. 594.

⇒1039(13) (Cal.App.) A variance between allegation and proof will not be prejudicial error, where if complaint had been amended to meet the proof, the result would have been the same.—*Lompoc Produce & Real Estate Co. v. Browne*, 183 P. 166.

⇒1039(13) (Cal.App.) Where owner repudiated building contract, contractors' failure to declare on the contract and repudiation thereof, in suit for reasonable value of services performed, was harmless, where evidence relating to contract and its repudiation was introduced without objection on the theory that existence of contract and its repudiation was an issue to be tried.—*Fatta v. Catalano*, 183 P. 224.

⇒1039(13) (Cal.App.) Surety cannot complain of variance increasing amount of recovery against principal, where indebtedness of principal, if increase were deducted, was more than penalty of bond.—*Hillcrest Co. v. Shrier*, 183 P. 239.

⇒1039(13) (Wash.) Any variance between allegations that certain cars of fruit were intrusted to defendant's exclusive control and testimony that plaintiff retained full power of disposition, presents no ground for reversal, where plaintiff's

counsel stated at beginning of case that defendant had no power to dispose of fruit without notice to plaintiff shipper.—*Umpqua Valley Fruit Union v. North Pacific Fruit Distributors*, 183 P. 101.

⇒1043(4) (Cal.App.) Where the final judgment in an action to remove a cloud on title established the right of plaintiff to the possession of the property and to be freed from all claims of the defendant as of the date of the filing of the complaint, defendant, on appeal from an order appointing a receiver, cannot complain that the order was erroneous, because he could not have been injured thereby; the final judgment in the case having been affirmed.—*Davies v. Ramsdell*, 183 P. 702.

⇒1043(7) (Okl.) The granting of plaintiff's motion for a continuance after commencement of trial is not reversible error, where it does not appear that such ruling prejudiced the rights of the adverse party.—*Jackson v. Levy*, 183 P. 505.

⇒1048(6) (Cal.App.) In an action for personal injuries resulting from an automobile collision, although cross-examination by plaintiff of defendant's witnesses as to radius in which it was possible to turn a car, of the make and manufacture of that driven by defendant, was erroneous, yet where it is apparent from the nature of the questions and answers thereto that it was without prejudice it must be considered harmless.—*Saylor v. Taylor*, 183 P. 843, 845.

⇒1050(1) (Cal.) Any possible error in admitting evidence containing a suggestion of compromise in a breach of contract case held not reversible error, since action was based on a written contract, which was not altered by defendant's belief as to whether he was or was not bound by its terms.—*Slankard v. Wagon*, 183 P. 562.

⇒1050(1) (Cal.App.) In an action for conversion of corporate stock against the trustee under a pooling agreement, admission in evidence for plaintiff of testimony as to declarations made by the promoter of the company to plaintiff as to ownership, though not in the presence of defendant, if erroneous, held harmless to defendant.—*Schaad v. Barceloux*, 183 P. 716.

⇒1050(1) (Cal.App.) The improper striking of testimony as hearsay was harmless to the party aggrieved, where a letter embodying the same matter was in evidence.—*Watterson v. Owens River Canal Co.*, 183 P. 816.

⇒1050(1) (Okl.) A party cannot complain of the admission of evidence over his objection to a single question, where he permits like evidence of other witnesses to be admitted without objection.—*Whitehead Coal Mining Co. v. Schneider*, 183 P. 49.

⇒1050(1) (Okl.) In servant's action for personal injury, from master's negligence in failing to furnish a reasonably safe place for work, etc., where his liability was doubtful, the admission of opinion evidence as to ultimate fact of negligence was prejudicial to defendant.—*Federal Oil & Gas Co. v. Campbell*, 183 P. 894; *Okmulgee Window Glass Co. v. Bright*, 183 P. 898.

⇒1050(2) (Cal.) In action involving the legitimacy of a child, any error in admitting declarations by the mother's husband that he intended to go to another town held not prejudicial.—*In re McNamara's Estate*, 183 P. 552.

⇒1050(2) (Cal.) In payee bank's action on a note, defended on ground of payment by check of corporation in which maker was a stockholder, payable to plaintiff's cashier, on the latter's misrepresentation that the bank examiner required it to be paid, testimony of the bank's directors that they had not authorized a demand for payment of the note was immaterial, as the position of cashier carried such authority, and was harmful, where it was shown that the cashier had appropriated it to his own use.—*National Bank of San Mateo v. Whitney*, 183 P. 789.

⇒1050(3) (Cal.App.) It was not prejudicial error to admit improper evidence, which was merely cumulative of uncontradicted evidence on a point practically conceded.—*Barrios v. Pacific States Trading Co.*, 183 P. 236.

⇒1051(3) (Okl.) Where plaintiff, suing on life policy, alleged that a certain party was the insurer's agent, which allegation was not denied within Rev. Laws 1910, § 4759, the admission of evidence to establish the agency so admitted was not prejudicial error.—*Federal Life Ins. Co. v. Lewis*, 183 P. 975.

⇒1054(1) (N.M.) Where no evidence of irregularities in an execution sale appeared on the record, and there was sufficient testimony exclusive of affidavits of officers and others, to sustain court's findings that sale was valid, erroneous admission of such affidavits was harmless.—*Springer v. Wasson*, 183 P. 398.

⇒1054(3) (Utah) Error in admitting evidence is harmless, where court disregarded it in entering judgment.—*Pingree Nat. Bank of Ogden v. Weber County*, 183 P. 334.

⇒1056(1) (Cal.App.) Exclusion of evidence, in action on note transferred as collateral security for certain indebtedness, to show that certain of the indebtedness was not due, was harmless; the balance due exceeding the note.—*Sonoma County Nat. Bank v. Skinner*, 183 P. 464.

⇒1056(2) (Wash.) Erroneously sustaining an objection to evidence regarding a concern's incorporation because it was oral is harmless, where the offered testimony was immaterial.—*Umpqua Valley Fruit Union v. North Pacific Fruit Distributors*, 183 P. 101.

⇒1058(2) (Cal.App.) Sustaining objection to question is harmless; the fact sought to be elicited thereby appearing by subsequent testimony of the witness.—*Sonoma County Nat. Bank v. Skinner*, 183 P. 464.

⇒1060(1) (Cal.App.) Counsel may ask prospective jurors whether they are interested in any insurance company, but persistent inquiries as to whether they would be prejudiced by knowledge that a casualty company had insured defendant, and directly implying that such insurance had been affected, constitute reversible error in an evenly balanced case.—*Arnold v. California Portland Cement Co.*, 183 P. 171.

⇒1064(4) (Wash.) Judgment will not be reversed on all technical and minor inaccuracies in instructions; the instruction being sufficient if it gives the law in such way that the jury will understand and will not be misled.—*Anderson v. Rucker Bros.*, 183 P. 70.

⇒1066 (Cal.App.) An abstractly erroneous instruction may be harmless when applied to the particular facts.—*Randolph v. Hunt*, 183 P. 358.

Instruction that defendant automobile owner was liable for the negligent running down of a pedestrian on a highway, if he had not parted with right to control machine's operation, does not constitute reversible error, because implying that the right, instead of exercise, of control was vital question, where there was no evidence that defendant attempted to exercise any control over the driver.—*Id.*

⇒1066 (Okl.) Instruction on questions of law, not applicable to issues involved or the evidence in support thereof abstractly correct, is not ground for reversal, unless it appears that it was calculated to confuse or mislead jury, to prejudice of losing party.—*Holmes v. Halstid*, 183 P. 969.

⇒1068(1) (Cal.App.) Any error in instructing the jury that their verdict depended on whether statements made by insured were false, instead of charging that any one false statement would avoid the policy, held not ground for reversal, where the jury found all the statements true.—*McEwen v. New York Life Ins. Co.*, 183 P. 873.

⇒1071(3) (Cal.App.) In architect's action against owner on contract giving architect stipulated percentage of cost of residence and garage, finding that owner directed architects to

construct garage, not to exceed certain amount, if error, as not being supported by evidence, was harmless, where it was found that architects were not entitled to compensation in connection with construction of residence, and the payment actually made to architect was more than sufficient to compensate architects for their services in connection with the construction of garage.—Hudson v. Barneson, 183 P. 274.

☞1071(3) (Cal.App.) In an action by an intending passenger, struck by a street car, defendant cannot complain that the evidence does not sustain a finding that the car windows were so obscured by mist that the motorman could not see and that he neglected to remove such obstruction, since, if not so obscured, the motorman could have seen, so that it was negligence to suddenly start the car and run it against plaintiff, when he was immediately in front of it.—Rucker v. San Diego Electric Ry. Co., 183 P. 578.

☞1071(6) (Cal.App.) A judgment will be sustained though the trial court failed to find on a material issue, unless a finding in appellant's favor on that issue would require a reversal.—Weichers v. Dehail, 183 P. 187.

☞1073(1) (Ok.) In assignee's action to foreclose mortgage against mortgagor's subsequent grantee, who had assumed mortgage, where written assignment was in evidence, failure to introduce note, which by inadvertence had not arrived at trial, could not prejudice defendant, where plaintiff testified that note was either in a bank or in mail from such bank.—Jackson v. Levy, 183 P. 505.

(I) Error Waived in Appellate Court.

☞1078(3) (Cal.) Where the point is not mentioned in the briefs, the appellate court will ignore an appeal from order denying motion to strike out certain parts of the complaint.—California Portland Cement Co. v. Boone, 183 P. 447.

☞1078(6) (Cal.) On appeal from an order granting a new trial, notwithstanding appellants limited their contention on appeal to two grounds, the entire record must be reviewed, and where it fails to disclose any ground supporting such order, it must be reversed.—Smith v. Royer, 183 P. 660.

☞1078(6) (Cal.App.) Where an appellee's brief urges only one ground why the court was warranted in granting a motion for a new trial, it will be assumed that there was no other valid ground for a new trial.—Luckie v. Diamond Coal Co., 183 P. 178.

(J) Decisions of Intermediate Courts.

☞1094(1) (Ok.) Where an appeal from county court is tried in district court on a transcript of evidence taken before county court, which is also presented in Supreme Court on same record, it is in as favorable position to pass on weight of the evidence as the district court, and it is its duty to do so.—Co-wok-ochee v. Chapman, 183 P. 610.

(K) Subsequent Appeals.

☞1097(1) (Cal.App.) On appeal from an order appointing a receiver in an action to remove a cloud on title, a decision on another appeal from the final judgment in the action, so far as it is based on the same facts, furnishes the law of the case.—Davies v. Ramsdell, 183 P. 702.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

☞1106(4) (Utah) Where the record in an action at law to recover taxes illegally exacted is indefinite as to whether the tax was properly calculated, the case will be remanded for purpose of taking further evidence.—Pingree Nat. Bank of Ogden v. Weber County, 183 P. 334.

☞1107 (Or.) Where an action was brought in 1914 to restrain a county treasurer from col-

lecting penalties under L. O. L. § 3682, as amended by Laws 1913, p. 334, § 20, and a demurrer to the complaint was sustained, and an appeal was taken to the Supreme Court, and pending the appeal the act of 1913 was amended by Laws 1915, p. 184, § 1, so as to eliminate the penalties, and Laws 1915, p. 298, an act of general amnesty and forgiveness as to penalties incurred, was enacted, the demurrer will be sustained by the Supreme Court, but the clerk of the circuit court, where the taxes without the penalties were tendered, will be ordered to pay to the county treasurer the amount so tendered and paid into court, and the proper authorities will be ordered to accept the same in full payment of taxes.—Spexarth v. Sherman, 183 P. 23.

(D) Reversal.

☞1170(3) (Cal.App.) In an action on the common counts for money had and received, judgment for plaintiff will not be reversed on defendant's contention that, since the written contract between it and plaintiff was executory, judgment on the common counts cannot be sustained; a technical defense involving no change in result by sending the case back for retrial being no cause for reversal, under Const. art. 6, § 4½.—M. H. Hoffman, Inc., v. Bernstein Film Productions, 183 P. 293.

☞1170(3) (Ok.) Where demurrer to petition was overruled and a trial amendment allowed, and defendant did not demur to petition as amended, and evidence was introduced without objection proving a matter which defendant contended should have been alleged in original petition, Supreme Court will not consider error in overruling demurrer to original petition, in view of Rev. Laws 1910, § 6005.—Knox v. Cruel, 183 P. 427.

☞1170(6) (Ok.) In coal miner's action for injury from employer's failure to furnish props as requested, the query in argument of plaintiff's counsel as to whereabouts of defendant's foreman and as to why defendant had not called him as a witness, to which objection was overruled, but which record did not show to have affected verdict, was not reversible error within Rev. Laws 1910, § 6005.—Whitehead Coal Mining Co. v. Schneider, 183 P. 49.

☞1170(7) (Ok.) In action by assignee of note secured by mortgage against mortgagor's grantee, who had assumed mortgage, where evidence showed that assignment was made on date shown on its face before maturity of note, any error in requiring defendant to show whether assignment was made before or after maturity could not be taken advantage of by defendant, in view of Rev. Laws 1910, § 6005.—Jackson v. Levy, 183 P. 505.

☞1170(9) (Cal.App.) Although an instruction was erroneous where the appellate court is satisfied upon examination of the evidence that it did not result in miscarriage of justice, the verdict should not be set aside in view of Const. art. 6, § 4½.—Saylor v. Taylor, 183 P. 843, 845.

☞1172(3) (Ok.) A verdict for shipper for a lump sum for damages to two interstate shipments and one intrastate shipment of live stock, where he had not given the written notice of injury required by contract of shipment, required a new trial as to the intrastate shipment, as court could not ascertain what part of verdict, if any, was allowed for that cause of action.—St. Louis, I. M. & S. Ry. Co. v. Evans, 183 P. 609.

☞1173(2) (Or.) Where a mother for consideration agreed to convey to a son her share of land owned by them in common, and after her death he sued his sisters and brother, to whom the mother had devised the land subject to a life estate in his favor, and some of the children made no resistance, defaulting or withdrawing appearance, and decree was rendered for the son against all the other children, part of whom appealed, the reversal of the decree as to the children who appealed did not necessarily work

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

a reversal as to those who did not contest the complaint.—*Le Vee v. Le Vee*, 183 P. 773.
 Ⓒ1177(8) (Cal.App.) Though on the facts the findings and judgment should to a certain extent have been for the other party, and it is unlikely that there can be materially different testimony, yet it not being in the province of the appellate court to correct findings, the case must be remanded for new trial.—*Green v. Hynes*, 183 P. 568.

(F) Mandate and Proceedings in Lower Court.

Ⓒ1195(3) (Cal.App.) Statement in opinion on appeal that in view of admissions by defendant plaintiff had established prima facie case, being a statement concerning the facts of the case as disclosed by the record then under review, was not the law of the case upon subsequent trial.—*Globe Grain & Milling Co. v. Drenth*, 183 P. 285.

(G) Jurisdiction and Proceedings of Appellate Court After Remand.

Ⓒ1218 (Cal.App.) A misapprehension of counsel as to the effect of the judgment of the appellate court modifying the judgment of the trial court for plaintiffs by reducing the recovery furnishes no ground for recalling the remittitur after it has gone down and for setting aside the judgment and amending it in any particular.—*Crenshaw Bros. & Saffold v. Southern Pac. Co.*, 183 P. 208.

Ⓒ1221 (Cal.App.) After regular issuance of remittitur by the appellate court which has modified a judgment for plaintiffs and reduced their recovery, such remittitur having gone down, the appellate court cannot amend it and correct the judgment, having lost jurisdiction of the cause except in case of mistake, fraud, or imposition.—*Crenshaw Bros. & Saffold v. Southern Pac. Co.*, 183 P. 208.

The wide discretion of the appellate court, under Code Civ. Proc. § 473, to relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or inexcusable neglect, cannot be exercised where the court has lost jurisdiction, as by the going down of its remittitur.—*Id.*

Ⓒ1222 (Cal.App.) After regular issuance of remittitur by the appellate court which has modified a judgment for plaintiffs and reduced their recovery, such remittitur having gone down, the appellate court cannot amend it and correct the judgment, having lost jurisdiction of the cause except in case of mistake, fraud, or imposition.—*Crenshaw Bros. & Saffold v. Southern Pac. Co.*, 183 P. 208.

APPEARANCE.

See Courts, Ⓒ11; Criminal Law, Ⓒ1134, 1182; Parties, Ⓒ95.

Ⓒ10 (Or.) Though defendant's appearance be a special one, limited to a particular purpose, yet if he appears and offers contest on the merits of the complaint, it is a general appearance, giving jurisdiction of the person as to all matters in controversy.—*Duncan Lumber Co. v. Willapa Lumber Co.*, 183 P. 476.

APPROVAL.

See Vendor and Purchaser, Ⓒ339.

ARCHITECTS.

See Principal and Agent, Ⓒ99.

ARGUMENT OF COUNSEL.

See Criminal Law, Ⓒ718-730; Trial, Ⓒ108½.

ARREST.

See False Imprisonment, Ⓒ7; Malicious Prosecution, Ⓒ18; Witnesses, Ⓒ306.

ARSON.

See Witnesses, Ⓒ274, 349.

ASSAULT AND BATTERY.

See Action, Ⓒ48; Criminal Law, Ⓒ178; False Imprisonment, Ⓒ3; Trial, Ⓒ244; Witnesses, Ⓒ219.

I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Therefor.

Ⓒ15 (Cal.) Seller in conditional sale, being justified in retaking possession without process of law only where possession can be secured peaceably, is liable for assault in forcible retaking.—*Silverstin v. Kohler & Chase*, 183 P. 451.

(B) Actions.

Ⓒ24(1) (Wash.) A complaint alleging that plaintiff, a grocer, while making a delivery to a tenant in defendant's apartment house, was wantonly and unlawfully assaulted and beaten by defendant, to his damage in a stated sum, states a good cause of action, the plaintiff having an implied license to enter for the purposes of making the delivery, and also because of the allegation that the assault was wanton and unlawful.—*Konick v. Champneys*, 183 P. 75.

Ⓒ34 (Cal.) Where question of punitive damages had been withdrawn from jury in an assault case, provoking circumstances cannot be considered in mitigation of the actual damages suffered by plaintiff.—*Benjamin v. Walton*, 183 P. 529.

Ⓒ40 (Cal.) \$1,000 held not excessive damages for injuries which evidence tended to show caused permanent impairment to one eye, internal adhesions in the abdomen, severe pains, loss of sleep, and impaired earning capacity, resulting from an assault.—*Benjamin v. Walton*, 183 P. 529.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

Ⓒ78 (Cal.App.) Indictment, charging that defendant committed an assault by means and force likely to produce great bodily injury, in that he willfully, unlawfully, etc., made an assault on the person of another by such means and force in that he whipped, struck, beat, bruised, and cut such other with a rawhide whip on the naked body, held sufficient to charge the offense denounced by Pen. Code, § 245, in that it specified the manner of use of the whip.—*People v. Brown*, 183 P. 829.

ASSESSMENT.

See Drains, Ⓒ85-90; Highways, Ⓒ121-128; Municipal Corporations, Ⓒ511-530; Taxation, Ⓒ453, 454.

ASSIGNMENTS.

See Appeal and Error, Ⓒ1073, 1170; Bills and Notes, Ⓒ357, 525; Brokers, Ⓒ75; Evidence, Ⓒ178, 422; Mortgages, Ⓒ224, 253, 258, 460; Trusts, Ⓒ11; Vendor and Purchaser, Ⓒ214.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

Ⓒ19 (Cal.App.) The benefits to be derived from a transaction may always be assigned.—*Hay v. Hollingsworth*, 183 P. 582.

ASSOCIATIONS.

See Building and Loan Associations; Insurance, Ⓒ697.

ASSUMPSIT, ACTION OF.

See Work and Labor.

⚡6(1) (Cal.App.) Assumpsit is the proper remedy to recover money which defendant has admitted belongs to plaintiff and has promised to pay.—*M. H. Hoffman, Inc., v. Bernstein Film Productions*, 183 P. 293.

ASSUMPTION OF RISK.

See Master and Servant, ⚡204-217.

ATTACHMENT.

See Garnishment.

ATTORNEY AND CLIENT.

See Appeal and Error, ⚡1039; Chattel Mortgages, ⚡115; Covenants, ⚡132; Criminal Law, ⚡641, 655, 657, 718, 722½, 726, 730, 1037, 1090; District and Prosecuting Attorneys; Evidence, ⚡65; Executors and Administrators, ⚡524; Habeas Corpus, ⚡92; Levees, ⚡9, 11; Licenses, ⚡7, 11; Limitation of Actions, ⚡183, 197; Mandamus, ⚡4; Partition, ⚡114; Trial, ⚡108½, 244; Vendor and Purchaser, ⚡49.

I. THE OFFICE OF ATTORNEY.**(C) Suspension and Disbarment.**

⚡38 (Okla.) Though an attorney should endeavor to literally observe the law, it does not demand that every technical infraction shall require his disbarment, but it is those infractions of duty involving moral turpitude and evincing a depraved character that render him untrustworthy and are a reflection upon the bar and the court that demand disbarment.—*In re Reilly*, 183 P. 728.

⚡53(1) (Okla.) An attorney against whom disbarment proceedings are brought is presumed to be innocent of charges preferred, and to have performed his duty as an officer of the court in accordance with his oath, and the evidence in support of charges must satisfy court to a reasonable certainty that they are true and warrant a disbarment.—*In re Reilly*, 183 P. 728.

⚡53(2) (Okla.) In disbarment proceeding on charges of retaining part of amount of a settlement effected with adverse attorneys, of irregularities in collection of an expense account charged against his client, and in conspiring to retain attorneys to disqualify them from selecting a special judge, evidence held insufficient to warrant a disbarment.—*In re Reilly*, 183 P. 728.

⚡54 (Okla.) A referee in a disbarment proceeding is an officer of the court, which has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require.—*In re Reilly*, 183 P. 728.

Report of referee appointed to take evidence and report findings of fact and conclusions of law in a disbarment proceeding is not conclusive as to either findings or conclusions, but is accorded every reasonable presumption of correctness, and the burden is on the party attacking it, and it may be set aside by court if found to be incorrect.—*Id.*

II. RETAINER AND AUTHORITY.

⚡76(1) (Okla.) An attorney, who has been employed to conduct legal proceedings, undertakes to conduct them to their determination, and cannot abandon the services of his client without cause and upon reasonable notice.—*McLaughlin v. Nettleton*, 183 P. 416.

⚡86 (Idaho) Comp. Laws, § 3998, subd. 1, authorizing an attorney to bind his client by his agreement filed with clerk or entered upon minutes of court refers to stipulations and agreements as to conduct of an action pending

when the stipulation is made.—*Storey v. United States Fidelity & Guaranty Co. of Baltimore, Md.*, 183 P. 990.

An attorney at law, by virtue of his employment as such, has authority in behalf of his client to do all the acts, in or out of court, necessary or incidental to prosecution and management of suit, and which affect the remedy only.—*Id.*

⚡101(1) (Idaho) An attorney at law, by virtue of his employment as such, has no power to compromise and release the cause of action itself.—*Storey v. United States Fidelity & Guaranty Co. of Baltimore, Md.*, 183 P. 990.

An attorney employed to prosecute or defend in one action has no authority, by virtue of such employment, to compromise or settle another cause of action.—*Id.*

⚡101(1) (Okla.) An attorney, by virtue of his retainer, may do all things clearly pertaining to prosecution of his client's cause and protection of his client's interest involved in action, but without further express authority cannot bind his client by compromise of a pending suit, or other matter intrusted to his care.—*Vinson v. Davis*, 183 P. 902.

⚡103 (Idaho) Ratification by a client of the unauthorized act of his attorney cannot be inferred, in the absence of client's knowledge of all the material facts.—*Storey v. United States Fidelity & Guaranty Co. of Baltimore, Md.*, 183 P. 990.

IV. COMPENSATION AND LIEN OF ATTORNEY.**(A) Fees and Other Remuneration.**

⚡144 (Cal.) In view of Civ. Code, §§ 1647, 1654, 1638, as to interpretation of contracts, under a contract between attorneys and client relating to attorney's compensation in action to partition land and for an accounting, providing that attorneys "shall receive as their compensation 10 per cent. of whatever is recovered, either by litigation or settlement, excepting that if the court makes an allowance for an attorney's fee in said partition suit or other suits then such fee shall belong to said law firm, exclusive of the said 10 per cent. so to be paid by" the client, the attorneys were not entitled to 10 per cent. of the land set apart to the client in addition to a fee allowed, but were only entitled to such fee, as far as the partition suit was concerned, and 10 per cent. of the amount recovered in the accounting.—*Bennett v. Potter*, 183 P. 156.

ATTORNEY GENERAL

See Criminal Law, ⚡1182.

⚡6 (Okla.) The advice of the Attorney General, required by Rev. Laws 1910, § 8059, on all questions of law submitted by any state official, when obtained by state superintendent of public instruction for and at instance of county superintendent, relating to latter's official duty, should be followed.—*Rasure v. Sparks*, 183 P. 495.

AUTOMOBILES.

See Appeal and Error, ⚡1010, 1048, 1066; Chattel Mortgages, ⚡225; Highways, ⚡177, 183, 184; Master and Servant, ⚡302, 315, 316, 318, 330, 332, 405; Municipal Corporations, ⚡592, 705, 706; Negligence, ⚡72, 111, 142; New Trial, ⚡70; Railroads, ⚡348, 350; Trial, ⚡187, 256, 295, 296.

BAIL

See Witnesses, ⚡306.

BAILMENT.

See Highways, ⚡183; Pledges.

BANKRUPTCY.**III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.****(B) Assignment, and Title, Rights, and Remedies of Trustee in General.**

—152 (Cal.App.) Status of trustee in bankruptcy as judgment creditor as to property not in custody of the bankruptcy court, under Bankruptcy Act July 1, 1898, § 47a, cl. 2, as Amended by Act Cong. June 25, 1910, § 8 (U. S. Comp. St. § 9631), attaches upon the date of filing of petition in bankruptcy.—*Scales v. Holje*, 183 P. 308.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

—185 (Cal.App.) As to fraudulent or avoidable transfers by bankrupt, antedating the four-month period prior to bankruptcy, the trustee in bankruptcy is in no better legal position than the creditors whom he represents; his right to avoid the transfer being merely that of the creditor's common-law right.—*Scales v. Holje*, 183 P. 308.

—186(1) (Cal.App.) A purchaser of corporate property within four months prior to adjudication in bankruptcy who complied with a request of the seller's president and general manager by applying a portion of the purchase price toward discharging personal debts incurred for the corporation's benefit cannot be required to make such payments a second time to the corporation's trustee in bankruptcy.—*Doughty v. Moors*, 183 P. 199.

(E) Actions by or Against Trustee.

—303(1) (Cal.App.) Under Civ. Code, §§ 3431, 3439, 3442, trustee in bankruptcy cannot recover assets of corporation transferred by sole stockholder more than four months before bankruptcy, in absence of proof of fraud or a fraudulent conspiracy between stockholders and transferee, or of insolvency, or contemplated insolvency, at time of transfer, or that there were creditors of the corporation at such time.—*Scales v. Holje*, 183 P. 308.

BANKS AND BANKING.

See Appeal and Error, —1050; Bills and Notes, —405, 537, 538; Criminal Law, —400; False Pretenses, —49; Gifts, —30, 66; Judgment, —674; Taxation, —128, 454, 537, 543.

III. FUNCTIONS AND DEALINGS.**(B) Representation of Bank by Officers and Agents.**

—107 (Cal.) The rule that, where the payee of a promissory note pays an agent who does not produce the note, payment is at the maker's risk, has no application to a payment made to a bank cashier subject to his order, since he has authority to collect notes due the bank.—*National Bank of San Mateo v. Whitney*, 183 P. 789.

—111 (Cal.) In payee bank's action on a note defended on ground of payment by check of corporation in which maker was a stockholder, payable to plaintiff's cashier upon the latter's misrepresentation that the bank examiner required it to be paid, testimony of the bank's directors that they had not authorized a demand for payment of the note was immaterial, as the position of cashier carried such authority.—*National Bank of San Mateo v. Whitney*, 183 P. 789.

—112 (Cal.) Where the cashier of plaintiff bank demanded payment of the note sued on, and such payment was made by a check payable to such cashier and applied to cashier's own overdrawn account, the form of payment

was immaterial, and the fact that the cashier requested a check payable to himself was without significance, where the request was made in his capacity as cashier.—*National Bank of San Mateo v. Whitney*, 183 P. 789.

Although bank cashier's demand for payment of a note, made about 24 hours after the note's execution, by personally coming to defendant maker's office and requesting check payable to himself, was unusual, yet, where defendant knew his company had borrowed to the limit, and while an officer thereof he had given this personal note to the bank for money put into the company, the cashier's statement that the bank examiner objected to the bank's carrying the note was sufficient to allay all suspicion of defendant, who was not by such demand put on notice that the cashier was trying to defraud defendant or the bank.—*Id.*

IV. NATIONAL BANKS.

—258 (N.M.) A national bank may borrow money and issue evidence of indebtedness therefor.—*Ellis v. Citizens' Nat. Bank of Portales*, 183 P. 34.

—260(4) (N.M.) A national bank's guaranty of a third person's paper to which bank holds no title, where the guaranty is not necessary or incidental to transfer of title to paper and where loan is for benefit of a third person, is beyond bank's power under National Banking Act, § 1 (U. S. Comp. St. § 9661), and no suit can be maintained thereon.—*Ellis v. Citizens' Nat. Bank of Portales*, 183 P. 34.

Where a national bank puts forward a third party as a borrower and guarantees repayment of loan, and the proceeds of loan go to bank and are converted to its use, its guaranty is not ultra vires under National Banking Act, § 1 (U. S. Comp. St. § 9661), and suit is maintainable thereon.—*Id.*

—261(3) (N.M.) Where national bank guarantees paper of a third person to which it holds no title, and the guaranty is not necessary or incidental to transfer of title to paper, and the loan is for benefit of a third person, the bank, when sued on such guaranty, is not estopped from pleading that it is ultra vires under National Banking Act, § 1 (U. S. Comp. St. § 9661).—*Ellis v. Citizens' Nat. Bank of Portales*, 183 P. 34.

BASTARDS.

See Appeal and Error, —1050; Constitutional Law, —145; Evidence, —269, 291; Indians, —18; Trial, —59.

I. ILLEGITIMACY IN GENERAL.

—3 (Cal.) In determining the legitimacy of a child born after its parents had separated, it will be assumed the parents had intercourse during the last night they lived together.—*In re McNamara's Estate*, 183 P. 552.

Civ. Code, § 194, providing that children born within 10 months after dissolution of a marriage are presumed to be legitimate, creates only a prima facie presumption.—*Id.*

In Civ. Code, § 194, creating a presumption that children born 10 "months" after dissolution of a marriage are legitimate, the quoted word refers to periods of 30 days, although under section 14, Civ. Code, provisions refer to calendar months, unless the context requires a different meaning.—*Id.*

There is no conclusive, but only a prima facie, presumption regarding the legitimacy of a child born during wedlock, where the mother left her husband to cohabit with another 304 days before the child's birth, since such period exceeds the normal time for gestation.—*Id.*

—5 (Cal.) In action involving the legitimacy of a child, the mother's testimony that her husband had no access to her during the normal gestation period prior to the child's birth is admissible under Code Civ. Proc. § 1870, subdivisions 1, 15, specifying facts which may be proved, and chapter 1879 making all persons,

with immaterial exceptions, competent witnesses.—In re McNamara's Estate, 183 P. 552.

⚡6 (Cal.) Evidence that a child was born 304 days after its mother left her husband to cohabit with another, etc., held to overcome the prima facie presumption regarding legitimacy of children born during wedlock, and sustain a finding of illegitimacy.—In re McNamara's Estate, 183 P. 552.

⚡13 (Cal.) In Civ. Code, § 230, providing that a father may legitimate a child by receiving it into his "family," etc., the quoted word does not necessarily mean the father's relations, but may mean the family in which the father resides, even though it consists of the child and its mother.—In re McNamara's Estate, 183 P. 552.

Evidence held to sustain a finding that a father had legitimated his child by adopting it pursuant to Civ. Code, § 230, requiring a public acknowledgment of paternity, treatment of child as if legitimate, and its reception into father's family.—Id.

II. CUSTODY, SUPPORT, AND PROTECTION.

⚡17 (Cal.App.) A judgment requiring a father to support his illegitimate child, pursuant to Civ. Code, § 196a, does not impair contract obligations, in violation of Const. art. 1, § 16, because father had previously given the mother a lump sum for an instrument releasing him from further obligations.—Fernandez v. Aburrea, 183 P. 366.

⚡17½ (New, vol. 12 Key-No. Series) (Cal. App.) Under the direct provisions of Civ. Code, § 196a, a mother may sue in her own name on behalf of her illegitimate child, to require the child's father to contribute to its support.—Fernandez v. Aburrea, 183 P. 366.

III. PROCEEDINGS UNDER BASTARDY LAWS.

⚡37 (Cal.App.) Father's obligation to support his illegitimate child is a continuing duty, against which statute of limitations does not run while child needs its father's support.—Fernandez v. Aburrea, 183 P. 366.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations; Insurance, ⚡697.

BIDS.

See Municipal Corporations, ⚡830.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

See Alteration of Instruments, ⚡20; Appeal and Error, ⚡1050, 1056, 1073, 1170; Banks and Banking, ⚡107, 111, 112; Bills and Notes, ⚡485; Chattel Mortgages, ⚡115; Courts, ⚡169; Criminal Law, ⚡400; Evidence, ⚡80, 429, 441, 444; False Pretenses, ⚡7, 49; Guaranty, ⚡21, 35, 54, 70; Husband and Wife, ⚡49½, 131, 133; Insurance, ⚡90, 349, 668; Jury, ⚡14; Landlord and Tenant, ⚡33; Limitation of Actions, ⚡155; Mortgages, ⚡280, 292, 460; Payment, ⚡30, 63; Pleading, ⚡291, 403; Pledges, ⚡55, 56; Principal and Agent, ⚡106; Quieting Title, ⚡2; Sales, ⚡847; Tender, ⚡15; Trial, ⚡184, 243, 840, 404; Vendor and Purchaser, ⚡180.

II. CONSTRUCTION AND OPERATION.

⚡124 (Wyo.) A note payable at the option of the holder at a banking house in Denver or at a bank in New York does not entitle the holder, demanding payment at Denver, to add to the principal and interest "handling charges to New York," or the cost of New York ex-

change.—H. E. Wright & Co. v. Douglas, 183 P. 786.

⚡129(1) (Or.) Where a note payable five years from date contains the clause, "due if ranch is sold or mortgaged," the quoted clause is not self-executing, but merely confers option upon holder to treat debt as due if contingency occurs.—Nickell v. Bradshaw, 183 P. 12.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

⚡155 (Or.) Under L. O. L. §§ 5834, 5837, defining negotiable instruments, etc., a note payable five years from date and containing the clause, "due if ranch is sold or mortgaged," is not rendered nonnegotiable by quoted words.—Nickell v. Bradshaw, 183 P. 12.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Bona Fide Purchasers.

⚡357 (Cal.App.) The assignee of a note as collateral for present and subsequent debts is, as regards subsequent debts, a bona fide holder of the note only as to such of those debts as are incurred before maturity of the note.—Sonoma County Nat. Bank v. Skinner, 183 P. 464.

⚡365(1) (Ok.) The purchaser of a negotiable note before its maturity, in due course of business, in good faith, without notice of imperfections or defects, takes it freed of the outstanding equities and defenses that maker might have asserted against original payee.—Conqueror Trust Co. v. Bayless Drug Co., 183 P. 419.

⚡379 (Ok.) In action on notes by a holder in due course, the maker's evidence as to terms of contract between himself and payee, that payee had violated contract, and that consideration of notes had failed after negotiation, was no defense, without showing holder's notice of contract, or of failure of consideration at or before purchasing notes.—Conqueror Trust Co. v. Bayless Drug Co., 183 P. 419.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

⚡405 (Or.) Under L. O. L. §§ 5905, 5920, relating to presentment of negotiable instruments for payment, a note payable at a bank is sufficiently presented if it is in bank at date of maturity ready to be delivered by bank to the proper person upon payment being made.—Nickell v. Bradshaw, 183 P. 12.

VII. PAYMENT AND DISCHARGE.

⚡430 (Cal.App.) Debt remaining, after crediting on a note a payment of part of it, is not extinguished, in the absence of agreement to that effect, by marking the note "Paid," surrendering it, and taking a new note for the balance.—Sonoma County Nat. Bank v. Skinner, 183 P. 464.

VIII. ACTIONS.

⚡468 (Or.) Where a note payable five years after date contained a clause making it due if the maker's ranch was sold or mortgaged, a plaintiff relying upon expiration of five-year period need not allege or prove that ranch had not been sold.—Nickell v. Bradshaw, 183 P. 12.

⚡485 (Ok.) In action for foreclosure of a mortgage securing a note, defendant, by filing his unverified denial, admitted execution of note.—Jackson v. Levy, 183 P. 505.

⚡498 (Or.) The holder of a note has burden of proving that notice of dishonor was mailed within the time prescribed by L. O. L. § 5937.—Nickell v. Bradshaw, 183 P. 12.

⚡516 (Ok.) In action on note, where certain defendants by answer admitted its execution and failed to introduce any evidence, and where plaintiff introduced the note, a judgment against plaintiff was error.—Cushing v. Newbern, 183 P. 409.

⚡525 (Cal.App.) Evidence that the maker of a note assigned as collateral for subsequent

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

debts of the payee paid it to the payee after its maturity with no knowledge of the assignee's claim has no tendency to show that debts of the payee to the assignee, incurred after assignment, were incurred after maturity of the note, and so not secured by it as against the maker.—*Sonoma County Nat. Bank v. Skinner*, 183 P. 484.

⚡526 (Or.) Evidence that written notice of dishonor was postmarked during afternoon of following day does not establish a compliance with L. O. L. § 5937, requiring deposit in post office in time to go by mail on day following day of dishonor, etc., since there is no proof regarding time of outgoing mails.—*Nickell v. Bradshaw*, 183 P. 12.

⚡527(1) (Or.) Possession at time and place of payment of a note properly indorsed is prima facie evidence of authority to receive payment.—*Nickell v. Bradshaw*, 183 P. 12.

⚡537(7) (Or.) Conflicting evidence held to make a jury question whether note sued upon was in a bank's possession for presentment on day note fell due, as required by L. O. L. § 5904, or in plaintiff's lock box in bank.—*Nickell v. Bradshaw*, 183 P. 12.

⚡538(7) (Cal.) In a bank's action to recover on a note, defended on the ground that it had been paid by the check of a company of which defendant was a stockholder, payable to plaintiff's cashier, an instruction that, in the absence of contrary evidence, the jury were entitled to believe such check was given in payment of an obligation due from the company to the cashier when the real issue was whether the check was given plaintiff by delivery to its cashier, or to the cashier personally, was erroneous, being a misapplication of Code Civ. Proc. § 1963, subd. 7.—*National Bank of San Mateo v. Whitney*, 183 P. 789.

BONDS.

See Appeal and Error, ⚡461, 465, 468, 487, 1039; Contracts, ⚡34, 172, 314; Criminal Law, ⚡1144; Divorce, ⚡182; Guardian and Ward, ⚡175, 182; Indemnity, ⚡8; Mechanics' Liens, ⚡284; Municipal Corporations, ⚡365, 530; Pleading, ⚡312; Principal and Surety, ⚡149; Prohibition, ⚡3; Replevin, ⚡124; Witnesses, ⚡306.

BOUNDARIES.

See Adverse Possession, ⚡66; Constitutional Law, ⚡92; Counties, ⚡2, 10; Highways, ⚡90; Quieting Title, ⚡35.

I. DESCRIPTION.

⚡20(2) (Cal.App.) In order that a conveyance by lot number with reference to a recorded map should carry title to the center of the street shown, it is necessary that there be first a valid dedication and acceptance of the street; but, there having been a dedication, sales by number of lots abutting on the street carry title to its center.—*Elliott v. McIntosh*, 183 P. 692.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

⚡33 (Cal.) Relative to eastern boundary of property conveyed by deed of the westerly half of a city lot, according to recorded map, the word "lot" will be presumed, in the absence of circumstances indicating a contrary intention to be used in its general and customary sense, of not including the half of the street to which the owner of the lot held title, subject to the public easement.—*Earl v. Dutour*, 183 P. 438.

Presumption of the word "lot" in deed of westerly half of city lot, according to recorded map, being used in its general and customary sense of not including part of street, held not rebutted by the map, nor by the fact that the deed conveyed half of the water right appurtenant to the lot, which had originally been allotted on the basis of acreage, including the portion of the lot lying in the street.—*Id.*

⚡35(3) (Cal.App.) In an action to quiet title, evidence of surveyors as to the location of the measured boundary line is immaterial, where there is an agreed boundary line.—*Doyle v. Bradshaw*, 183 P. 185.

⚡46(3) (Cal.App.) Where there was uncertainty as to true location of boundary line between lots, a dispute regarding it, possession, and payment of taxes for period required to establish adverse possession, the agreed line became in law the true line between the properties, regardless of the accuracy of the agreed location as made to appear by subsequent survey or measurement.—*Doyle v. Bradshaw*, 183 P. 185.

BRIEFS.

See Appeal and Error, ⚡757-773.

BROKERS.

See Evidence, ⚡422.

II. EMPLOYMENT AND AUTHORITY.

⚡7 (Cal.App.) Owner's proposed modification of broker's contract for an indefinite period did not create a new contract between the parties, where the proposed modification was never accepted by broker.—*United States Farm Land Co. v. Darter*, 183 P. 696.

⚡8(1) (Cal.App.) The presumption is in favor of the continuance of land broker's contract for an indefinite period.—*United States Farm Land Co. v. Darter*, 183 P. 696.

⚡10 (Cal.App.) Owner, to terminate land broker's contract for a period of indefinite duration, must give broker notice of its cancellation.—*United States Farm Land Co. v. Darter*, 183 P. 696.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

⚡38(3) (Cal.App.) Owners cannot recover from their broker who effected real estate exchange transaction, damages for misrepresentation of value of property received by them in exchange, without alleging and proving that such property was of a less market value than their own land.—*Stouffer v. Eymann*, 183 P. 210.

IV. COMPENSATION AND LIEN.

⚡40 (Cal.App.) Where purchaser, procured by broker under broker's contract for indefinite period, had signed contract of sale, owner's subsequent proposed modification of the contract could not defeat broker's right to commission.—*United States Farm Land Co. v. Darter*, 183 P. 696.

⚡44 (Cal.App.) While a contract of employment between a landowner and a real estate broker to sell land on commission remains executory, the principal may rescind it, but he must give notice of rescission to the broker before the latter has performed.—*United States Farm Land Co. v. Darter*, 183 P. 696.

⚡48 (Cal.App.) If owner was dissatisfied with purchasers procured by broker, he should have notified broker, or have declined to enter into a contract with purchasers; but, having accepted purchasers without being misled by brokers, he is bound to pay broker's commission.—*United States Farm Land Co. v. Darter*, 183 P. 696.

⚡54 (Cal.App.) The services of a real estate broker are fully performed, and his commission fully earned, when he has procured a purchaser ready and willing to enter into a contract of sale upon the terms fixed by the owner.—*United States Farm Land Co. v. Darter*, 183 P. 696.

⚡57(2) (Cal.App.) When a principal makes a sale to a purchaser found by the broker, having availed himself of the broker's services, he is liable for commissions, though the sale was made at a lower price than originally proposed by him to the broker.—*United States Farm Land Co. v. Darter*, 183 P. 696.

⚡63(1) (Cal.App.) Vendor, having agreed to pay broker commission pro rata upon payment

of purchase price, is required to act in good faith and do nothing to prevent, discourage, or embarrass the completed purchase of the property and do everything possible to aid in securing the purchase price.—*Ratzlaff v. Trainor-Desmond Co.*, 183 P. 269.

—§64(1) (Cal.App.) The services of a real estate broker are fully performed, and his commission fully earned, when he has procured a purchaser ready and willing to enter into a contract of sale upon the terms fixed by the owner, and the subsequent insolvency of purchaser cannot defeat his recovery of commissions.—*United States Farm Land Co. v. Darter*, 183 P. 696.

Where owner entered into a contract of sale with purchasers procured by broker, for price in excess of that specified in broker's contract, broker was entitled to commissions though purchasers afterwards defaulted.—*Id.*

—§75 (Cal.App.) Where broker's contract with owner provides for payment of commissions pro rata as purchase price is paid, broker is entitled to entire commission upon cancellation of owner's contract with purchaser by mutual consent of owner and purchaser.—*Ratzlaff v. Trainor-Desmond Co.*, 183 P. 269.

Where vendor, having agreed to pay broker commissions pro rata upon payment of purchase price after payment of first 20 per cent., conveyed title to the land and assigned its interest in the contracts to another party, the entire commission became due; vendor having in effect abandoned and made it impossible to carry out its contract with purchasers procured by broker.—*Id.*

V. ACTIONS FOR COMPENSATION.

—§82(2) (Cal.App.) In land broker's action on commission notes, in which owners seek to avoid liability and counterclaim for damages upon ground of broker's misrepresentation as to value of property received in exchange, *held*, that answer failed to plead that property received in exchange was not worth as much as property transferred in return therefor.—*Stouffer v. Eymann*, 183 P. 210.

—§85(1) (Cal.App.) In land broker's action upon principal's written agreement to pay commissions for services performed, where answer alleged there was no consideration for agreement, parol evidence as to such services was not inadmissible as being violative of statute of frauds requiring broker's authority to be in writing, but was admissible for purpose of showing consideration.—*Ratzlaff v. Trainor-Desmond Co.*, 183 P. 269.

—§86(4) (Cal.App.) In broker's action for commission, evidence consisting of correspondence *held* to show that broker procured purchasers, who entered into a contract of sale with owner.—*United States Farm Land Co. v. Darter*, 183 P. 696.

—§88(14) (Wash.) Findings that plaintiff broker was entitled to a certain percentage of the sale price, that a buyer was found, but that defendant owner wrongfully refused to complete the sale *held* to sustain a judgment for plaintiff, since the term "sale price" as used in the findings did not imply a consummated sale.—*Evans v. Rublee*, 183 P. 83.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

—§94 (Cal.App.) Under authority to broker to sell lands, terms "not less than one-fifth cash down, balance in four equal annual installments," principals were not bound by a sale, $\frac{15}{20}$ of price payable at date by transfer of an equity to broker, balance in two annual installments, shortly afterwards discounted and paid to broker, and appropriated by him, all without knowledge of principals.—*Schmalzing v. Swain*, 183 P. 580.

—§100 (Idaho) Where a realty broker acts for two parties with adverse interests in effecting an exchange of lands, with the knowledge and consent of both, neither principal is liable to

the other for the broker's tortious acts, without collusion or direct participation of one of principals.—*Ringer v. Wilkin*, 183 P. 986.

—§102 (Idaho) Instruction that owner of realty is responsible for fraudulent representations of broker with whom it is listed for sale, though owner did not instruct broker to make such representations, and did not know that they were being made, was erroneous.—*Ringer v. Wilkin*, 183 P. 986.

BUILDING AND LOAN ASSOCIATIONS.

—§46(1) (Okla.) To entitle a foreign corporation to powers accorded to building and loan associations by Wilson's Rev. & Ann. St. 1903, c. 18, art. 19, and to enforce its contracts with citizens of such territory in courts of Oklahoma, it must appear that statutes under which it was organized are identical or substantially similar to statutes of territory, and that its business was substantially like that conducted by such associations in territory.—*Midland Savings & Loan Co. v. Nicoll*, 183 P. 731.

In action by Colorado building and loan association to foreclose mortgages, etc., *held*, on the evidence, that it was not an association organized under statutes substantially similar to those authorizing formation of such associations in Oklahoma territory, and that its business was not substantially like that of such associations in the territory, so that it was not entitled to the powers of such associations under its laws.—*Id.*

—§46(10) (Okla.) In action by Colorado building and loan association to foreclose and cancel mortgages, etc., evidence *held* to show that the contracts sued on were usurious.—*Midland Savings & Loan Co. v. Nicoll*, 183 P. 731.

BUILDINGS.

See Estoppel, —§82; Municipal Corporations, —§192, 626, 628.

BULK SALES.

See Fraudulent Conveyances, —§47, 172.

BURROS.

See Constitutional Law, —§287; Municipal Corporations, —§604, 625.

CANALS.

See Evidence, —§317; Pleading, —§236.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

—§15 (Cal.App.) In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, evidence *held* insufficient to show the existence or making of another contract between plaintiff and the canal company, as alleged in plaintiff's complaint, and on which his cause of action was based.—*Watterson v. Owens River Canal Co.*, 183 P. 816.

In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, evidence *held* to show that any money expended by plaintiff or work performed by him was furnished and performed as part of the canal company's original contract with the contractor for construction of the canal.—*Id.*

CANCELLATION OF INSTRUMENTS.

See Action, —§50; Brokers, —§10, 44, 75; Evidence, —§434; Exchange of Property, —§17; Insurance, —§349, 668; Jury, —§14; Limitation of Actions, —§65; Lis Pendens, —§26; Mines and Minerals, —§9; Patents, —§214, 215; Vendor and Purchaser, —§334.

CARRIERS.

See Appeal and Error, **843**, 1039, 1071, 1172; Constitutional Law, **245**; Evidence, **147**; Justices of the Peace, **69**.

II. CARRIAGE OF GOODS.**(D) Transportation and Delivery by Carrier.**

86 (Okla.) Under Rev. Laws 1910, § 821, a railroad carrier, to absolve itself from liability as an insurer, must deliver the property to the consignee at the place to which it is addressed, in the manner usual at that place.—*Wichita Falls & N. W. Ry. Co. v. J. J. Brown Co.*, 183 P. 889.

88 (Okla.) Where carrier delivered cotton to compress company, as arranged by consignee holding shipper's bill of lading with draft attached, and retained that company's tickets instead of delivering them to consignee, as was usual at that place, so that consignee could not secure the cotton, there was no delivery thereof within Rev. Laws 1910, § 821.—*Wichita Falls & N. W. Ry. Co. v. J. J. Brown Co.*, 183 P. 889.

(F) Loss of or Injury to Goods.

114 (Okla.) Where a carrier failed to deliver cotton to the consignee, but turned it over to a compress company, retaining such company's ticket, it was liable as insurer on loss of the cotton by fire.—*Wichita Falls & N. W. Ry. Co. v. J. J. Brown Co.*, 183 P. 889.

III. CARRIAGE OF LIVE STOCK.

215(2) (Utah) If at the time of unloading sheep there was an unreasonable delay by the acts of defendant carrier, it was liable if damage resulted from such negligence, when the sheep were unloaded too late in the day and so were chilled; it having been its duty to place the cars in proper position for unloading with reasonable promptness.—*Smart v. Oregon Short Line R. Co.*, 183 P. 320.

218(10) (Okla.) Provision of contract for interstate shipment of live stock, making written notice of claim for damages before removal from point of shipment or destination, and before it was mingled with other stock served within one day after delivery at destination, a condition precedent to recovery of damage, is reasonable, and bars recovery, though injury occurred while stock was in exclusive possession of carrier.—*St. Louis, I. M. & S. Ry. Co. v. Evans*, 183 P. 609.

228(1) (Utah) Sheep shipped over the line of defendant carrier having arrived at destination in good condition, and having been in good condition when unloaded, the burden of proof, on the charge that there was unreasonable delay in putting the cars in position for unloading, so that the sheep were unloaded too late in the day and were chilled, was on plaintiff shipper.—*Smart v. Oregon Short Line R. Co.*, 183 P. 320.

In an action against a carrier for damages to sheep from delay in placing cars in position for unloading, the burden was on shipper to prove the carrier's negligence in delaying the unloading too late in the day, so that the sheep were chilled, was the proximate cause of their loss.—*Id.*

228(5) (Utah) In an action against a carrier of sheep for injuries from delay in placing the cars in position for unloading, so that the sheep were chilled, evidence held insufficient to show negligence of the carrier, and to show that any negligence was the proximate cause of the damage.—*Smart v. Oregon Short Line R. Co.*, 183 P. 320.

183 P.—64

IV. CARRIAGE OF PASSENGERS.**(C) Performance of Contract of Transportation.**

264 (Cal.App.) A railroad's passenger was clearly in the wrong in insisting to the conductor on riding from V. to S. on a ticket reading from S. to V., unless he himself was not at fault in the matter of the mistake in the ticket.—*Squires v. Southern Pac. Co.*, 183 P. 695.

(D) Personal Injuries.

315(3) (Cal.App.) Where plaintiff was injured while crossing defendant's street car track in front of a car, which had stopped and was suddenly started, that it was not shown that the car had stopped for the purpose of permitting passengers to board the same, held immaterial, where the car had stopped to discharge passengers, so that plaintiff and others might approach expecting to board it.—*Rucker v. San Diego Electric Ry. Co.*, 183 P. 578.

322 (Cal.App.) In a personal injury action against a street railway company, allegations of the complaint held to charge clearly that the injuries were received as a direct result of defendant's negligence in the operation of its south-bound car, and the court having so found, the result of the action could not be changed by a finding for defendant with respect to negligence in the operation of its north-bound car which struck plaintiff subsequently.—*Rucker v. San Diego Electric Ry. Co.*, 183 P. 578.

(E) Contributory Negligence of Person Injured.

333(1) (Cal.App.) The fact that a carrier may owe its passengers the highest degree of care in safeguarding their exit from the carrier's premises after leaving its trains does not absolve the passenger from the duty of using ordinary care.—*Trulsson v. Southern Pac. Co.*, 183 P. 686.

333(10) (Cal. App.) Where plaintiff, alighting from defendant's train at an unusual place stepped upon another track after looking down it only a short distance in the direction from which trains would come, because of his view being obstructed by the departing train, walked with his back toward the approaching train without noticing the same until too late to step from such track, his negligence precluded recovery.—*Trulsson v. Southern Pac. Co.*, 183 P. 686.

347(3) (Cal.App.) It cannot be said as a matter of law that plaintiff, injured by a street car, was negligent when he attempted to pass in front of it while it was standing still at a street crossing; the fact of care or want of care on plaintiff's part being a matter for the court or jury to determine from surrounding circumstances.—*Rucker v. San Diego Electric Ry. Co.*, 183 P. 578.

CERTIORARI.

See Contempt, **67**; Executors and Administrators, **315**; Limitation of Actions, **130**.

I. NATURE AND GROUNDS.

1 (Nev.) Proceedings on certiorari are of appellate nature, though not pursued in ordinary and technical form of appeal.—*Dixon v. Second Judicial District Court in and for Washoe County*, 183 P. 312.

16 (Cal.App.) Certiorari will not issue to review a proceeding by an inferior tribunal prior to court's final adjudication.—*Frost v. Superior Court in and for Modoc County*, 183 P. 206.

28(2) (Nev.) A claim that a court erred in determining that a wife's cause of action for support and maintenance was brought within St. 1913, c. 97, was not a claim that the court exceeded its jurisdiction, so as to be reviewable

on certiorari.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317.

II. PROCEEDINGS AND DETERMINATION.

§37 (Nev.) In the exercise of its discretion the Supreme Court may issue, under Rev. Laws, § 5685, a writ of certiorari to review an action of a district court without notice to the adverse party, but the Supreme Court should not be asked, in such a proceeding, to annul a judgment granting support and maintenance to a wife, where the adverse party is not made a party to the application for the writ.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317.

§43 (Nev.) Clerk of court is not required under Rev. Laws, § 5686, to annex transcript in returning writ of certiorari directed to the court unless petitioner in serving writ upon clerk pays the fees prescribed by law for the making of the transcript.—Dixon v. Second Judicial District Court in and for Washoe County, 183 P. 312.

§46 (Nev.) In the exercise of its discretion the Supreme Court may issue, under Rev. Laws, § 5685, a writ of certiorari to review an action of a district court without notice to the adverse party.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317.

On certiorari to review the action of the district court, the latter should not place itself in the position of adverse party, as if it had some personal interest in sustaining its judgment, or throw obstacles in the way to prevent a review of its proceedings as by failing to give notice to adverse party of proceedings.—Id.

§60 (Nev.) Though Rev. Laws, § 5686, requires clerk of court to return transcript with writ of certiorari where writ is directed to the court, prosecutor of writ is required to use due diligence in having complete record made out, and on his failure to do so proceedings will be dismissed.—Dixon v. Second Judicial District Court in and for Washoe County, 183 P. 312.

In certiorari proceedings in Supreme Court against lower court, where clerk refused to annex transcript to writ because of petitioner's failure to pay fees, court will not dismiss proceedings on ground that petitioner failed to exercise due diligence in having record made out, where petitioner acted in good faith, believing that his duty ended upon issuance of writ, and that it was then Supreme Court's duty to require lower court and clerk to return writ with transcript under Rev. Laws, §§ 5686, 5687.—Id.

CHANCERY.

See Equity.

CHATTEL MORTGAGES.

See Pleading, §343.

I. REQUISITES AND VALIDITY.

(C) Execution and Delivery.

§60 (Okla.) A chattel mortgage is valid between the parties without being witnessed.—Lankford v. First Nat. Bank, 183 P. 56.

A compliance with Rev. Laws 1910, § 4036, relating to execution and attestation of signature to a chattel mortgage, is only required to entitle mortgage to be filed with register of deeds of proper county and operate as constructive notice to creditors and subsequent purchasers and incumbrancers without actual notice.—Id.

"Signed and validated," as used in Rev. Laws 1910, § 4036, refer to the attestation of a chattel mortgage, and are essential only as a requisite to entitle mortgage to be filed for record.—Id.

§61 (Okla.) A chattel mortgage is valid between the parties without being acknowledged.—Lankford v. First Nat. Bank, 183 P. 56.

II. FILING, RECORDING, AND REGISTRATION.

(A) Original.

§85 (Okla.) Where it does not appear from face of a chattel mortgage that officer taking the acknowledgment or the subscribing witnesses are legally disqualified within Rev. Laws 1910, § 4036, by their interest in property, the mortgage may properly be received for record, which will be constructive notice to subsequent creditors and mortgagees.—Lankford v. First Nat. Bank, 183 P. 56.

For the purpose of record a chattel mortgage must be attested either by acknowledgment or witnessed by two disinterested witnesses, in view of Rev. Laws 1910, § 4036.—Id.

§90 (Okla.) Where chattel mortgage is duly filed for record, and acknowledgment is regular on its face, or mortgage on its face is regularly attested before two witnesses, but there is a latent defect in mortgage because a subscribing witness or the person taking acknowledgment is disqualified by interest within Rev. Laws 1910, § 4036, not appearing on face of mortgage, the record is voidable, and not void.—Lankford v. First Nat. Bank, 183 P. 56.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§115 (Wyo.) Where maker of notes and mortgage tendered the amount thereof, showing an honest desire to pay such amount, both at maturity and thereafter, and the holder was at all times demanding more than the notes and mortgage called for, and it did not appear that the holder's attorney took any action toward the collection of the notes other than to publish notice of foreclosure, if in fact he did so, three days after tender in gold of more than the principal and interest then due on the notes, the holder was not entitled to an attorney's fee under a provision in the notes for 15 per cent. additional as an attorney's fee if placed in the hands of an attorney or collected by an attorney, with or without suit.—H. E. Wright & Co. v. Douglas, 183 P. 786.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(A) Rights and Liabilities of Parties.

§225(1) (Wash.) Purchaser of automobile subject to a chattel mortgage acquires no greater rights than those possessed by mortgagor, and is in no position to deny validity of mortgage.—First Nat. Bank v. Northwest Motor Co., 183 P. 81.

CHILDREN.

See Infants; Parent and Child.

CIRCUS.

See Animals, §89, 71, 74; Pleading, §35.

CITIES.

See Municipal Corporations.

CIVIL RIGHTS.

See Constitutional Law, §88; Deeds, §149.

CIVIL SERVICE.

See Injunction, §11, 126; Municipal Corporations, §133, 216, 217.

CLERKS OF COURTS.

See Appeal and Error, §428, 605, 612, 714, 1107; Certiorari, §43, 60; Evidence, §348.

CLUBS.

See Insurance, §646.

COLLATERAL ATTACK.

See Counties, 57.

COMMERCE.

See Carriers, 218; Constitutional Law, 245; Master and Servant, 264, 291.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

See Injunction, 11, 126; Master and Servant, 383; Officers, 100.

COMMON LAW.

See Admiralty, 20; Death, 11; Mortgages, 187; Pledges, 56.

COMPROMISE AND SETTLEMENT.

See Appeal and Error, 1050; Attorney and Client, 101; Evidence, 460; Husband and Wife, 278, 281.

CONDITIONAL SALES.

See Sales, 456-479.

CONSPIRACY.

See Bankruptcy, 303; Criminal Law, 423, 427; Injunction, 28, 118.

CONSTITUTIONAL LAW.See Statutes, 64-118.
For validity of statutes relating to particular subjects, see also the various specific topics.**II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.**

13 (Okl.) In the construction of constitutions, the intention of the lawmakers, when ascertained, must govern.—Hudson v. Hopkins, 183 P. 507.

32 (Wash.) Const. art. 4, § 13, article 11, § 8, article 2, § 25, and article 3, § 25, prohibiting increase in compensation of public officers during their term of office, are prohibitory in their nature, are self-executing, binding alike upon the authority empowered to fix salaries or compensation of public officers, whether the Legislature or a board or commission, or Legislature with concurrence of electorate.—State v. Wardall, 183 P. 67.

47 (Wash.) Declarations that statutes are invalid are generally the results of consideration of the enactments as they appear upon their faces, or influenced by facts within common knowledge, and of which courts take judicial notice.—State v. Clausen, 183 P. 115.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) Legislative Powers and Delegation Thereof.**

63(3) (Cal.App.) The Legislature alone is authorized by the Constitution to fix the compensation of officers, and any attempted delegation of that power to the board of supervisors is of no force or effect.—Sarter v. Siskiyou County, 183 P. 852.

(B) Judicial Powers and Functions.

68(1) (Nev.) The whole matter of the division of counties and the creation of new ones is in its nature political, and not judicial, and belongs wholly to the legislative department of the government.—Pershing County v. Sixth Judicial Dist. Court, 183 P. 314.

70(1) (Wash.) Where the Legislature (Laws 1919, p. 299) makes an appropriation of money for relief of a certain person "for services performed and material furnished," the court cannot go behind the statute and hear evidence to determine whether or not any services were performed or materials furnished, as one branch of the government cannot impeach the judgment of another and co-ordinate branch of the government as triers of fact.—State v. Clausen, 183 P. 115.

70(3) (Wash.) Where a Legislature (Laws 1919, p. 299) made an appropriation to provide payment for services performed and materials furnished the state by a certain person, the court cannot inquire into the motives of the Legislature in making the appropriation, although fraud and corruption are alleged.—State v. Clausen, 183 P. 115.

IV. POLICE POWER IN GENERAL.

81 (Cal.) The state Legislature is possessed of the entire police power, except as its power is limited by the provisions of the Constitution; but it cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business, which is not inherently, or because of the manner in which it is carried on, injurious to persons or property, or to the public health, convenience, safety, or morals.—Frost v. City of Los Angeles, 183 P. 342.

V. PERSONAL CIVIL AND POLITICAL RIGHTS.

88 (Cal.) St. 1913, p. 1097, prohibiting the practice of optometry without a license, is not invalid upon the ground that it interferes with personal liberty of citizen to fit glasses, etc.—Ex parte Rust, 183 P. 548.

VI. VESTED RIGHTS.

92 (Nev.) The inhabitants of a county have no vested rights as far as the boundaries of the county or the extent of its territory are concerned, and the same may be changed without their consent.—Pershing County v. Sixth Judicial Dist. Court, 183 P. 314.

VII. OBLIGATION OF CONTRACTS.**(C) Contracts of Individuals and Private Corporations.**

145 (Cal.App.) A judgment requiring a father to support his illegitimate child, pursuant to Civ. Code, § 196a, does not impair contract obligations, in violation of Const. art. 1, § 16, because father had previously given mother a lump sum for an instrument releasing him from further obligations.—Fernandez v. Aburra, 183 P. 366.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

206(1) (Cal.App.) Const. U. S. Amend. 14, so far as it prohibits any abridgment of the privileges and immunities of citizens, and guarantees the equal protection of the laws, addresses itself to the state government and its instrumentalities, and not to contracts between individuals.—Title Guarantee & Trust Co. v. Garrett, 183 P. 470.

X. EQUAL PROTECTION OF LAWS.

237 (Cal.App.) Ordinance prohibiting maintenance of corral for mules and burros in business distinct without a permit does not impair any constitutional right in giving city authorities the power to grant permit to one person and deny it to another.—Boyd v. City of Sierra Madre, 183 P. 230.

245 (Ariz.) Employers' Liability Law is not in violation of Const. U. S. Amend. 14, relating to equal protection.—United Verde Copper Co. v. Wiley, 183 P. 737.

⚡245 (Ariz.) The Employers' Liability Law is not violative of Const. U. S. Amend. 14.—*Swansea Lease, Inc., v. Molloy*, 183 P. 740.

⚡245 (Wash.) Laws 1917, p. 96, § 19, making the provisions of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) applicable to railroads engaged in both interstate and intrastate commerce, does not deny equal protection of the laws in violation of Fourteenth Amendment to the federal Constitution, in that it discriminates against employees of purely intrastate carriers.—*Archibald v. Northern Pac. R. Co.*, 183 P. 95.

⚡250 (Cal.App.) Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not contrary to Const. U. S. Amend. 14, § 1, though other sections of the Penal Code relating to crimes against children, such as sections 272, 273, 273g, and 650½, made the condemned acts misdemeanors only.—*People v. Camp*, 183 P. 845.

XI. DUE PROCESS OF LAW.

⚡256 (Cal.App.) Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not to deny to persons prosecuted under its provisions the equal protection of the laws, or to deprive them of liberty without due process, contrary to Const. U. S. Amend. 14, § 1, though other sections of the Penal Code relating to crimes against children, such as sections 272, 273, 273g, and 650½, made the condemned acts misdemeanors only.—*People v. Camp*, 183 P. 845.

⚡283 (Cal.) The tax under Pol. Code, §§ 2745-2778, as to permanent road divisions, on the property in a division, for highway improvements therein, being a general tax, does not amount to a taking of property without due process because not in proportion to benefits.—*Anaheim Sugar Co. v. Orange County*, 183 P. 800.

⚡301 (Ariz.) Employers' Liability Law is not in violation of Const. U. S. Amend. 14, relating to equal protection and due process.—*United Verde Copper Co. v. Wiley*, 183 P. 737.

⚡301 (Ariz.) The Employers' Liability Law, is not violative of Const. U. S. Amend. 14.—*Swansea Lease, Inc., v. Molloy*, 183 P. 740.

⚡320 (Cal.App.) Building Law of San Francisco, Ordinance No. 4170, N. S., providing for the demolition of wooden buildings within fire limits by board of public works upon owner's failure to raze building within specified period after notice, does not deprive owner of building, erected in fire district in violation of Ordinance No. 1188, of any vested rights without due process of law.—*Maguire v. Reardon*, 183 P. 303.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

⚡328 (Cal.) Optometry Act 1913, § 10, authorizing physicians and surgeons, but not osteopaths, to treat eyes, etc., does not unreasonably discriminate against osteopaths, in violation of Const. art. 1, §§ 1, 11, 21, article 4, § 25, subds. 19, 33, and the Fourteenth Amendment to the federal Constitution.—*Ex parte Rust*, 183 P. 548.

CONTEMPT.

See Divorce, ⚡182, 186.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

⚡67 (Cal.App.) Statutory contempt proceedings by superior court, under Code Civ. Proc. §§ 714 or 715, will not be reviewed by certiorari until a final order has been made, although the court may have made jurisdictional mistakes during the proceedings.—*Frost v. Superior Court in and for Modoc County*, 183 P. 206.

CONTINUANCE.

See Appeal and Error, ⚡684, 1043; Criminal Law, ⚡595-603, 655, 1144, 1151; Habeas Corpus, ⚡92; Justices of the Peace, ⚡128.

CONTRACTS.

See Appeal and Error, ⚡1039, 1050, 1071, 1170; Assignments; Attorney and Client, ⚡144; Bastards, ⚡17; Bills and Notes; Canals, ⚡15; Constitutional Law, ⚡145, 206; Corporations, ⚡519; Counties, ⚡139; Covenants; Customs and Usages, ⚡12; Damages, ⚡40, 163; Evidence, ⚡178, 317, 397, 484, 441, 442, 457, 460, 498; Exchange of Property; Executors and Administrators, ⚡202; Fixtures, ⚡27; Frauds, Statute of; Guaranty; Husband and Wife, ⚡278, 279, 281; Indemnity; Injunction, ⚡57, 63, 118; Insurance, ⚡697; Joint Ventures, ⚡5; Limitation of Actions, ⚡51, 69; Master and Servant, ⚡88, 106, 204, 316, 318, 339; Mechanics' Liens, ⚡14; Money Received, ⚡18; Municipal Corporations, ⚡278, 339, 358, 365, 593, 628; Patents, ⚡214, 215; Pleading, ⚡36, 140, 236; Principal and Agent, ⚡119; Principal and Surety, ⚡128; Public Lands, ⚡139; Sales; Specific Performance; Trial, ⚡395; Usury, ⚡98; Vendor and Purchaser; Wills, ⚡792; Work and Labor, ⚡14.

I. REQUISITES AND VALIDITY.

(C) Formal Requisites.

⚡34 (Nev.) Parties may adopt a written contract, and thus make it as binding as though formally executed by both, without signing it; and hence in an action by subcontractor against the surety on the contractor's bond, brought after complete performance by subcontractor, the fact that the written subcontract was not executed is no defense.—*U. S. Fidelity & Guaranty Co. v. Reno Electrical Works*, 183 P. 886.

(D) Consideration.

⚡47 (Cal.) There must always be consideration to support a valid promise.—*Bennett v. Potter*, 183 P. 156.

(E) Validity of Assent.

⚡99(3) (Cal.App.) Conflicting evidence *held* to sustain the trial court's finding that a written instrument should be reformed upon ground of mutual mistake, although the parties to the contract had not met until they executed it.—*Roush v. Kirkman*, 183 P. 353.

(F) Legality of Object and of Consideration.

⚡111 (Cal.App.) Husband's agreement to refrain from contesting wife's divorce suit, in consideration of wife's agreement to make settlement of property rights, *held* contrary to public policy.—*Lanktree v. Lanktree*, 183 P. 954.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚡152 (Cal.App.) A contract, whether construed according to its terms or in the light of circumstances surrounding its making, should be interpreted in accordance with the plain import of the language used.—*Vollmer v. Wheeler*, 183 P. 264.

⚡172 (Cal.App.) Where a man breached his contract with his wife to deliver bonds which he was to redeem for a specified sum within five years, failure to make such deposit of the bonds converted the agreement into an absolute promise for the payment of the money, and a right of action for recovery thereof matured upon such breach; demands for such delivery having been

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

previously made.—*Etienne v. Etienne*, 183 P. 689.

In an action for breach of contract by failure to deliver corporate bonds, which were to be later redeemed, the objection that damages must be based on the value of the bonds at time of breach, and that no proof thereon is contained in the record, is not well taken, where it is shown that defendant appellant construed the contract as requiring immediate deposit of the bonds, and the contract provides that the "bonds are taken" "as being the equivalent of \$60,000."—*Id.*

§176(3) (Or.) In an action for breach of a contract to render plaintiff medical and surgical treatment and furnish hospital facilities, whether plaintiff's ailment was chronic, and therefore not covered by the contract, was a question of fact for the jury, a chronic disease being one of long duration, or characterized by slowly progressive symptoms; citing Words and Phrases, First and Second Series, Chronic.—*Coffey v. Northwestern Hospital Ass'n*, 183 P. 762.

(B) Parties.

§187(3) (N.M.) Where for a sufficient consideration one agrees to assume and pay another's debt, the creditor is impliedly included within the privity of promise, and may single out the promisor and sue him by direct action.—*Lawrence Coal Co. v. Shanklin*, 183 P. 435.

(C) Subject-Matter.

§198(2) (Cal.App.) A contract to furnish all material and labor necessary to put in place ornamental plaster work according to specifications, which required waterproofing with a certain material, requires the builder to do such waterproofing in absence of evidence showing that such work was not a process customarily included in ornamental plastering.—*Schmohl v. John Simpson & Co.*, 183 P. 350.

(D) Place and Time.

§208 (Or.) In action for breach of a contract by defendant hospital association to furnish free hospital services where a hospital is provided, and free medical and surgical treatment, without specification as to place to be rendered, *held*, that an instruction that, under the terms and conditions of the contract, defendant was not bound to render services to plaintiff outside of the city and county in which defendant's hospital was located was properly refused.—*Coffey v. Northwestern Hospital Ass'n*, 183 P. 762.

III. MODIFICATION AND MERGER.

§238(2) (Cal.) An account stated is a mere unperformed promise to pay a stated sum to another, and is therefore an executory contract, under Civ. Code, § 1661, and hence an oral statement of account cannot be shown to alter a written contract, under section 1698.—*Bennett v. Potter*, 183 P. 156.

IV. RESCISSION AND ABANDONMENT.

§266(2) (Cal.App.) Where, in an action to rescind a contract, a return in specie of all the property received by the plaintiff is rendered impossible by reason of his having parted with a portion of it before discovery of fraud, *held*, under Civ. Code, § 3408, that rescission will not be denied, where there is a return of all property on hand with compensation in money for the remainder.—*Menefee v. Oxnam*, 183 P. 379.

§270(1) (Cal.App.) Where plaintiffs' delay in commencing action, after giving notice of their election to rescind the contract, in no wise damaged defendant, the delay is no ground for denial of relief.—*Menefee v. Oxnam*, 183 P. 379.

§272 (Cal.) Plaintiff, suing in one count for money advanced under a contract and in another count for damages for breach of contract, by accepting amount advanced with interest in

full satisfaction of demand based on cause of action of first count exercised his right of rescission, and terminated the contract, and cannot thereafter recover on second count for breach thereof.—*House v. Piercy*, 183 P. 807.

V. PERFORMANCE OR BREACH.

§277(1) (Or.) Where defendant hospital association, which had contracted to furnish medical, surgical, and hospital service to plaintiff in case of illness, in replying to plaintiff's request for care and service virtually refused to treat plaintiff on the ground that her disease was chronic, and not subject to treatment under the contract, plaintiff was relieved from making further requests for treatment.—*Coffey v. Northwestern Hospital Ass'n*, 183 P. 762.

§282 (Cal.App.) In action for tile work done under a contract providing work must be "satisfactory to the owner," evidence that tiling was done in a workmanlike manner, but that cracks developed, due probably to settling of building, sustains a recovery, since quoted words only require contractor to complete his work in a manner satisfactory to a reasonable man.—*Bruner v. Hegyl*, 183 P. 369.

§302 (Cal.) An owner of property being improved, who was to furnish a statement of defects, was not required, by implication, to add to a statement of defects directions as to the steps which the contractor should take in order to remedy the defect.—*Patten & Davies Lumber Co. v. Amigo Co.*, 183 P. 439.

§305(1) (Cal.) Where defects in work constituted material departures from the contract, and were made by the contractor with intent to cheat and defraud, and the owner was thereby cheated and defrauded, the contractor is in no position to assert that the owner waived his right to object to the defects in the work by failing to serve a statement of defects as required by the contract.—*Patten & Davies Lumber Co. v. Amigo Co.*, 183 P. 439.

§310 (Cal.App.) Where later lessee's agreement with former lessee, in consideration of former lessee's surrender of his lease so that the later lessee could lease the premises, provided for installment payments by later lessee to former during existence of later lessee's lease and during period of renewal upon later lessee's election to renew its lease, and provided for assignment to former lessee of right of renewal upon later lessee's failure to exercise option, former lessee was not entitled to payments during period of renewal, notwithstanding later lessee's failure to assign or exercise option to renew, where later lessee's lease was cancelled by court before time of renewal by reason of its insolvency.—*People v. Magee*, 183 P. 289.

§312(3) (Or.) In an action for breach of a contract to furnish medical and hospital services, the fact that plaintiff did not pay an assessment when due is immaterial, where the contract provided that "no cancellation of membership shall be made while the member is sick," and plaintiff was ill at such time.—*Coffey v. Northwestern Hospital Ass'n*, 183 P. 762.

§314 (Cal.App.) Where defendant made a contract before divorce for a property settlement agreeing to deliver certain bonds to his wife to be redeemed by him at a fixed price within five years, and delayed delivery until performance became impossible, his conduct was equivalent to a breach of contract, although the time for redeeming the bonds had not arrived and the plaintiff could then maintain an action for the breach.—*Etienne v. Etienne*, 183 P. 689.

VI. ACTIONS FOR BREACH.

§324(1) (Cal.) Upon refusal of a party to perform a contract, the other party, who has paid money thereunder, may either treat contract as rescinded and sue to recover the money, or may elect not to acquiesce in rescission,

and sue for damages for the breach, but cannot do both.—*House v. Piercy*, 183 P. 807.

CONVERSION.

See Trover and Conversion.

CORPORATIONS.

See Appeal and Error, *§*1050, 1056; Bankruptcy, *§*186, 303; Banks and Banking; Building and Loan Associations; Carriers; Electricity; Evidence, *§*121, 158; Exchange of Property, *§*3; Levees, *§*8; Life Estates, *§*15; Municipal Corporations; Parties, *§*95; Payment, *§*63; Pleading, *§*248; Principal and Agent, *§*106; Railroads; Specific Performance, *§*70; Trusts, *§*272.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

*§*52 (Cal.App.) The residence of a corporation is in the state under whose laws it is incorporated.—*Ryan v. Inyo Cerro Gordo Mining & Power Co.*, 183 P. 250.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(D) Transfer of Shares.

*§*116 (Cal.App.) Testimony that plaintiff said to defendant, "I guess I will let you have that," was insufficient to show a demand by the plaintiff that defendant purchase corporate stock under a contract wherein defendant agreed to purchase it at a certain price at a certain time, if plaintiff so desired.—*McManaman v. Vickery*, 183 P. 229.

Under an agreement to purchase corporate stock at the end of one year from date at a certain price, if owner then elected to sell, an election to sell and notification thereof made ten months after the expiration of the year was not made within a reasonable time.—*Id.*

A purchaser of corporate stock who has the option of requiring another person to buy it at the end of a year for a certain price must exercise the option within a reasonable time after the termination of the year.—*Id.*

*§*116 (Cal.App.) Where corporate stock was delivered to plaintiff by the promoter of the company in consideration of services, and plaintiff deposited the stock with defendant, as trustee, under a pooling agreement, and defendant, in violation of his trust, by collusion with the promoter surrendered plaintiff's certificate to the promoter, who had it canceled, and a new certificate issued to him, defendant was guilty of a conversion, and liable to plaintiff for the return of his certificate or its value before any dissolution or winding up of the company, which would involve no violation of Civ. Code *§* 309.—*Schaad v. Barceloux*, 183 P. 716.

*§*121(5) (Cal.App.) In an action to enforce an option to sell corporate stock, plaintiff having the right to require defendant one year from date of an agreement to purchase the stock at a certain price, evidence held insufficient to show that defendant did anything to interfere with plaintiff's exercise of his option so as to justify a delay of ten months after the expiration of the year in giving notice of election to sell.—*McManaman v. Vickery*, 183 P. 229.

(E) Interest, Dividends, and New Stock.

*§*150 (Wash.) Assets of dissolved corporation which board of directors authorized to be distributed to its stockholders according to law was not a dividend, a "dividend," when spoken of in inference to an existing corporation and not one being closed up and dissolved, being funds which the corporation sets apart from its profits to be divided among its members.—*Rossi v. Rex Consol. Mining Co.*, 183 P. 120.

*§*155(4) (Wash.) Where a contract of sale of shares of capital stock of a corporation is placed in escrow without any reference being

made to dividends, the vendee is entitled to dividends accruing to the stock while in escrow, upon payment of the purchase price.—*Rossi v. Rex Consol. Mining Co.*, 183 P. 120.

V. MEMBERS AND STOCKHOLDERS.

(D) Liability for Corporate Debts and Acts.

*§*240(1) (Cal.App.) Where sole stockholder drew checks on corporation payable to his personal creditor, only such creditors of the corporation as were creditors at time of transaction may complain; each payment being a separate transaction of which only such creditors as were creditors at the particular time thereof may complain.—*Scales v. Holje*, 183 P. 308.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

*§*422(3) (Cal.App.) In the absence of any showing to the contrary, a corporation is bound by the statements of its president and general manager, with whom another company dealt, relying on his personal responsibility and control.—*M. H. Hoffman, Inc. v. Bernstein Film Productions*, 183 P. 293.

*§*426(2) (N.M.) A corporation may ratify an unauthorized agreement of another person made in its behalf, and by such ratification become bound.—*Lawrence Coal Co. v. Shanklin*, 183 P. 435.

(F) Civil Actions.

*§*519(3) (Wash.) Evidence held to establish that a contract for handling cars of fruit was made between plaintiff and defendant, although practically all the dealings were had between plaintiff and one of defendant's subsidiary corporations.—*Umpqua Valley Fruit Union v. North Pacific Fruit Distributors*, 183 P. 101.

XII. FOREIGN CORPORATIONS.

*§*666 (Cal.App.) A foreign corporation doing business in California, after complying with Civ. Code, *§* 408, does not establish a "residence" in any particular county, such as is contemplated by the provisions of Code Civ. Proc. relating to the place of trial.—*Ryan v. Inyo Cerro Gordo Mining & Power Co.*, 183 P. 250.

A foreign corporation, a nonresident of the state, is not entitled to have an action against it for personal injuries tried in the county where the injury occurred; Code Civ. Proc. *§* 396, in so far as pertinent, not applying to nonresidents, and not limiting the rights of plaintiffs against nonresidents.—*Id.*

CORROBORATION.

See Husband and Wife, *§*297.

COSTS.

See Covenants, *§*132.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

*§*60 (Okla.) Plaintiff, in an action for recovery of money only, is entitled, under Rev. Laws 1910, *§* 5229, on a judgment in his favor to the allowance of costs, and a jury is not authorized to divide the costs between plaintiff and defendant.—*Wallingford v. Alcorn*, 183 P. 726.

COUNTIES.

See Appeal and Error, *§*1107; Constitutional Law, *§*63, 68, 92; Corporations, *§*606; Embezzlement, *§*26; Husband and Wife, *§*289, 308; Indictment and Information, *§*125; Intoxicating Liquors, *§*69, 106; Judgment, *§*800; Larceny, *§*7, 32, 60; Lis Pendens, *§*22; Mandamus, *§*4, 14, 102; Municipal Corporations, *§*889; Officers, *§*100; Statutes, *§*174, 175.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

⚡2 (Nev.) The inhabitants of a county have no vested rights as far as the boundaries of the county or the extent of its territory are concerned, and the same may be changed without their consent.—*Pershing County v. Sixth Judicial Dist. Court*, 183 P. 314.

⚡10 (Nev.) Unless a limitation exists in the Constitution, the power of the Legislature is absolute, by general or special statutes, to provide change of boundaries, division, addition, consolidation of existing counties, or the creation and organization of new counties.—*Pershing County v. Sixth Judicial Dist. Court*, 183 P. 314.

II. GOVERNMENT AND OFFICERS.

(A) Organization and Powers of Government in General.

⚡24 (Wash.) Counties, though legal entities, and in a sense municipal corporations, are but political subdivisions of the state, and, as such, are but agencies of the state, subject to legislative control.—*Great Northern Ry. v. Stevens County*, 183 P. 65.

(C) County Board.

⚡57 (Cal.) Action of a county board of a judicial or quasi judicial nature may be collaterally attacked only on the ground of excess of jurisdiction.—*Anaheim Sugar Co. v. Orange County*, 183 P. 809.

(D) Officers and Agents.

⚡74(5) (Cal.App.) Pol. Code, §§ 4258, subd. 12, 4044, 4290, relating to compensation of county surveyors, must be strictly construed, the fees and compensation of public officers being a matter of statutory origin and right which cannot be increased during the term for which the officer was elected, in view of Const. art. 11, § 9.—*Sarter v. Siskiyou County*, 183 P. 852.

⚡74(6) (Cal.App.) Neither Pol. Code, § 4044, nor § 4290, nor any other statute, make any provision for the payment of deputy county surveyors in the counties of the twenty-ninth class, and the board of supervisors are limited to the \$10 per day allowable to the county surveyor, and cannot pay him or his deputies any additional amount for such day, in view of Const. art. 11, § 9, providing county officers' compensation cannot be increased during the term for which elected.—*Sarter v. Siskiyou County*, 183 P. 852.

A county surveyor of a county of the twenty-ninth class cannot demand the payment of \$6 or \$10 per diem for services performed by any of his deputies upon the theory that such per diem constitutes the expense necessary for conducting the duties of his office as the law requires, the services of his office being limited to a per diem compensation of \$10, allowed the county surveyor by Pol. Code, § 4044.—*Id.*

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(C) County Expenses and Charges and Statutory Liabilities.

⚡139 (Or.) Laws 1915, c. 141, § 24, requiring district attorneys to prosecute diligently persons violating the act prohibiting the sale of intoxicating liquors, and section 25, providing for payment by the county court of expenses and disbursements incurred therein by and under the direction of the district attorney, do not authorize a district attorney as the county's agent to make a specific contract for services in procuring evidence specifying the amount the county shall pay, in the absence of statutory provision therefor, in view of L. O. L., § 937, placing the contract power with the county court (Per Johns and McBride, JJ.).—*Irwin v. Klamath County*, 183 P. 780.

The words, "expenses incurred and disbursements made by and under the direction of district attorney," in Laws 1915, c. 141, § 25, have reference to ordinary expenses, including amounts actually disbursed, or for which he made himself personally liable, such as hotel bills, railroad fare, etc., incurred while prosecuting violators of Prohibition Law, but does not include employment of agents by the month to travel over the county to ferret out possible offenders and gather evidence. (Per Bennett, J.)—*Id.*

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

⚡190(1) (Wash.) Neither Const. art. 7, § 9, article 11, § 12, nor any other constitutional provision, vests a county with the power to levy taxes; the power of a county to tax existing only by grant from the sovereign state.—*Great Northern Ry. v. Stevens County*, 183 P. 65.

⚡190(2) (Wash.) A county cannot levy a tax for current expenses to exceed eight mills, as provided by Rem. Code 1915, § 9213, even though such levy is made, in pursuance of section 9212, to cover necessary expenses to be incurred for the maintenance of the governmental functions of the county for the ensuing year.—*Great Northern Ry. v. Stevens County*, 183 P. 65.

⚡196(8) (Wash.) On appeal from a judgment for defendants, in an action by a taxpayer to recover taxes illegally levied and to enjoin county authorities from expending the taxes collected, or to be collected, the case will be disposed of as though it is simply one on the part of the taxpayer seeking recovery of the amount unlawfully exacted from it; no temporary injunction having issued in the case, and the record not showing the circumstances under which other taxpayers may have paid the illegal levy, nor what their several rights might be with reference thereto.—*Great Northern Ry. v. Stevens County*, 183 P. 65.

VI. ACTIONS.

⚡216 (Cal.App.) Under Code Civ. Proc. § 342, outlawing claims against counties six months after rejection by the supervisors, which section is made applicable to actions by the state by section 345, *held*, that a demand or bill by state board of health against a county under Stat. 1913, p. 868, for cost of eradicating rodents and other vermin from county, is barred six months after rejection, since there is no difference between "bill" or "demand," and a "claim."—*State Board of Health of California v. Alameda County*, 183 P. 455.

COURTS.

See Admiralty, ⚡20; Appeal and Error, ⚡624, 801; Certiorari, ⚡28; Constitutional Law, ⚡70; Contempt; Criminal Law, ⚡1134, 1182; Indians, ⚡28; Judges; Judgment, ⚡674; Justices of the Peace; Prohibition.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

⚡1 (Or.) "Jurisdiction" is the power to hear and decide.—*Ralston v. Bennett*, 183 P. 766.

⚡11 (Or.) Jurisdiction of a person *sui juris* depends either on proper service of summons on him or on voluntary appearance.—*Duncan Lumber Co. v. Willapa Lumber Co.*, 183 P. 476.

⚡17 (Or.) "Jurisdiction of the subject-matter" means authority of the court to hear and determine the kind of case presented, is conferred by law, and lack of it, under L. O. L. § 72, cannot be waived.—*Duncan Lumber Co. v. Willapa Lumber Co.*, 183 P. 476.

⚡37(1) (Or.) Jurisdiction of the subject-matter means authority of the court to hear and determine the kind of case presented, is conferred by law, and lack of it, under L. O. L. §

72, cannot be waived.—*Duncan Lumber Co. v. Willapa Lumber Co.*, 183 P. 476.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

—99(2) (Cal.) Order of the District Court of Appeal overruling demurrer to a petition for prohibition, and the views stated by the court as its reasons for making the order, do not constitute the law of the case so far as further proceedings in such court are concerned, or on any petition for hearing in the Supreme Court that may be filed after the proceeding is finally determined by the District Court of Appeal.—*Yolo Water & Power Co. v. Superior Court*, 183 P. 453.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

—169(5) (Okla.) In action, filed prior to Sess. Laws 1917, c. 119, amending Rev. Laws 1910, § 1816, by increasing county court's jurisdiction from \$200 to \$1,000, for \$89.90, interest, and attorney's fees, on a note, wherein defendants filed a counterclaim for \$325, to which plaintiff filed a reply, the county court had jurisdiction to try the counterclaim, in view of section 4714.—*Moline Plow Co. v. Adair*, 183 P. 499.

V. COURTS OF PROBATE JURISDICTION.

—202(4) (Okla.) County courts, under Const. art. 7, § 13, and Rev. Laws 1910, §§ 6553, 6554, have full jurisdiction of all minors' estates, and until the minor becomes of age all judgments and orders rest in the bosom of court, and may be modified, vacated, or set aside during such time, upon proper notice and for good cause shown.—*Tucker v. Leonard*, 183 P. 907.

VI. COURTS OF APPELLATE JURISDICTION.

(B) Courts of Particular States.

—212 (Cal.) If the Supreme Court has power to order transfer of a prohibition proceeding to it from the District Court of Appeal prior to final judgment by the latter court, it is not warranted in exercising such power after respondent's demurrer to the petition has been overruled, and an alternative writ directed to issue, but no final judgment has been given; peculiar facts of the case not constituting such an emergency as requires an immediate decision by the highest court.—*Yolo Water & Power Co. v. Superior Court*, 183 P. 453.

COVENANTS.

See Deeds, —156; Landlord and Tenant, —48; Limitation of Actions, —47; Quiet-
ing Title, —15; Vendor and Purchaser, —58.

II. CONSTRUCTION AND OPERATION.

(B) Covenants of Title.

—42(1) (Cal.App.) "Suffered," as used in Civ. Code, § 1113, relating to implied covenant against incumbrances "suffered by the grantor," implies reasonable control, and does not apply to an incumbrance not caused by the act of the party nor within his power to prevent.—*Crist v. Fife*, 183 P. 197.

(D) Covenants Running with the Land.

—69(2) (Cal.) Building restrictions in a deed, frequently spoken of as "equitable easements," were unknown to the common law and are not among the servitudes enumerated by Civ. Code, §§ 801, 802, and the enforcement thereof is limited to those which directly concern and benefit the dominant tenement, and the instrument creating such servitude will be strictly

construed; any doubt being resolved in favor of the free use of the land.—*Werner v. Graham*, 183 P. 945.

—72 (Cal.) Where lots had been sold subject to building restrictions, grantor's deed to purchaser of a lot, quitclaiming any interest in the lot, had the effect of releasing the restrictions as to the lot, so far as it was in the grantor's power to release them.—*Werner v. Graham*, 183 P. 945.

—79(3) (Cal.) If the restrictive provisions of a deed, with regard to buildings, amounted to covenants as well as conditions, where neither the plaintiff, seeking to quiet title against the restrictions, nor any of the defendants, owners of other lots under similar deeds, were the original parties to the covenants, and plaintiff did not contractually assume the covenant obligations, and defendants did not acquire by assignment from the common grantor his rights as covenantee, there was no privity of contract between plaintiff and defendants.—*Werner v. Graham*, 183 P. 945.

As to the "equitable easement" of building restrictions claimed against a certain lot sold with building restrictions, there is, as to lots sold by the common grantor prior to his conveyance of such lot, no equitable servitude, since it cannot be said that the covenants in the deed to such lot were exacted by him for the benefit of lots he did not own.—*Id.*

Where lot was sold with building restrictions, but grantor later quitclaimed any interest therein, lots which such grantor sold subsequently had no servitude over such lot; such servitude having been surrendered by the grantor's quitclaim.—*Id.*

Where owner of tract sold a portion thereof with restrictions, but without a word indicating that the land conveyed was part of a larger tract, the balance of which the grantor still retained, or that the restrictions were intended for the benefit of other lands, or that their benefit was to inure to and pass with other lands, and without description or designation of the land which was to be the dominant tenement as to the equitable servitude created by the restrictions, and the only expression as to who might act in case of breach of the restrictions was that in such case the land should revert to the grantor, his heirs or assigns, it is not possible reasonably to construe the restrictions as covenants running, not to the grantor, his heirs or assigns, but to him as the owner of certain land not designated or described, and to his various successors in interest in such land, especially in view of Civ. Code, § 1468, although subsequently enacted, defining covenants running with the land as "expressed to be for the benefit of the land of the covenantee."—*Id.*

Where owner of a tract sells a lot therefrom with restrictions, but without express reference in the deed to a common plan of restrictions, or in any way indicating any agreement between grantor and grantee that the lot is taken subject to such a plan, it is immaterial, as affecting the question whether the restrictions run personally to the owner and not to the owners of other lots in the tract, that the owner, in selling such lots from time to time, in each conveyance has exacted restrictive covenants evidently in accordance with a common plan, since not the grantor's intent alone, but the joint intent of the parties, must govern, and of such intent their deed constitutes the final and exclusive memorial.—*Id.*

—81 (Cal.) Where plaintiff seeks to quiet title against building restrictions on his lots against owners of other lots with similar restrictions in deeds from a common grantor, there is no privity of estate between the plaintiff and the defendants in the usual sense of the word, neither holding through or under the other or others, and the restrictions are not recognized by the common law as covenants running with the land, and are not for the benefit of the estate

conveyed to plaintiff, but to its detriment.—*Werner v. Graham*, 183 P. 945.

III. PERFORMANCE OR BREACH.

⚡88 (Okla.) Under Rev. Laws 1910, § 1166, the grantee defending an action to recover realty conveyed to him by warranty deed, to which grantor is made a party and is duly served with summons therein, is not required to give grantor written notice that such action has been brought.—*Rennie v. Gibson*, 183 P. 483.

⚡94 (Okla.) Covenants of "seisin" and "good right to convey" are synonymous, and, if broken at all, are broken when made.—*Rennie v. Gibson*, 183 P. 483.

⚡96(1) (Utah) Where the purchaser of land demanded a warranty deed to protect himself against incumbrances, in the absence of any exception from the covenants that such a deed imports under Comp. Laws 1917, § 4881, the grantors must answer for damages sustained by the grantee by reason of the incumbrance of a materialman's lien existing at execution of the deed, "incumbrance," as used in a deed, meaning every right to or interest in the land which may subsist in third persons to the diminution of its value, but consistent with the passing of the fee, though the sale of the premises had not been directly from the grantors to the grantee, but there had been an intermediate sale; the conveyance being made directly to save expense.—*Boothe v. Wyatt*, 183 P. 323.

IV. ACTIONS FOR BREACH.

⚡121(2) (Okla.) Where grantor was a party to an action wherein there was a recovery of land, or any interest adverse to any warranty deed thereto, the record of such judgment is conclusive evidence of the paramount title of adverse claimant.—*Rennie v. Gibson*, 183 P. 483.

Where land was conveyed by defendant to plaintiff by general warranty deed, and in an action against them there was a judgment that title was never in defendant, and canceling the deed, the defendant had same right to appeal from judgment as plaintiff, and when neither appealed, the judgment became final.—*Id.*

⚡121(2) (Utah) In a grantee's action to recover from his grantors damages sustained by reason of the foreclosure of a materialman's lien the deed having covenanted against incumbrances, finding of the trial court in the case of the materialman against the grantee and the parties from whom he had purchased, themselves purchasers from the grantors, held conclusive as to the fact that the materialman's lien was an incumbrance against the premises.—*Boothe v. Wyatt*, 183 P. 323.

⚡132(1) (Okla.) In an action for breach of covenant of warranty in a deed executed and delivered in 1905 to lands in that part of Oklahoma then known as Indian Territory, the grantee may recover costs and necessary expenses, including reasonable attorney's fees, incurred in a bona fide defense or assertion of his title, though grantor did not expressly agree to pay such expenses.—*Rennie v. Gibson*, 183 P. 483.

CRIMINAL LAW.

See Assault and Battery, ⚡78; Constitutional Law, ⚡250, 258; Criminal Law, ⚡1184; Disorderly House; Embezzlement; Escape; False Pretenses; Fish, ⚡13; Grand Jury; Habeas Corpus, ⚡92; Homicide; Husband and Wife, ⚡308; Indictment and Information; Infants, ⚡12, 20; Insurrection; Intoxicating Liquors; Larceny; Malicious Prosecution, ⚡24, 149; Riot; Statutes, ⚡86, 118; Witnesses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

⚡13 (Cal.App.) Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, is not rendered incurably uncer-

tain, vague, and unintelligible, in that it cannot be ascertained what lewd and lascivious acts are prohibited, because the section, by clerical error or otherwise, refers to Pen. Code, pt. 2, relating solely to criminal procedure, instead of part 1.—*People v. Camp*, 183 P. 845.

V. VENUE.

(A) Place of Bringing Prosecution.

⚡112(7) (Cal.App.) Where, after defendant had first stolen the potatoes, larceny of which is charged, he carried them away into another county for sale, his possession was a larceny in each county into which he carried the goods, every moment's continuation of the trespass and felony amounting in legal contemplation to a new caption and asportation, and he could be prosecuted in the second county into which he carried the goods, as for a larceny committed therein, apart from Pen. Code, § 786.—*People v. Mills Sing*, 183 P. 865.

(B) Change of Venue.

⚡144 (Okla.Cr.App.) Where one charged before a justice of the peace was arrested and brought before the justice, and filed an affidavit for a change of venue because he believed that he could not have a fair trial before the justice, the justice's duty was thereafter purely ministerial, and under Rev. Laws 1910, § 6149, he could only enter a proper order transferring cause to another justice, and was without jurisdiction to render judgment or issue order of commitment.—*Ex parte Van Fleet*, 183 P. 986.

VII. FORMER JEOPARDY.

⚡178 (Cal.App.) Under Pen. Code, § 1887, providing dismissal of the action bars another prosecution for the same offense if a misdemeanor, but not if a felony, dismissal on motion of the district attorney of complaint in justice court, charging defendant with battery, a misdemeanor, held not a bar to prosecution of defendant for the felony of assault by means and force likely to produce great injury, denounced by section 245.—*People v. Brown*, 183 P. 829.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

⚡302(4) (Okla.Cr.App.) Where information or indictment contains more than one count, the state, before the jury is sworn and by leave of court, may properly dismiss one or more of such counts, and try defendant upon remaining count or counts.—*Middleton v. State*, 183 P. 626.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

⚡322 (Cal.App.) There is no presumption that a prisoner in a county jail is illegally restrained.—*People v. Drevor*, 183 P. 370.

(B) Facts in Issue and Relevant to Issues, and Res Gestae.

⚡366(6) (Cal.App.) In prosecution for homicide, the state claiming that defendant was the cause of the death of decedent, the woman with whom he was living, and defendant claiming that she died from influenza, testimony was inadmissible that decedent told a witness, five days after the time when the state claimed defendant inflicted the deadly blows, that she had been delirious, had had a fever, and had fallen in the bathroom and hurt herself.—*People v. Bray*, 183 P. 712.

⚡367 (Cal.App.) When the bodily or mental feelings of a person are material issues, the usual expressions of those feelings, involuntary declarations, and exclamations, are admissible as tending in some degree to show bodily pain

and suffering, or present physical condition, being the mental reflexes of what it might be impossible to show otherwise.—*People v. Bray*, 183 P. 712.

Testimony of complaints of bodily pain and suffering is admissible on the principle of res gestæ only, and statement of a person's present condition or symptoms, or of the preceding cause of a present condition, are not admissible.—*Id.*

Declarations or complaints by one in his last illness which are but a narrative of the cause of sickness or injury, or the manner in which, or the time at which, the injury was inflicted, or the nature of past symptoms, or the bodily condition at a prior time, are incompetent and inadmissible.—*Id.*

In a prosecution for manslaughter of the woman with whom defendant was living, he claiming that she died of influenza, testimony as to declarations by decedent of present bodily condition, offered to show that decedent disregarded the conditions that would make for health or sickness, etc., held inadmissible.—*Id.*

(E) Best and Secondary and Demonstrative Evidence.

§400(6) (Cal.App.) In a prosecution for drawing a check upon a banking corporation in which accused had insufficient funds, the bank's corporate character may be proved by parol.—*People v. Patterson*, 183 P. 209.

(F) Admissions, Declarations, and Hearsay.

§406(3) (Okla.Cr.App.) An admission by an accused explaining suspicious circumstances for his own defense, from which jury may or may not infer guilt, does not come within the rule that confessions must be voluntary to be admissible.—*Wilson v. State*, 183 P. 613.

§407(1) (Cal.) Where accused denied charges made in his presence, the accusatory statements are inadmissible.—*People v. Lapara*, 183 P. 545.

§413(2) (Okla.Cr.App.) A statement or declaration by an accused explaining suspicious circumstances for his own defense, from which jury may or may not infer guilt, does not come within the rule that confessions must be voluntary to be admissible.—*Wilson v. State*, 183 P. 613.

Statements of one accused of murder in giving an account of himself or of the homicide which tend to explain incriminating circumstances are admissible, and may be proven false by prosecution after it has proved that accused made them.—*Id.*

(G) Acts and Declarations of Conspirators and Codefendants.

§423(1) (Cal.App.) What one conspirator to commit larceny said or did in furtherance of the common purpose during the life of the conspiracy was admissible against his coconspirator, prosecuted for the larceny.—*People v. Mills Sing*, 183 P. 865.

§427(3) (Cal.App.) Where the facts from which a conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime conspired to be committed that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that the evidence should first be introduced to establish prima facie the fact of the conspiracy.—*People v. Mills Sing*, 183 P. 865.

(H) Opinion Evidence.

§465 (Cal.App.) In a prosecution for larceny of potatoes, defendant representing that he was a buyer for cash, testimony of a witness as to the price defendant and his confederate had "agreed" to pay for the potatoes held inadmissible as a conclusion; the witness having testified to the particulars of the negotiations.—*People v. Mills Sing*, 183 P. 865.

(J) Testimony of Accomplices and Codefendants.

§511(2) (Cal.App.) Corroboration of an accomplice need not be by evidence of itself sufficient to support the charge, being sufficient, though slight, if it tends to connect defendant with the commission of the crime charged.—*People v. Rose*, 183 P. 874.

(K) Confessions.

§516 (Okla.Cr.App.) In criminal law, a "confession" is a voluntary statement by accused wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or his share and participation in it.—*Wilson v. State*, 183 P. 613.

A "confession" in a legal sense, is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred.—*Id.*

A statement, declaration, or admission by an accused explaining suspicious circumstances for his own defense, from which jury may or may not infer guilt, is not a "confession"—*Id.*

§519(4) (N.M.) Where defendant, knowing that he was under suspicion of stealing cattle, procured cattle inspector's statement to defendant's neighbor that inspector would see how owner felt, and, if he would not push case, would bring him to meet defendant, and that, if they came, defendant might understand that owner would not prosecute, a confession to the inspector and owner was involuntary.—*State v. Foster*, 183 P. 897.

Under rule excluding confession in criminal case if induced by promises of immunity by persons in authority, a cattle inspector and the owner of cattle which defendant was accused of stealing were "persons in authority," where inspector and owner were in such situation that defendant, confessing, might reasonably consider them persons able to afford him aid.—*Id.*

(M) Weight and Sufficiency.

§564(1) (Cal.App.) Evidence that defendant assisted a fellow prisoner while both were confined in a certain county jail, etc., held to sufficiently establish the venue in a prosecution for aiding a prisoner to escape.—*People v. Drevoir*, 183 P. 370.

XI. TIME OF TRIAL AND CONTINUANCE.

§576(8) (Okla.Cr.App.) A defendant, who has never demanded or been refused a trial, is not entitled to a discharge under Const. art. 2, § 20, and Rev. Laws 1910, § 5547, providing for a speedy trial.—*Weeks v. State*, 183 P. 932.

§576(11) (Okla.Cr.App.) The burden is on defendant, in support of his motion to dismiss, to show that laches was on part of state through its prosecuting officers, and otherwise the presumption is that delay in trial was caused by or with consent of defendant.—*Weeks v. State*, 183 P. 932.

§595(10) (Okla.Cr.App.) An absent witness, for whose testimony a continuance was sought, would be incompetent to testify that he was county attorney when information was filed, and that it was agreed that, if defendant relinquished all interest in an automobile, his case would be dismissed, and that he told defendant county judge approved agreement, as the only competent evidence as to dismissal was the trial court's record.—*Weeks v. State*, 183 P. 932.

§596(1) (Okla.Cr.App.) In a prosecution for grand larceny, where record showed that testimony of an alleged absent witness would have been cumulative, it could not be said that trial court abused its discretion in overruling defendant's motion for a continuance.—*Ashburn v. State*, 183 P. 521.

§598(2) (Okla.Cr.App.) In prosecution for keeping a house of ill fame, a motion for a

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continuance for absence of a material witness, an inmate at time of a raid, December 18, 1916, and an intimate friend of a codefendant, was properly denied, where no effort was made to obtain her attendance until April 2d, one day before trial, though it could probably have been obtained within three or four days.—*Bornheim v. State*, 183 P. 514.

—598(2) (Okla.Cr.App.) Where sheriff's return, filed May 9th, stated that he could not find witness subpoenaed by defendant within his county, and affidavit filed at trial on May 20th alleged that defendant's attorney examined return, and continued to think that witness had been duly served until he did not appear when called, a motion for a continuance for absence of such alleged material witness was properly denied for want of diligence.—*Wilson v. State*, 183 P. 613.

—603(8) (Okla.Cr.App.) An application for a continuance for absence of a witness was insufficient, where it did not aver that defendant was unable to prove by other witnesses the facts to which it was alleged such absent witness would testify.—*Weeks v. State*, 183 P. 932.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

—641(1) (Cal.App.) A professional court interpreter, familiar with the methods of criminal jury trials, who, on his trial for obtaining money by false pretenses, himself managed and presented his defense, having announced ready for trial, was not deprived of his right, under Const. art. 1, § 13, to be represented by counsel, if he desired, having voluntarily failed to procure such assistance.—*People v. Rose*, 183 P. 874.

—655(1) (N.M.) It is improper for court during trial to make any unnecessary comments, or to take any unnecessary action, which might tend to prejudice the rights of either of the parties litigant.—*State v. Parks*, 183 P. 433.

—655(3) (Okla.Cr.App.) In passing on a motion for a continuance for physical unfitness of defendant's counsel to undertake the trial, it was improper for court, in presence of attending jurors from whom a jury was to be selected, to express his opinion that, "The motion is simply a ruse to pass the case over."—*Boyer v. State*, 183 P. 620.

—657 (N.M.) When it becomes unavoidable, the court has the right, even in presence of jury, to impose fine upon any person connected with trial, and its action cannot of itself cause a mistrial, merely because it might have some influence on minds of jurors.—*State v. Parks*, 183 P. 433.

—657 (Okla.Cr.App.) Action of trial court, without just ground and in presence of jury, in severely reprimanding defendants' counsel and assessing heavy fines against him and ordering him committed until they were paid, prejudice the defense before the jury and was reversible.—*Boyer v. State*, 183 P. 620.

(C) Reception of Evidence.

—673(5) (Cal.App.) In a prosecution for rape, where defendant's counsel elicited from prosecutrix on cross-examination that defendant had had relations with her for two years before the date of the crime charged, the court properly instructed that such evidence was received and admitted to prove the adulterous disposition of defendant, etc.—*People v. Lopez*, 183 P. 674.

(E) Arguments and Conduct of Counsel.

—718 (Cal.) Where prosecution relies on direct evidence, and any circumstantial evidence is incidental to and corroborative of the direct evidence, defendant's counsel may be prevented from arguing law of circumstantial evidence to jury.—*People v. Lapara*, 183 P. 545.

—722½ (Cal.App.) In prosecution for manslaughter of the woman with whom defendant was living, she being undivorced from her hus-

band, the district attorney was justified in referring to decedent by her proper married name, and not as defendant's wife.—*People v. Bray*, 183 P. 712.

—726 (N.M.) Remarks of district attorney, which ordinarily would be improper, are no cause for reversal, where provoked by defendant's counsel and in reply to his acts and statements, unless such remarks extend to an impertinent reply, and bring the jury extraneous matters touching important issues.—*State v. Parks*, 183 P. 433.

—727 (Cal.App.) In prosecution for manslaughter of the woman with whom defendant was living as his wife, she not having been divorced from her husband, certified copy of marriage certificate and license, showing that defendant and decedent had gone through the form of a marriage ceremony, was inadmissible, offered for alleged purpose of overcoming district attorney's repeated and proper reference to decedent as the wife of her real husband.—*People v. Bray*, 183 P. 712.

—730(1) (Cal.App.) Where the court trying a prosecution for murder erroneously limited defendant's two counsel to 2½ hours in their argument, in the absence of anything to show that the additional three-quarters of an hour actually allowed counsel was not ample, the error must be deemed to have been cured.—*People v. Castro*, 183 P. 828.

(G) Necessity, Requisites, and Sufficiency of Instructions.

—770(2) (Okla.Cr.App.) Defendant, on request, has the right to have an affirmative instruction given applicable to his testimony, based on the hypothesis that it is true, and when such testimony affects a material issue and would be ground for acquittal.—*Peyton v. State*, 183 P. 639.

—814(1) (Okla.Cr.App.) It is not error to refuse a requested instruction not applicable to the issues.—*Johnson v. State*, 183 P. 926.

—814(3) (Okla.Cr.App.) It is not reversible error to refuse a requested instruction not applicable to the evidence, though it states a correct rule of law.—*Cole v. State*, 183 P. 734.

—814(12) (Cal.App.) In a prosecution for manslaughter, where no evidence was offered for or against defendant's reputation, an instruction that the law presumed defendant had a good reputation for truth, honesty, and integrity was properly refused, despite Code Civ. Proc. § 1847.—*People v. Hopper*, 183 P. 836.

—814(17) (Cal.) Where prosecution relies upon direct evidence, and any circumstantial evidence is merely incidental to and corroborative of direct evidence, an instruction on circumstantial evidence is unnecessary.—*People v. Lapara*, 183 P. 545.

—815(5) (Okla.Cr.App.) In trial for unlawful transportation of liquor, an instruction leaving no alternative but to convict, though defendant had no knowledge of, or reason to know, contents of a package placed in his automobile by state's witness, which question was raised by defendant's testimony, which, if true, would have entitled him to acquittal, was erroneous as depriving defendant of benefit of his theory of defense.—*Peyton v. State*, 183 P. 639.

—815(13) (Cal.App.) In a prosecution for rape, an instruction that the jury under the information could find a verdict of guilty of rape as charged, of assault with intent to commit rape, of assault, and of not guilty, held not erroneous as taking from the jury the right to consider whether or not prosecutrix was over 16 and under 18; the only evidence being that she was 13.—*People v. Lopez*, 183 P. 674.

—822(1) (Okla.Cr.App.) The charge of the court must be considered as a whole and not piecemeal.—*Rogers v. State*, 183 P. 41.

—822(1) (Okla.Cr.App.) It is sufficient if the instructions, taken as a whole, substantially present the law of the case fairly.—*Wilson v. State*, 183 P. 613.

§823(4) (Wash.) It was not prejudicial error to instruct, "Every person who with intent to deprive or defraud shall steal, or obtain property of another of the value of more than \$25, shall be guilty of the crime of grand larceny," where it was manifestly given merely to inform the jury that they must find that the property taken was of the value of more than \$25; the other instructions fully informing the jury as to all the elements of larceny.—*State v. Donovan*, 183 P. 127.

§823(16) (Okla.Cr.App.) A paragraph in general instructions, which technically does not state the law correctly, authorizing a conviction if defendant was directly or indirectly concerned in commission of the acts constituting the offense alleged, was not necessarily reversible error, where other given instructions overcame the objection.—*Middleton v. State*, 183 P. 626.

(H) Requests for Instructions.

§824(7) (Cal.App.) Failure to instruct on accomplice testimony was not erroneous; defendant not having requested such charge and refusing assistance of attorney.—*People v. Rose*, 183 P. 874.

§829(1) (Cal.App.) The refusal of instructions containing matter sufficiently covered by the charge given by the court was not erroneous.—*People v. Luttrell*, 183 P. 681.

§829(1) (Okla.Cr.App.) Requested instructions covering but one legal proposition, which is in effect given in the general charge, were properly refused.—*Middleton v. State*, 183 P. 626.

§829(1) (Okla.Cr.App.) It is not error for trial court to refuse to give a requested instruction containing a correct statement of the law, if the principles stated therein have already been covered in the general instructions.—*Johnson v. State*, 183 P. 926.

§829(5) (Cal.App.) In a prosecution for manslaughter, the court properly refused to instruct that defendant was entitled to act on the appearances as they presented themselves to him as a reasonable man, though it might subsequently turn out that decedent was unarmed, and there was no danger to defendant, where another instruction covered the same ground, without error of which defendant can complain.—*People v. Hopper*, 183 P. 836.

§829(8) (Cal.App.) In a prosecution for manslaughter, the trial court did not err in refusing to charge that evidence of decedent's bad character for peace and quiet could be considered by the jury, where the subject-matter was sufficiently covered by another instruction.—*People v. Hopper*, 183 P. 836.

§829(11) (Cal.App.) In a prosecution for manslaughter, where the court charged that the jury should consider with caution any testimony as to defendant's oral admissions, it did not err in refusing to instruct that declarations are weak and unsatisfactory in their nature as evidence, etc.—*People v. Hopper*, 183 P. 836.

§829(18) (Cal.App.) In prosecution for larceny, where defendant pleaded not guilty, but offered no evidence, and the court instructed on reasonable doubt, and on the duty of the jury to acquit if such a doubt existed, etc., refusal of an instruction that if there was any reasonable theory deducible from the evidence consistent with defendant's innocence, there must be an acquittal, held not prejudicial; the matter having been adequately covered.—*People v. Mills Sing*, 183 P. 865.

§829(18) (Okla.Cr.App.) Refusal of defendant's requested instruction that jury could not convict if there was a reasonable doubt as to whether any one of the elements of the offense had been proven was not error, where the subject was substantially covered by the general charge.—*Bornheim v. State*, 183 P. 514.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§922(16) (Cal.App.) In a prosecution for manslaughter, when taken with the other in-

structions, a charge that, if the commission of the homicide by defendant is proved to a moral certainty and beyond a reasonable doubt, it devolves on defendant to prove circumstances of mitigation, etc., held not erroneous, as virtually instructing that defendant should prove mitigation or justification, and not that he might raise a reasonable doubt as to such defense.—*People v. Hopper*, 183 P. 836.

§939(1) (Wyo.) In a prosecution for larceny, testimony of one who had purchased the stolen horse that he bought it not of defendant, but from the prosecuting witness, was material, but as newly discovered evidence was not sufficient to require a new trial, where defendant was not diligent in procuring it, inasmuch as defendant knew that such witness had the stolen mare at such purchaser's place a day or two after the theft.—*Jones v. State*, 183 P. 745.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§980(2) (Cal.App.) Pen. Code, § 1192, providing that, "upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree," is mandatory, and where the court fails to determine the degree in a murder case, in which defendant has pleaded guilty, any attempted sentence is illegal and invalid.—*People v. Paraskevopolis*, 183 P. 585.

A voluntary statement or plea by one accused of murder would be sufficient to uphold a determination by the court of the degree, as required by Pen. Code, § 1192; but, in order to pronounce judgment, under Pen. Code § 190, the court should have before it evidence both to determine the degree and to enable a sound and just exercise of the power of determining whether the punishment for first degree murder shall be death or life imprisonment.—*Id.*

§992 (Okla.Cr.App.) In view of Rev. Laws 1910, § 2319, permitting jury in their discretion to award the death penalty or life imprisonment on a conviction of murder, the trial court cannot render judgment and sentence except in accordance with the verdict, when the death penalty is assessed.—*Wilson v. State*, 183 P. 613.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§1023(8) (Cal.App.) Since no appeal from an order denying defendant's motion in arrest of judgment finds any warrant under the Penal Code, an attempted appeal therefrom must be disregarded, in view of Pen. Code, § 1237.—*People v. Bray*, 183 P. 712.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§1032(4) (Okla.Cr.App.) Where defendant proceeded to trial on an amended information, without asking additional time to plead thereto and without filing any motion to quash or set it aside, he waived failure to reverify it.—*Thayer v. State*, 183 P. 931.

§1033(2) (Okla.Cr.App.) Where two were jointly indicted, a motion by one before a severance, for a change of venue, in which the other did not join, was not a motion by the other, and where change was denied, and a severance had, and the defendant, not joining in motion, was separately convicted and appealed, the overruling of motion could not be successfully assigned as error.—*Middleton v. State*, 183 P. 626.

§1036(1) (Cal.App.) The introduction of evidence received without objection in a criminal case cannot be urged as error upon appeal.—*People v. Patterson*, 183 P. 209.

§1036(1) (Okla.Cr.App.) Admission of alleged incompetent evidence cannot be reviewed, where no objection was made or exception reserved.—*Ashburn v. State*, 183 P. 521.

§1037(1) (Cal.App.) Where defendant did not assign misconduct of the prosecuting attor-

ney in argument at the time when the objectionable statement was made to the jury, such objection will not be considered on appeal.—*People v. Hopper*, 183 P. 836.

⇒1044 (Okla.Cr.App.) Defendant, by not moving to quash or set aside the information because of the defect in the verification appearing on its face, waived the defect.—*Thayer v. State*, 183 P. 931.

⇒1054(1) (Okla.Cr.App.) Admission of alleged incompetent evidence cannot be reviewed, where no objection was made or exception reserved.—*Ashburn v. State*, 183 P. 521.

(D) Record and Proceedings Not in Record.

⇒1088(1) (Cal.App.) The record of a criminal action consists of, first, the indictment or information and a copy of the minutes of the plea or demurrer; second, a copy of the minutes of the trial; third, the written instructions, etc.; and, fourth, a copy of the judgment.—*People v. Camp*, 183 P. 845.

⇒1090(13) (N.M.) Alleged remarks of an attorney for the state during trial were not reviewable, where they were not incorporated in record by bill of exceptions.—*State v. Parks*, 183 P. 433.

⇒1099(7) (Okla.Cr.App.) A purported case-made, not signed and certified by the trial judge within the time limited by the statute for filing it in the Criminal Court of Appeals, is a nullity.—*Watt v. State*, 183 P. 512.

Where a convicted defendant without laches or fault loses the benefit of his exceptions, as reserved in a case-made, because of trial judge's absence from the state when it should have been settled and signed and until after time limited by statute for filing it in Criminal Court of Appeals, a new trial would be granted.—Id.

Where case-made was served within extended time and notice given of time of settling and signing it, before which time trial judge left state, and was absent until after time limited by statute for filing case-made, and transcript of evidence was essential to review, the conviction will be reversed, and new trial granted.—Id.

⇒1114(1) (Cal.App.) In prosecution for manslaughter of woman with whom defendant was living, defendant claiming that she died of influenza, the Appellate Court, despite any statement of counsel to the trial court, cannot reverse conviction for refusal to grant defendant's motion for an order directing issuance of a subpoena duces tecum directed to the city health officer, and requiring production of the certificate of death filed with him, in the absence of showing that such certificate gave influenza as the cause of death.—*People v. Bray*, 183 P. 712.

⇒1124(3) (Okla.Cr.App.) Without a duly authenticated transcript of the testimony taken upon the trial, the question as to whether the court erred in overruling a motion for new trial on the ground of newly discovered evidence, is not before the Criminal Court of Appeals.—*Whately v. State*, 183 P. 925.

(E) Assignment of Errors and Briefs.

⇒1130(2) (Cal.App.) On appeal from conviction of murder, where the sole argument that the trial court erred in refusing instructions is the claim the refusal to give each and all of the instructions found in the clerk's transcript on pages of certain numbers was prejudicial error, and withdrew full consideration of the case from the jury, the appellate court will not trouble to examine such instructions to discover wherein they are erroneous.—*People v. Castro*, 183 P. 828.

⇒1130(2) (Okla.Cr.App.) Where plaintiff in error incorporates in his brief only detached parts of a paragraph of instructions as alleged error, and does not present entire paragraph and treat it in its relation to entire charge, the Criminal Court of Appeals will not review such assignment.—*Rogers v. State*, 183 P. 41.

(G) Review.

⇒1134(3) (Cal.App.) Upon an appeal from an order denying a motion to set aside a judgment of sentence for murder entered upon defendant's plea of guilty, the decision of the superior court upon the question of accused's entering his plea upon misapprehension or in ignorance of the scope or effect of such plea or of his rights will not be reviewed.—*People v. Paraskevopolis*, 183 P. 585.

⇒1134(3) (Okla.Cr.App.) Where it appears that if a judgment of conviction was executed the term of imprisonment would have been served, and where no appearance was made either to orally argue case on appeal or by filing a brief for plaintiff in error, the criminal court of appeals in its discretion will either dismiss because questions involved are moot, or affirm under its rule 9 (165 Pac. x).—*Smith v. State*, 183 P. 515.

⇒1134(3) (Okla.Cr.App.) Where a demurrer to an information or indictment containing two counts is overruled, and the state then dismisses one of such counts, whether count erred in overruling demurrer to count dismissed is immaterial, and will not be reviewed.—*Middleton v. State*, 183 P. 626.

⇒1144(7) (Okla.Cr.App.) Without a proper record affirmatively showing the contrary, the presumption is that the court had continued a case for a presumptively lawful cause.—*Weeks v. State*, 183 P. 932.

⇒1144(16) (Cal.App.) In support of conviction, the appellate court is authorized to presume that the verdict was predicated on any theory deducible from the evidence which will support the charge and the verdict.—*People v. Rose*, 183 P. 874.

⇒1144(17) (Okla.Cr.App.) Where an appeal is taken to the Criminal Court of Appeals, and record fails to show that judgment was superseded by required supersedeas bond in court below, the presumption obtains that judgment was immediately carried into effect by incarceration in the penitentiary, where such imprisonment was provided in the judgment.—*Smith v. State*, 183 P. 515.

⇒1151 (Okla.Cr.App.) To cause a reversal of a conviction for the denial of a defendant's motion for a continuance, it must be clearly shown that denial was an abuse of court's discretion.—*Boyer v. State*, 183 P. 620.

⇒1159(2) (Okla.Cr.App.) Questions of fact are to be decided by the jury, and, where the evidence reasonably supports the verdict, the judgment will be affirmed.—*Freeman v. State*, 183 P. 626.

⇒1159(4) (Cal.App.) The appellate court, even with the added powers vested in it with respect to review of questions of fact by Const. art. 6, § 4½, cannot consider the evidence to determine whether the witnesses on whose testimony the jury presumptively predicated a verdict of guilty testified to the truth or not.—*People v. Rose*, 183 P. 874.

⇒1159(4) (Okla. Cr. App.) The credibility of witnesses and the weight of their testimony being solely a question for jury, the Criminal Court of Appeals if, after a careful examination of evidence, it is not prepared to say that jury were not warranted in convicting, will affirm.—*Jones v. State*, 183 P. 518.

⇒1159(4) (Okla.Cr.App.) Notwithstanding it is shown that a witness has been convicted of larceny of live stock, and that his general reputation for truth is bad, the jury may believe his testimony if it is sufficient to legally convict accused of offense charged, and the Criminal Court of Appeals will not set aside conviction, though the evidence was in direct conflict with the evidence for accused; the credibility of witnesses being exclusively for jury.—*Cole v. State*, 183 P. 734.

⇒1159(4) (Okla.Cr.App.) The veracity of witnesses is within the exclusive province of the jury, and where they have determined it the Criminal Court of Appeals will not disturb their

verdict where the trial is free from prejudicial error.—*Thaxton v. State*, 183 P. 926.

⇒1159(4) (Wyo.) In a larceny prosecution where the only evidence upon which the jury could rightfully find the defendant guilty was testimony of a witness who had himself pleaded guilty to the larceny of a horse, considering witness's character, the improbability of his story, and his being directly contradicted by several witnesses on material matters, following the rule that judgment will not be reversed if supported by substantial credible evidence, *held* that evidence was neither substantial nor credible, was insufficient to sustain a conviction and warranted reversal.—*Jones v. State*, 183 P. 745.

⇒1163(5) (Okla.Cr.App.) In view of fact that defendant, in trial for unlawful transportation of liquors, had borne a reputation as a law-abiding citizen and had held offices in county, it could not be assumed that refusal of an affirmative instruction covering the law applicable to his testimony, which, if true, would entitle him to an acquittal, was not prejudicial.—*Peyton v. State*, 183 P. 639.

⇒1165(1) (Okla.Cr.App.) A defendant cannot complain of an error that cannot operate to his prejudice.—*Wilson v. State*, 183 P. 613.

⇒1166½(8) (Okla.Cr.App.) Where defendant has exhausted his peremptory challenges, it is reversible error to overrule a challenge for cause when the examination of juror, and resolution of all doubt in the evidence in favor of defendant, shows that juror is not impartial.—*Middleton v. State*, 183 P. 626.

⇒1166½(12) (Okla.Cr.App.) An improper remark by court, while ruling on testimony of defendant's witness, which was in effect a comment on weight of evidence, is not ground for reversal, where court thereafter instructed jury to disregard it, and where Criminal Court of Appeals on examination of record finds that proof of defendant's guilt was practically undisputed.—*Wilson v. State*, 183 P. 613.

⇒1169(1) (Okla.Cr.App.) The admission of evidence not germane to the issues involved, but which in no wise tends to show defendant's guilt, while not approved, is not prejudicial error.—*Waldon v. State*, 183 P. 637.

⇒1170(2) (Cal.App.) In a prosecution for rape, any error in sustaining the district attorney's objection to testimony of prosecutrix admitting that on preliminary examination she had testified to certain facts contrary to her testimony on trial, was harmless to defendant, where the evidence was in the record through reading of a portion of the transcript on preliminary examination.—*People v. Lopez*, 183 P. 674.

⇒1170½(3) (N.M.) Error in overruling an objection to a question is not ground for reversal, where question was not answered.—*State v. Parks*, 183 P. 433.

⇒1170½(5) (N.M.) Rulings upon question to a witness on cross-examination, although erroneous, are no ground for a reversal, where no substantial prejudice results.—*State v. Parks*, 183 P. 433.

⇒1172(1) (Cal.App.) In a prosecution for aiding a prisoner to escape, refusing a requested instruction that defendant must have known the prisoner was in legal custody, etc., is not reversible error where the fact was so apparent that defendant must have known it.—*People v. Drevoir*, 183 P. 370.

⇒1172(8) (Okla.Cr.App.) In trial for riot, an instruction that if any three or more defendants feloniously combined, with intent to use violence, and carried weapons or were disguised, and violently took prosecuting witness from a meeting, they should be found guilty as charged and assessed punishment at not less than 2 or more than 10 years, and that if they advised or encouraged participants in riot, punishment should be assessed for not less than 2 or more than 20 years, was not prejudicial under the evidence and verdict.—*Johnson v. State*, 183 P. 926.

⇒1173(2) (Cal.App.) In a prosecution for obtaining money by false pretenses on a forged check, in view of the circumstances, failure of the trial court to explain to the jury the status of an accomplice as a witness, and how his testimony should be viewed and considered, as required by Code Civ. Proc. § 2061, *held* harmless to defendant.—*People v. Rose*, 183 P. 874.

⇒1178 (Okla.Cr.App.) Unless an inspection of entire record shows some fundamental error not assigned, only such errors as are argued in defendant's brief will be considered, as errors not argued will be regarded as abandoned.—*Rogers v. State*, 183 P. 41.

(H) Determination and Disposition of Cause.

⇒1182 (Okla.Cr.App.) Where no appearance was made for plaintiff in error on submission of cause, nor any brief filed in his behalf, and where an examination of pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals rule 9 (165 Pac. x).—*Roy v. State*, 183 P. 428.

⇒1182 (Okla.Cr.App.) Where no appearance was made for plaintiff in error on submission of cause nor any brief filed in his behalf, and where an examination of the pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals Rule 9 (165 Pac. x).—*Smith v. State*, 183 P. 429.

⇒1182 (Okla.Cr.App.) Where no briefs are filed nor argument presented on appeal from a conviction, the Criminal Court of Appeals will examine the record, and, if no error is apparent, will affirm.—*Davis v. State*, 183 P. 431.

⇒1182 (Okla.Cr.App.) Where no appearance was made for plaintiff in error on submission of cause, nor any brief filed in his behalf, and where an examination of pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals rule 9 (165 Pac. x).—*Hughes v. State*, 183 P. 431.

⇒1182 (Okla.Cr.App.) Where a cause on appeal was called for submission and no appearance was then made by plaintiff in error to orally argue the case, and no brief was filed in his behalf, the Attorney General's motion to affirm the conviction for failure to diligently prosecute the appeal would be sustained.—*Bowers v. State*, 183 P. 432.

⇒1182 (Okla.Cr.App.) Where no appearance was made for plaintiff in error on submission of cause, nor any brief filed in his behalf, and where an examination of pleadings, instructions, judgment, and sentence disclosed no prejudicial error, the judgment would be affirmed in accordance with Criminal Court of Appeals Rule 9 (165 Pac. x).—*Leddon v. State*, 183 P. 432.

⇒1182 (Okla.Cr.App.) Where it appears that if a judgment of conviction was executed the term of imprisonment would have been served, and where no appearance was made either to orally argue case on appeal or by filing a brief for plaintiff in error, the Criminal Court of Appeals, in its discretion, will either dismiss because questions involved are moot, or affirm under its rule 9 (165 Pac. x).—*Smith v. State*, 183 P. 515.

⇒1182 (Okla.Cr.App.) Where there was no appearance for plaintiffs in error, nor any brief filed in their behalf, and the Criminal Court of Appeals, on examination of the pleadings and instructions, judgment, and sentence finds no prejudicial error, the judgment will be affirmed in accordance with its rule 9 (165 Pac. x).—*Wilhite v. State*, 183 P. 625.

⇒1184 (Okla. Cr. App.) Where information charged embezzlement, and court charged thereon, and the verdict was "Guilty as charged,"

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

imposing two years in penitentiary, a journal entry showing a judgment as of conviction for "robbery," with sentence for two years, though minimum punishment for robbery is five years, would be modified by substituting "embezzlement" for "robbery."—*Smith v. State*, 183 P. 515.

⚡1186(4) (Cal.) Error in admitting accusatory statements, which defendant denied, in a murder case, *held* harmless, where facts in statements were established by other proof, in view of Const. art. 6, § 4½, prohibiting reversals except for errors substantially injuring accused.—*People v. Lapara*, 183 P. 545.

⚡1186(4) (Okla. Cr. App.) Under Rev. Laws 1910, § 6005, relating to harmless error, the Criminal Court of Appeals has a large discretion in determining effect of errors, and each case must depend upon its own circumstances, as it is court's opinion on consideration of particular record, including evidence, that controls as to whether alleged error caused a miscarriage of justice.—*Wilson v. State*, 183 P. 613.

Rulings of trial court, if conceded to be erroneous, which affect no substantial right of defendant, must be regarded as technical and insufficient to warrant reversal of conviction under Rev. Laws 1910, § 6005.—*Id.*

⚡1186(4) (Okla. Cr. App.) Where an examination of the entire record shows that a misdirection of jury has not resulted in a miscarriage of justice or a substantial violation of a constitutional or statutory right, the Criminal Court of Appeals cannot set aside a conviction, in view of Rev. Laws 1910, § 6005.—*Cole v. State*, 183 P. 734.

⚡1186(4) (Okla. Cr. App.) Where record shows that all jurors composing regular panel were examined upon their voir dire before an open venire was issued for additional jurors, the trial court's refusal to have all the jurors on the regular panel called, as provided in Rev. Laws 1910, § 5828, when case was called for trial, was not reversible error, as when it is clear that defendant was not deprived of any substantial right or privilege, a conviction will not be reversed.—*Johnson v. State*, 183 P. 926.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

⚡1213 (Cal. App.) Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not to authorize the infliction of unusual punishment, within the meaning of the inhibition of Const. Cal. art. 1, § 6.—*People v. Camp*, 183 P. 845.

CROPS.

See Sales, ⚡12, 197, 409, 418; Tenancy in Common, ⚡43.

CUSTOMS AND USAGES.

See Mines and Minerals, ⚡14; Sales, ⚡81.

⚡12(1) (Cal. App.) In order to read a custom into an agreement, it is necessary to show that the party attempted to be bound had actual or constructive knowledge of the custom.—*Van Degrift v. Mullen*, 183 P. 351.

⚡13 (Cal. App.) Where there is a statutory form (Civ. Code, § 2948) for a written instrument, it is logical to infer that parties making an agreement which is silent as to a form to be used had the legal form in view, rather than another form customarily used.—*Van Degrift v. Mullen*, 183 P. 351.

In purchaser's action to recover a purchase price installment, evidence that a mortgage form containing conditions not found in the statutory form (Civ. Code, § 2948) was generally used in the county, etc., *held* insufficient to show that parties contracted with reference to such custom or intended purchaser should execute such a mortgage, instead of statutory form, for balance of purchase price.—*Id.*

⚡18 (Okla.) Suit to enforce plaintiff's rights under an oral contract to procure oil and gas

leases, and to be "carried for an eighth" free in first well on each tract and in other wells drilled, the drilling expenses to be paid by other party if nonproducing or out of production, was not within rule requiring custom of particular place and local commercial usages to be pleaded before they can be proved.—*Winemiller v. Page*, 183 P. 501.

DAMAGES.

See Assault and Battery, ⚡34, 40; Brokers, ⚡38, 82; Covenants, ⚡121; Death, ⚡52; Evidence, ⚡498; Insurance, ⚡198; Landlord and Tenant, ⚡48, 49, 291; Levees, ⚡9; Libel and Slander, ⚡121; Negligence, ⚡56; New Trial, ⚡76; Pleading, ⚡236, 330; Replevin, ⚡79, 124; Sales, ⚡383, 418; Trial, ⚡244, 397; Vendor and Purchaser, ⚡3; Waters and Water Courses, ⚡179.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⚡40(2) (Wash.) Prospective profits lost by a breach of contract are recoverable if they can be estimated with reasonable certainty.—*Nelson v. Davenport*, 183 P. 182.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚡128 (Ariz.) Damages will not be considered excessive, unless they are so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as to manifestly show passion, partiality, prejudice, or corruption.—*United Verde Copper Co. v. Wiley*, 183 P. 737.

⚡131(2) (Cal.) Where plaintiff, 70 years of age, was attacked while riding a bicycle by two vicious dogs, receiving a wound in his leg which had to be dressed twice a day by a trained nurse for three weeks, during which he was confined to his home, and daily for three weeks thereafter, and it was more than three months before he could walk without experiencing pain, and he sustained a severe nervous shock, which continued until time of trial, a verdict of \$700 is not excessive.—*Smith v. Royer*, 183 P. 660.

⚡132(6) (Okla.) Verdict for \$8,423.83 awarded coal miner 46 years old, earning \$5 per day, for crushing of his hips and right leg and partial paralysis of that leg, disabling him from such work for about 2½ years, and causing permanent injury and continued physical pain, in absence of any record showing of jury's passion or prejudice, was not excessive.—*Whitehead Coal Mining Co. v. Schneider*, 183 P. 49.

⚡132(6) (Wash.) Where plaintiff sustained injury to leg so that bones were crushed and splintered and protruded through flesh, making it difficult to get bones united, and where injury left leg permanently crooked, paining plaintiff whenever he used leg, and making it impossible to continue working as a stevedore, in which occupation he had been earning substantial wages, a \$6,300 verdict was not excessive.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

⚡143 (Ariz.) The measure of damages for a servant's personal injury is not the difference between his earning power before and after his injury, but under general allegations of a complaint for injury resulting in the loss of an eye the servant was entitled to damages for mental and physical suffering caused by the injury and extraction of his eye.—*United Verde Copper Co. v. Wiley*, 183 P. 737.

⚡159(5) (Wash.) In action for damages to land from overflow, where complaint specifically

alleged various items of damages, without referring to any deposit of sand or gravel on the land, evidence to prove damage to land from sand or gravel held inadmissible as not within pleadings.—Anderson v. Rucker Bros., 183 P. 70.

(B) Evidence.

⚡163(1) (Wash.) To recover prospective profits of which plaintiff was deprived by defendant's breach of contract, it is essential to establish the contract and its breach, and then to furnish proof within the proper measure of damages.—Nelson v. Davenport, 183 P. 132.

⚡187 (Ariz.) In a servant's action for personal injuries, evidence held to show that the loss of plaintiff's eye had reduced his earning capacity.—United Verde Copper Co. v. Wiley, 183 P. 737.

(C) Proceedings for Assessment.

⚡206(1) (N.M.) Where plaintiff in personal injury case voluntarily exhibited injury to his head to jury for inspection, denial of defendant's motion to compel plaintiff to submit to physical examination of his head by physicians named by defendant was error.—Holton v. Janes, 183 P. 395.

⚡216(7) (Cal.App.) An instruction that if the jury believed plaintiff was "liable" to continual suffering and future mental anguish and bodily pain the verdict should be commensurate therewith was erroneous, since Civ. Code, § 3283, provides that "damages may be awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future," and the word "liable" must be construed, not as referring to a detriment certain to result, but rather to a future possible or probable happening which may not actually occur.—Saylor v. Taylor, 183 P. 843, 845.

DEATH.

See Appeal and Error, ⚡1039; Limitation of Actions, ⚡130; Master and Servant, ⚡265, 279, 281; Principal and Agent, ⚡43; Railroads, ⚡348.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

⚡11 (Okl.) Rev. Laws 1910, § 5281, creates a right of action for damages for death by wrongful act which did not exist at common law, and which does not obtain in the absence of such act.—Kerley v. Hoehman, 183 P. 980.

(B) Jurisdiction, Venue, and Limitations.

⚡38 (Okl.) The limitation of two years prescribed by Rev. Laws 1910, § 5281, in which action for death must be commenced, is a condition imposed upon exercise of the right of action granted by the act, and the time is not extended by fraudulent concealment of cause of death.—Kerley v. Hoehman, 183 P. 980.

The two years fixed by Rev. Laws 1910, § 5281, for commencement of an action for death by wrongful act, is a condition of the liability and action thereby created, and not a statute of limitations, and commencement of action within such time is indispensable to the liability and to the action, notwithstanding Const. art. 23, § 7.—Id.

(D) Pleading and Evidence.

⚡52 (Cal.App.) Allegation of complaint for death, that plaintiff has been damaged through negligence of defendant and by death of her husband in the sum of \$50,000, is a sufficient averment that she had suffered pecuniary loss by his death in that sum.—Ward v. Southern Pac. Co., 183 P. 594.

DEBT, ACTION OF.

See Account Stated, ⚡7.

DEDICATION.

See Boundaries, ⚡20.

I. NATURE AND REQUISITES.

⚡19(1) (Cal.App.) When an owner of a tract of land plats it upon a map designating certain portions as public streets or highways, and thereafter records the map, he is deemed to have made an offer to dedicate the indicated streets to the public for highway purposes, and if such dedication is accepted it becomes irrevocable.—Elliott v. McIntosh, 183 P. 692.

⚡31 (Cal.App.) Where the owner of land plats it on a map designating streets or highways, and records the map, thereby offering to dedicate the streets to the public, by such dedication alone the owner does not part with title to the land occupied by the streets, but grants the public merely an easement for travel, and on failure to accept the dedication the easement expires and full title reverts to the owner of the adjoining land.—Elliott v. McIntosh, 183 P. 692.

⚡34 (Cal.App.) Acceptance of a landowner's offer to dedicate streets indicated by the map or plat recorded by him must be evidenced within a reasonable time after the offer, and, if not, the owner may resume possession and revoke his offer.—Elliott v. McIntosh, 183 P. 692.

⚡35(1) (Cal.App.) The mere filing of a map designating certain portions of a tract as streets does not constitute acceptance of their dedication.—Elliott v. McIntosh, 183 P. 692.

Acceptance of streets offered to be dedicated by recordation of the owner's map or plat may be either actual or implied, by the formal act of the public authorities having jurisdiction.—Id.

⚡37 (Cal.App.) Acceptance of streets offered to be dedicated by recordation of the owner's map or plat may be either actual, or implied, by the formal act of the public authorities having jurisdiction, or by mere user on the part of the public long enough to evidence its intention to accept.—Elliott v. McIntosh, 183 P. 692.

⚡39 (Cal.App.) If lots are sold by number, and not by metes and bounds reference being made to a map previously prepared by the owner showing streets and alleys, and recorded, the owner, original dedicator of the streets, is estopped to deny that the portions designated as streets on the map were in fact dedicated to or accepted by the public.—Elliott v. McIntosh, 183 P. 692.

⚡41 (Cal.App.) If an owner, having recorded a map showing streets laid out, sells the lots designated thereon by specific reference to the map, he is presumed to have made an irrevocable dedication of the streets.—Elliott v. McIntosh, 183 P. 692.

DEEDS.

See Adverse Possession, ⚡113; Appeal and Error, ⚡907, 1010, 1036; Boundaries, ⚡20, 33; Covenants, ⚡79, 96, 121; Evidence, ⚡353; Execution, ⚡320; Husband and Wife, ⚡47, 49½, 119; Indians, ⚡39; Limitation of Actions, ⚡47; Mortgages; Pleading, ⚡34; Reformation of Instruments, ⚡25; Vendor and Purchaser, ⚡50, 86, 148, 170, 224, 334, 336, 342; Waters and Water Courses, ⚡152.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

⚡2 (Okl.) Although title to realty may have been conveyed to a grantee under the statutes of Arkansas prior to statehood, if since statehood, and since Oklahoma statutes were put in force, the grantee reconveyed to original grantor, such title is determined by statutes of Oklahoma.—Kent v. Tallent, 183 P. 422.

⚡25 (Okl.) A quitclaim deed, made in compliance with Rev. Laws 1910, § 1161, is as effectual in conveying the title of the grantor as is a warranty deed; the distinction being that

in a quitclaim deed the words "and warrant the title to the same" are omitted.—Tucker v. Leonard, 183 P. 907.

(D) Delivery.

⚡56(2) (Or.) In the absence of intention on the part of parents to deliver to their son a deed to the home farm in consideration of his agreement to support them, there was no delivery of the deed.—Houck v. Houck, 183 P. 3.

⚡56(3) (Or.) Delivery of a deed, to be valid, must be such as deprives the grantor of the possession and control of the instrument.—Houck v. Houck, 183 P. 3.

⚡60 (Cal.App.) In view of Civ. Code, § 1056, where deeds were duly delivered, the fact that the grantor requested that they should not be recorded until the happening of some future event, does not affect their validity, for they would pass title without recordation.—Avery v. Avery, 183 P. 453.

(E) Validity.

⚡68(1½) (Cal.App.) If one is able to understand the nature and situation of his property, his relations to those around him, and the effect of his acts, and is free from delusion, he is capable of disposing of his property, notwithstanding he is afflicted with symptoms of insanity which later necessitate his commitment to an insane asylum; hence though certificates of medical examiners attached to a judgment committing one as an insane person stated the attack of insanity began 1½ months ago, deeds made by the one committed approximately 30 days earlier, are not voidable on that account, etc.—Avery v. Avery, 183 P. 453.

III. CONSTRUCTION AND OPERATION.

(E) Conditions and Restrictions.

⚡149 (Cal.App.) Condition in deed of fee-simple absolute against leasing or selling to negroes within a certain time is within the common-law rule, of which Civ. Code, § 711, is declaratory, that "conditions restraining alienation, when repugnant to the interest created, are void."—Title Guarantee & Trust Co. v. Garrott, 183 P. 470.

Civ. Code, § 711, declaring that conditions restraining alienation, when repugnant to the interest created, are void, is applicable, whether the provision be a condition subsequent, a conditional limitation, or a covenant.—Id.

⚡156 (Cal.) If the provisions of a deed regarding building restrictions were in fact conditions, and not covenants, the defendants, owners of other lots with similar restrictions in deeds from a common grantor, were not entitled to enforce them as against plaintiff, where the reversion clause of plaintiff's deed ran in favor of grantor, his heirs and assigns, which does not include the defendants, since under Civ. Code, §§ 768, 1046, by "assigns" must be meant assignees of the reversion or right of re-entry.—Werner v. Graham, 183 P. 945.

IV. PLEADING AND EVIDENCE.

⚡194(1) (Or.) In suit by a son against his mother and the other children of her and her deceased husband to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, the burden to prove delivery of the deed to the son was upon him.—Houck v. Houck, 183 P. 3.

⚡195 (Cal.App.) Under Civ. Code, §§ 158, 2235, 2231, 2224, conveyance by husband to wife, in view of their confidential relations, is presumed to be without sufficient consideration.—Williamson v. Williamson, 183 P. 301.

⚡196(3) (Cal.App.) Under Civ. Code, §§ 158, 2224, 2231, 2235, conveyance by husband to wife, in view of their confidential relations, is presumed to be not only without sufficient con-

183 P.—65

sideration, but the result of undue influence.—Williamson v. Williamson, 183 P. 301.

⚡208(1) (Or.) In suit by a son against his mother and the other children of her and the deceased father to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, evidence held to show that it was not the purpose of the parents at the time of the alleged transaction to deliver their deed to the son or part with title to the property.—Houck v. Houck, 183 P. 3.

⚡211(4) (Cal.App.) Evidence held to show that defendant husband, uninfluenced other than by a situation due to his own wrongful acts, and prompted by a desire to secure a dismissal of the action wherein his wife was declared entitled to a divorce, conveyed the property in question to her as her sole and separate estate.—Williamson v. Williamson, 183 P. 301.

DEMAND.

See Corporations, ⚡116.

DEPOSITIONS.

See Process, ⚡119.

DEPOSITS IN COURT.

See Appeal and Error, ⚡1107.

DESCENT AND DISTRIBUTION.

See Adoption, ⚡21; Executors and Administrators; Husband and Wife, ⚡278, 279; Indians, ⚡18, 28; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

⚡69 (Ok.). Where a husband bequeathed to his wife one-third of his real estate in trust, and the remaining two-thirds to certain of his children, naming them, in trust, all to be held by a trustee until the youngest child then living becomes of age, one-third interest to be then conveyed to the wife, and the remaining two-thirds to be divided among the children, the income pending the trust to the use of the wife and children in the proportions named, the provision was in contravention of Rev. Laws 1910, § 8341, making the wife the forced heir of her husband.—Hill v. Buckholts, 183 P. 42.

Under Rev. Laws 1910, § 8341, husband and wife while married each becomes the forced heir of the other to one-third of the property owned by each respectively, and such interest cannot be bequeathed by the other from said heir, and, where it constitutes real estate, the estate of the owner therein is meant, whether it be the fee or a lesser estate.—Id.

⚡71(3) (Ok.). Petition in an action by a wife to recover her undivided third interest in the real and personal estate of her deceased husband, to which she was a forced heir under Rev. Laws 1910, § 8341, held to state a cause of action.—Hill v. Buckholts, 183 P. 42.

⚡71(7) (Cal.) A finding, in proceedings to determine heirship, that widow was not entitled to any part of estate, held to import a finding that settlement agreement between widow and deceased had not been obtained through duress or undue influence.—In re McOlelland's Estate, 183 P. 798.

DISMISSAL AND NONSUIT.

See Appeal and Error, ⚡110, 468, 479, 487, 499, 640, 744, 773, 781-801; Certiorari, ⚡60; Criminal Law, ⚡302, 576, 1134, 1182; Divorce, ⚡182, 186; Master and Servant, ⚡264; Replevin, ⚡124; Trial, ⚡163, 384.

II. INVOLUNTARY.

⚡60(1) (Cal.App.) Code Civ. Proc. § 583, providing for dismissal of action for want of prosecution on defendant's motion, when plaintiff has for two years after answer failed to bring such action to trial, and section 581a, providing that an action shall be dismissed unless summons shall have been issued within one year, and service and return made within three years, after its commencement, merely fixed a limit beyond which the court's discretion ceases, and do not prevent the court from dismissing earlier.—*Watterson v. Hillside Water Co.*, 183 P. 592.

⚡60(3) (Cal.App.) Where notices of motions to dismiss as to each defendant were made more than two years after commencement, and as to one defendant before summons had been served, and as to the other approximately one month after service, and after demurrer, but before answer, *held*, that it was not an abuse of the court's discretion to dismiss, although plaintiff's affidavits showed plaintiff had delayed because desiring advice of decision in different case, and that one of his attorneys had died, and that he had acted under belief that Code Civ. Proc. § 581a, allowed three years from date of filing complaint within which to serve summons.—*Watterson v. Hillside Water Co.*, 183 P. 592.

DISORDERLY CONDUCT.

See Criminal Law, ⚡598.

DISORDERLY HOUSE.

⚡17 (Okla.Cr.App.) Evidence *held* to sustain a conviction of keeping a house of ill fame.—*Bornheim v. State*, 183 P. 514.

DISTRICT AND PROSECUTING ATTORNEYS.

See Counties, ⚡139; Criminal Law, ⚡722½, 726, 1037, 1090; Grand Jury, ⚡33, 34; Witnesses, ⚡274, 349.

⚡3(1) (Okla.Cr.App.) If county attorney, under pressure from grand jury, caused resignation of an assistant and appointment of another to fill vacancy, the fact that such appointee filed with county commissioners a claim for his services before grand jury after duly qualifying, did not render his appointment void.—*Middleton v. State*, 183 P. 626.

DIVORCE.

See Equity, ⚡65; Executors and Administrators, ⚡188; Husband and Wife, ⚡285½, 289, 297; Parent and Child, ⚡2; Pleading, ⚡148.

III. DEFENSES.

⚡54 (Cal.) In a wife's separate maintenance action a finding that plaintiff was entitled to divorce on grounds of extreme cruelty precludes defendant husband from securing a divorce on his cross-complaint, even if he could have established plaintiff's cruelty.—*Mattson v. Mattson*, 183 P. 443.

⚡56 (Cal.App.) Under Civ. Code, § 111, subd. 2, and section 114, divorce must be denied where collusion appears.—*Lanktree v. Lanktree*, 183 P. 954.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(D) Evidence.

⚡127(4) (Cal.) Corroboration, in action for divorce for cruelty, may be sufficient, though weak; the nature of the cruelty being of a character making corroboration difficult.—*Brautigam v. Brautigam*, 183 P. 529.

⚡130 (Cal.App.) Conflicting evidence *held* to sustain the trial court's action in denying a divorce upon grounds of extreme cruelty, al-

though ten witnesses testified for plaintiff against three for defendant, in view of Code Civ. Proc. § 2061, providing that the greater number of witnesses is not conclusive, etc.—*Barrow v. Barrow*, 183 P. 364.

(F) Judgment or Decree.

⚡165(3) (Cal.App.) If court has not lost jurisdiction, a collusive divorce decree should be set aside on suggestion, and may be set aside by court of its own motion.—*Lanktree v. Lanktree*, 183 P. 954.

Where a collusive divorce decree has become final, equity will not interfere at the instance of either party, in absence of showing of coercion, imposition, or fraud upon complaining party.—*Id.*

Divorce decree, secured by wife pursuant to husband's agreement not to contest suit, in consideration of wife's settlement of property rights, will not be set aside after time within which to appeal and to move under Code Civ. Proc. § 473, has elapsed, upon wife's complaint that husband misrepresented valuation of his property and that he did not desire to marry another; the wife herself having been at fault in procuring collusive decree.—*Id.*

⚡169 (Cal.App.) A court, which had denied a wife's application for divorce, is without jurisdiction to restrain her from entering her husband's separate property, which she had selected for homestead purposes, pursuant to Civ. Code, §§ 1238, 1262 et seq.—*Barrow v. Barrow*, 183 P. 365.

(G) Appeal.

⚡181 (Okla.) Notice of appeal from a divorce decree, awarding permanent alimony and custody of a minor child, must be filed within ten days from date of decree, and appeal must be perfected within four months, as prescribed by Rev. Laws 1910, § 4971, otherwise Supreme Court has no jurisdiction of appeal.—*Linkugel v. Linkugel*, 183 P. 55.

⚡182 (Okla.) On appeal to review a decree of divorce awarding permanent alimony, the Supreme Court may enforce payment of temporary alimony pending appeal, and plaintiff in error, failing to make such payment as directed by the court after an opportunity to be heard, may be adjudged in contempt and punished, which punishment may include a dismissal of his appeal.—*Hansing v. Hansing*, 183 P. 978.

A party appealing from a judgment of a district court, awarding divorce and permanent alimony, must assume the burden of paying temporary alimony pendente lite, when so ordered by the court.—*Id.*

⚡182 (Wash.) Pending an appeal in a divorce action, the lower court has not jurisdiction to modify or alter the decree as far as it relates to custody of children, but such application must be made to Supreme Court, even though a supersedeas bond has been given.—*State v. Superior Court of Yakima County*, 183 P. 63.

On application by a party to a divorce action for a writ to prohibit the trial court from entering a decree in a habeas corpus proceeding brought to obtain possession of a child, pending an appeal, the Supreme Court, which alone has jurisdiction of questions concerning the custody of children pending the appeal, may treat the application for writ of prohibition as an original application for custody of the child.—*Id.*

On application in the Supreme Court for writ of habeas corpus to obtain custody of a child and to enforce a decree of the lower court in a divorce action, in which an appeal is pending, the court will leave the child in the position in which it was when the appeal was taken; the record disclosing no condition inapplicable to the welfare of the child.—*Id.*

⚡186 (Okla.) Punishment of plaintiff in error for contempt in failing to make payment of tem-

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porary alimony pending appeal, may include a dismissal of his appeal.—*Hansing v. Hansing*, 183 P. 978.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

⚡239 (Cal.App.) In action for divorce and for division of alleged community property, where defendant denied the allegations as to community property, alleging the property to be his own separate property, a finding by the court that the property was defendant's separate property did not convert the cause of action for divorce to one to quiet title, but was a finding upon an issue invited by plaintiff by proper allegation in her complaint, which allegation was denied by the answer.—*Barrow v. Barrow*, 183 P. 364.

⚡250 (Cal.App.) In divorce suit, where divorce was denied plaintiff wife, findings were not erroneous in failing to refer to money loaned by plaintiff to defendant, since, if anything was due her and she had not slept on her rights, she had an adequate remedy for recovery thereof in an action at law.—*Barrow v. Barrow*, 183 P. 364.

⚡267 (Cal.App.) Under Civ. Code, §§ 136, 140, and in view of Code Civ. Proc. § 671, the court which in her divorce suit had granted a wife a decree for maintenance, did not exceed its jurisdiction, in appointing receiver to take custody of and sell the husband's property to satisfy such decree for maintenance, on any ground that the judgment upon either the community property or the separate property of the husband created a lien which must be foreclosed to become effective.—*Lisenbee v. Lisenbee*, 183 P. 862.

⚡286 (Cal.App.) In the absence of appeal from the decree in a divorce action, the appellate court, on the husband's appeal from an order appointing receiver of the proceeds of his realty after failure to comply with the terms of the decree in the divorce suit, cannot review the question whether the superior court in a divorce proceeding has jurisdiction to deal with the separate property of the spouses.—*Lisenbee v. Lisenbee*, 183 P. 862.

DOGS.

See Animals, ⚡70, 72, 74, 81; Damages, ⚡131.

DOMICILE.

See Corporations, ⚡52, 666; Husband and Wife, ⚡289, 296, 308; Pleading, ⚡148; Venue, ⚡22, 41.

DRAINS.

See Judgment, ⚡518, 682, 746; Vendor and Purchaser, ⚡229.

II. ASSESSMENTS AND SPECIAL TAXES.

⚡85 (Cal.App.) The provisions of Pol. Code, § 3466, requiring assessments against land in reclamation districts to be collected and paid in installments, is mandatory; the only discretionary power vested thereby relating to the amounts of installments and times of their payment.—*Reclamation Dist. 785 v. Lovdal Bros. Co.*, 183 P. 598.

⚡90 (Cal.App.) A complaint by a reclamation district to foreclose an assessment lien does not state a cause of action where it shows that the landowners were not allowed their right under Pol. Code, § 3466, to pay the assessment in installments, and any action to collect the whole prior to failure to pay such an installment is premature.—*Reclamation Dist. 785 v. Lovdal Bros. Co.*, 183 P. 598.

Although Pol. Code, § 3466, relating to reclamation district assessments, provided for filing a lis pendens with the county recorder in actions to collect delinquent installments, section 3493½ authorizing actions to validate assess-

ments, contained no such provision; and since Code Civ. Proc. § 409, requiring such notice, relates entirely to actions involving title or possession of real property, an action to validate a reclamation assessment, which became a lien on the land, under Pol. Code, § 3463, did not require filing of lis pendens.—*Id.*

In an action by a reclamation district under Pol. Code, § 3493½, to validate assessments, which requires defendants to answer the complaint within 10 days when served with summons within the state, where the summons required defendant to so answer, "if served within the said county," and "within 30 days" "if served elsewhere," and the return showed service within the county, the service must be held to be in compliance with the statute, in view of the liberal construction required by Code Civ. Proc. § 4.—*Id.*

That the trustees of a reclamation district misappropriated funds is no defense to an action to collect an assessment validated previous to such misappropriation, and a judgment against the trustees for the amount alleged to have been misappropriated, to which the district was not a party, is inadmissible in evidence.—*Id.*

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Homicide, ⚡199.

DUE PROCESS OF LAW.

See Constitutional Law, ⚡258-320.

EASEMENTS.

See Covenants, ⚡69; Dedication, ⚡31; Vendor and Purchaser, ⚡219; Waters and Water Courses, ⚡151.

EJECTMENT.

See Adverse Possession, ⚡113; Appeal and Error, ⚡907; Judgment, ⚡682; Vendor and Purchaser, ⚡296.

I. RIGHT OF ACTION AND DEFENSES.

⚡10 (Cal.App.) Plaintiff in ejectment, who, with her husband, was in actual possession of the premises in dispute for more than 29 years until ousted by defendants' immediate predecessor, during all of which time the premises had been occupied and cultivated by plaintiff's husband, as against defendants was in actual prior and lawful possession, entitled to maintain ejectment, since where neither party relies on a paper title prior actual possession will support the action.—*Elliott v. McIntosh*, 183 P. 692.

III. PLEADING AND EVIDENCE.

⚡86(1) (Cal.App.) Actual possession establishes presumption of title and right to possession in an ejectment suit which can only be overcome by proof of anterior possession or title from a paramount source.—*Western California Land Co. v. Welch*, 183 P. 169.

ELECTION OF REMEDIES.

See Landlord and Tenant, ⚡49; Vendor and Purchaser, ⚡842; Venue, ⚡22.

ELECTIONS.

See Highways, ⚡127; Mandamus, ⚡79; Schools and School Districts, ⚡44.

ELECTRICITY.

⚡14(2) (Cal.App.) The duty of an electric power company was not absolutely to insulate or otherwise make safe its guy wires in any particular manner, but to make them safe under

all the exigencies offered by the surrounding circumstances.—*Royal Indemnity Co. v. Midland Counties Public Service Corporation*, 183 P. 960.

In reaching conclusion as to whether a power company was negligent in not guarding against the breakage of guy wires at the top as well as at the bottom, the jury should consider the nature of the country in which the pole was situated, the occupations of the persons living thereabouts, and the usual precautions taken under similar circumstances.—*Id.*

⚡18(1) (Cal.App.) One working in a barley field at the foot of a pole of an electric power company held not guilty of contributory negligence in attempting to back a horse off a guy wire to the pole which such horse had straddled, the action resulting in a breaking of the strands of the wire and a consequent shock to the person through the horse.—*Royal Indemnity Co. v. Midland Counties Public Service Corporation*, 183 P. 960.

⚡19(5) (Cal.App.) Evidence held to justify finding that defendant electric power company should have anticipated that the guy wire supporting a pole carrying high-power wires might be subjected to sufficient strain, by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire, and a consequent sagging, and should have insulated such wire so as to avoid injury to one working on the land.—*Royal Indemnity Co. v. Midland Counties Public Service Corporation*, 183 P. 960.

In view of the physical conditions of the place where the pole was situated, and the use to which the land was put, that of farming, jury held justified in finding that defendant electric power company had reason to anticipate injury to one working on the land near the base of the pole when a horse straddled a guy wire and struggled in being backed off, causing the strands of the wire to break.—*Id.*

⚡19(13) (Cal.App.) In an action against a power company to recover by subrogation for damages for personal injuries received by another than plaintiff, plaintiff being a workmen's compensation insurer and having paid the loss, instructions held to cover the point that in determining the company's negligence, in relation to its maintenance of a pole and high-power wires, the jury should consider the surrounding circumstances, etc.—*Royal Indemnity Co. v. Midland Counties Public Service Corporation*, 183 P. 960.

EMBEZZLEMENT.

See Criminal Law, ⚡1184; Indictment and Information, ⚡125.

⚡5 (Cal.App.) In embezzlement there is no intent at the time of taking to steal or wrongfully appropriate the property, but accused, having rightfully come into possession thereafter, forms the intent fraudulently to convert the property to his own use.—*People v. Mills Sing*, 183 P. 805.

⚡24 (Okla.Cr.App.) A requested instruction that the presence of defendant when aiding, abetting, or advising the embezzlement charged was necessary to a conviction, was incorrect; Rev. Laws 1910, § 7437, not specifying presence as an essential element of such crime.—*Middleton v. State*, 183 P. 626.

⚡26 (Okla.Cr.App.) Count of indictment alleging that one W., as treasurer of a county, officially received certain public moneys, funds, etc., for the state, the county, etc., and embezzled a certain amount thereof, and that defendant knowingly and feloniously procured, aided, and abetted the embezzlement, was sufficient.—*Middleton v. State*, 183 P. 626.

EMINENT DOMAIN.

See Levees, ⚡9, 11.

EMPLOYERS' LIABILITY ACTS.

See Appeal and Error, ⚡930; Constitutional Law, ⚡245, 301; Jury, ⚡32; Master and Servant, ⚡11, 83, 204, 264, 265, 284, 291; Statutes, ⚡117.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, ⚡237-250.

EQUITY.

See Appeal and Error, ⚡920, 1009; Divorce, ⚡165; Injunction; Joint Ventures, ⚡5; Justices of the Peace, ⚡128; Municipal Corporations, ⚡511; Partition; Pledges, ⚡56; Prohibition, ⚡10, 11; Public Lands, ⚡125, 128, 139; Quieting Title; Reformation of Instruments; Specific Performance; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

⚡39(1) (Cal.App.) In an equity suit to reform a land sale contract and for recovery of amount paid thereon, the court can retain jurisdiction to adjust all the rights and equities of the respective parties that are within the issues and disclosed by the evidence.—*McAuliff v. McFadden*, 183 P. 870.

⚡39(2) (Okla.) Where court of equity assumes jurisdiction of controversy on some ground other than accounting involved, and where accounting is necessary for full settlement of controversy, it will generally proceed to decree it and settle whole controversy, even to extent of settling matters of purely legal cognizance.—*Probst v. Bearman*, 183 P. 886.

(C) Principles and Maxims of Equity.

⚡65(1) (Cal.App.) Equity will leave parties to fraudulent transaction where they have placed themselves.—*Lanktree v. Lanktree*, 183 P. 954.

⚡65(3) (Cal.App.) In wife's action to have divorce decree set aside, where complaint shows wife at fault in having procured collusive decree, court, in sustaining demurrer to complaint, will not permit amendment of complaint changing allegations regarding her contract; wife not having come into court with clean hands.—*Lanktree v. Lanktree*, 183 P. 954.

II. LACHES AND STALE DEMANDS.

⚡87(1) (Cal.App.) The defense of laches is available whenever a demand or other preliminary action is necessary on the part of plaintiff, and such action is not taken within the period of limitations.—*People v. Magee*, 183 P. 289.

ERROR, WRIT OF.

See Appeal and Error.

ESCAPE.

See Criminal Law, ⚡564, 1172.

⚡5 (Cal.App.) In a prosecution for aiding a prisoner to escape, it is immaterial whether accused knew that the custody of the prisoner was legal.—*People v. Drevoir*, 183 P. 870.

⚡9 (Cal.App.) Where evidence shows defendant and a fellow prisoner in a county jail assaulted a deputy sheriff and escaped, etc., an information against defendant for aiding the other prisoner to escape is not fatally defective for failure to allege that defendant knew his companion was in legal custody.—*People v. Drevoir*, 183 P. 870.

⚡10 (Cal.App.) In a prosecution for aiding a fellow prisoner to escape, evidence that accused and his companion assaulted a deputy sheriff, that both escaped from jail, and that only accused was recaptured, etc., held to sus-

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tain a conviction against defendant's explanation that he was aiding sheriff to prevent the other prisoner from escaping.—*People v. Drevoir*, 183 P. 370.

⌚11 (Cal.App.) In a prosecution for aiding a fellow prisoner to escape, an instruction held to give defendant the benefit of every principle of law to which he was entitled.—*People v. Drevoir*, 183 P. 370.

ESCROWS.

See Corporations, ⌚155.

⌚1 (Or.) Deposit, by the vendors of a tract, in a specified bank, of deeds conveying lots to buyers of such lots from the vendees of the tract, held a full compliance by the vendors with their agreement to place such deeds in escrow in the bank, an "escrow" being an instrument importing obligation deposited with a stranger or third party, to be held until the performance of a condition, and then delivered, though the time given to some of the lot purchasers to pay extended the time beyond the contractual four-year period of payment for the whole tract.—*McPherson v. Barbour*, 183 P. 752.

ESTATES.

See Descent and Distribution; Executors and Administrators; Joint Tenancy; Life Estates; Perpetuities; Tenancy in Common; Wills.

ESTOPPEL.

See Banks and Banking, ⌚261; Dedication, ⌚39; Execution, ⌚302; Guaranty, ⌚21; Judgment, ⌚746; Mechanics' Liens, ⌚277; Principal and Surety, ⌚129; Wills, ⌚792.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

⌚62(5) (Cal.App.) City was not estopped to destroy wooden building constructed and maintained within fire limits in violation of City and County of San Francisco Ordinance No. 1198, though building permit to construct building was issued by board of public works, the right to destroy building being an exercise of police power which cannot be bartered away.—*Maguire v. Reardon*, 183 P. 303.

(E) Pleading, Evidence, Trial, and Review.

⌚110 (Cal.) In an action for libel, defendant publishing company's failure to plead an estoppel against plaintiffs, because the false information had been obtained through their agent, rendered the defense unavailable.—*Mahana v. Echo Pub. Co.*, 183 P. 800.

EVIDENCE.

See Constitutional Law, ⌚47, 70; Criminal Law, ⌚322-564; Limitation of Actions, ⌚197; New Trial, ⌚70, 71, 99, 104, 108, 139, 159; Pleading, ⌚330, 403; Witnesses.

Reception at trial, see Criminal Law, ⌚673; Trial, ⌚59-62.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

I. JUDICIAL NOTICE.

⌚6 (Cal.) Judicial notice may be taken regarding the period of gestation.—*In re McNamara's Estate*, 183 P. 552.

Judicial notice will be taken that 304 days exceeds the normal gestation period.—*Id.*

⌚9 (N.M.) It is a matter of common knowledge, of which courts will take notice, that the question of the impairment of vision is capable of exact demonstration by expert examination.—*Holton v. Jones*, 183 P. 395.

⌚10(1) (Cal.) Judicial notice will be taken that there are vast areas of timber lands in the state of Washington.—*Nichols v. Moore*, 183 P. 531.

⌚51 (Cal.) Judicial notice may be taken regarding the period of gestation, and the court may inform itself from technical publications, etc.—*In re McNamara's Estate*, 183 P. 552.

II. PRESUMPTIONS.

⌚53 (Cal.) When we say that a certain "inference" is warranted by certain facts proved, we mean no more than that jury is reasonably warranted in making that deduction from those facts, under Code Civ. Proc. § 1958.—*Maupin v. Solomon*, 183 P. 198.

⌚63 (Cal.App.) There is a legal presumption of sanity in regard to every man.—*Avery v. Avery*, 183 P. 453.

⌚65 (Ok.) An attorney, who as administrator was authorized by the sole heir, under order of the county court, to disburse to her a certain amount of intestate's estate, was bound to know and is presumed to know the limitations which the law places upon the authority of an attorney.—*Vinson v. Davis*, 183 P. 902.

⌚67(3) (Cal.App.) A judgment declaring one judicially insane, and committing him, establishes insanity only as of the date of the judgment, for there is a legal presumption of sanity in regard to every man, and proof of insanity at one time carries no presumption of its past existence.—*Avery v. Avery*, 183 P. 453.

⌚71 (Or.) There is a strong presumption that a letter or postcard marked and addressed to defendant, and mailed by plaintiff, was received by the defendant, and whether this presumption was overcome by defendant's evidence was a question of fact for the jury.—*Coffey v. Northwestern Hospital Ass'n*, 183 P. 762.

⌚80(1) (Wyo.) As to interest after maturity the laws of Colorado, where notes were made payable, will be presumed the same as laws of Wyoming until the contrary is shown.—*H. E. Wright & Co. v. Douglas*, 183 P. 786.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

⌚113(8) (Idaho) The price paid for property is not evidence of its market value.—*Ringer v. Wilkin*, 183 P. 986.

⌚113(10) (Idaho) Proof of the cost of excavating a cellar and constructing buildings is not competent as proof of the market value of real estate of which they form a part.—*Ringer v. Wilkin*, 183 P. 986.

⌚117 (Wash.) In an action for breach of a contract to purchase scrap iron, objection was properly sustained to defendant buyer's question to its manager if a particular person was a salesman for plaintiff seller, the material matter being what was done in the particular case by such salesman, while the witness had already testified that he could not say that he, the salesman, had authority to contract for his house.—*Bernstein v. Schwartz*, 183 P. 105.

(B) Res Gestæ.

⌚121(6) (Cal.App.) In an action for the conversion of corporate stock by the trustee under a pooling agreement, testimony as to declarations made by the promoter of the company to plaintiff, though not in the presence of defendant, tending to dispute defendant's claim of ownership of the stock in the promoter, held admissible as part of the res gestæ.—*Schaad v. Barceloux*, 183 P. 716.

(C) Similar Facts and Transactions.

⌚135(1) (Cal.App.) In an action in equity by a stockholder to enjoin execution and set aside a judgment in favor of an individual defendant against the company, the judgment

being claimed to have been obtained by fraud and collusion between the individual defendants and the directors of the company, having been obtained by one individual defendant as assignee of a claim of salary of the other, a director and the president of the company, evidence of a subsequent transaction whereby the directors of the company fraudulently endeavored to profit by a sale of the company's property on execution *held* inadmissible to show fraud in the transactions leading up to the judgment.—*Walberg v. Underwood*, 183 P. 254.

The surrounding facts and circumstances may be liberally used in determining fraud, and subsequent conduct and declarations of the parties may be shown in evidence of antecedent fraud if they are such as are related to the principal transaction so that a logical and legal inference may be drawn.—*Id.*

(D) Materiality.

⇒147 (Cal.App.) In action against street railway for injuries to passenger, where defense was that alleged accident had not occurred, testimony of crews of cars which, according to schedule, passed the point where the passenger claimed to have boarded car, from a short time prior to until a short time after time she claimed to have boarded it, that no such accident occurred upon the cars they were operating was admissible, though negative in character.—*Exposito v. United Railroads of San Francisco*, 183 P. 576.

V. BEST AND SECONDARY EVIDENCE.

⇒158(26) (Wash.) The fact of incorporation may be proved by oral testimony.—*Umpqua Valley Fruit Union v. North Pacific Fruit Distributors*, 183 P. 101.

⇒178(2) (Wash.) In an action against a restaurant keeper for breach of his contract to furnish garbage to plaintiff for use in fattening hogs, testimony of a witness, who hauled the garbage with reference to the regularity of weight of the daily hauls, etc., *held* admissible, after plaintiff testified that certain written statements of the weight of loads had been lost before trial.—*Nelson v. Davenport*, 183 P. 132.

⇒178(9) (Cal. App.) In an action by an assignee of a foreign judgment, a certified copy of an assignment of the judgment as recorded in the court where the judgment was rendered was properly admitted in evidence, where the evidence was undisputed that the original assignment which had been made and delivered to plaintiff was lost, and that the lost assignment was in the same form as the one shown in the record.—*Flickinger v. McKesson*, 183 P. 195.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⇒269(2) (Cal.) In action involving the legitimacy of a child, declarations by the mother's husband, made when she left him, that he was going to another town, *held* admissible.—*In re McNamara's Estate*, 183 P. 552.

(B) By Decedents Against Interest.

⇒276 (Cal.App.) In a beneficiary's action on a life policy, which authorized insured to change his beneficiary, statements made by insured, inconsistent with his representations to defendant insurer, are ordinarily admissible as declarations against the insured's interest.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

Where a life policy, authorizing an insured to change his beneficiary, is given by insured to the beneficiary, statements made by insured inconsistent with his representations to defendant insurer are inadmissible in an action by the beneficiary on the policy.—*Id.*

(C) As to Pedigree, Birth, and Relationship.

⇒291 (Cal.) In action involving the legitimacy of a child, declarations by the mother's deceased paramour that he was the child's father is admissible to show legitimation by adoption, pursuant to Civ. Code § 230, and also under Code Civ. Proc. § 1870, subd. 4, providing that declarations by a deceased regarding persons related to him constitute competent evidence.—*In re McNamara's Estate*, 183 P. 552.

IX. HEARSAY.

⇒317(4) (Cal.App.) In an action against a canal company for the cost of completing its canal brought as on a new contract by the surety for the contractor, testimony that the witnesses had heard a director of the canal company say that he had seen a third person interested in companies having business relations with the canal company, and that such person had stated he was glad plaintiff had gone on with the work, etc., *held* properly stricken as hearsay.—*Watterson v. Owens River Canal Co.*, 183 P. 816.

X. DOCUMENTARY EVIDENCE.

(B) Exemplifications, Transcripts, and Certified Copies.

⇒348(2) (Cal.App.) In an action on a foreign judgment, a certificate of the clerk of the foreign court that papers offered in evidence "are true and correct copies" of certain enumerated records, "as full and complete as the same remains on file and of record in my office," will be held sufficient as against an objection that it fails to certify "that the papers are copies of the originals on the file in this office."—*Flickinger v. McKesson*, 183 P. 195.

In an action on a foreign judgment, the certificate of authentication of the clerk of the foreign court will not be held insufficient in that the words "county clerk of county of P. and ex officio" were erased from before the words "clerk of the district court of said P. county," where the judge certified that he was the clerk, and that his signature was genuine, although the clerk in his certificate to the official character of the judge did not erase such descriptive words, and, although such erasures were unexplained.—*Id.*

(C) Private Writings and Publications.

⇒353(3) (Cal.) Recitals in a 50 year old deed relating to the property conveyed are competent evidence of the facts recited, even as against strangers to the title.—*Garbarino v. Noce*, 183 P. 532.

A 50 year old deed *held* admissible to show a declaration by the grantor while in possession that he then claimed full ownership of a ditch and water right.—*Id.*

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

⇒397(1) (Okla.) In the absence of accident or mistake of fact, parol evidence is inadmissible to vary the terms of a written contract.—*Shaw v. Hutton*, 183 P. 477.

⇒422 (Cal.App.) In land broker's action upon principal's written agreement to pay commission pro rata as purchase price was paid, parol evidence was admissible to show that the principal's contracts with purchasers were in full force at time of assignment thereof by principal.—*Ratzlaff v. Trainor-Desmond Co.*, 183 P. 269.

⇒424 (Cal.App.) It is competent for one sued as master for the negligence of his alleged servant, where the written contract bears evidence of that relation, to show, by parol evidence, that he and his alleged servant by their conduct put a different construction upon their contract

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

and treated each other as contractee and independent contractor.—*Luckie v. Diamond Coal Co.*, 183 P. 178.

(B) Invalidating Written Instrument.

⚡429 (Okla.) Parol proof is always admissible to show that a negotiable instrument was not in fact delivered, and never in fact took effect.—*Shaw v. Hutton*, 183 P. 477.

⚡434(11) (Cal.App.) In view of Civ. Code, §§ 1566, 1567, in an action for cancellation of a contract for the purchase by plaintiffs of territorial rights in a patent, plaintiffs, in attempting to show actual fraud, as defined by section 1572, and which is always a question of fact by section 1574, were entitled to show all the misrepresentations which were matters of inducement for entering into the written contract.—*Bechtold v. Coney*, 183 P. 841.

(C) Separate or Subsequent Oral Agreement.

⚡441(7) (Cal.App.) An oral agreement that certain tile work for defendant's residence should be done according to a sample held inadmissible, as an attempt to vary and modify by parol a subsequent written contract governing the work.—*Bruner v. Hegyi*, 183 P. 389.

⚡441(11) (Or.) Parol evidence that indorser and indorsee of a note agreed that indorsee would enforce payment only from maker is incompetent because contradicting the written contract of indorsement.—*Nickell v. Bradshaw*, 183 P. 12.

⚡442(1) (Cal.App.) The test of whether parol evidence is admissible as an exception to the rule that where terms of an agreement have been reduced to writing no evidence of other negotiations or terms is admissible, under Civ. Code, § 1625, and Code Civ. Proc. § 1856, is the completeness or incompleteness of the written contract, and whether it contains all the terms of the agreement which is to be determined from an inspection of the contract itself.—*Hudson v. Barneson*, 183 P. 274.

⚡442(1) (Cal.App.) Where mortgagor, pending foreclosure, conveyed property to trustee named in a deed of trust constituting another incumbrance upon the property, in consideration of trustee's agreement to try to sell property and give mortgagor half of profit, letter stating such agreement, being silent as to time within which trustee was to try to make sale, could be explained by parol testimony, showing that trustee's efforts to sell were to be made before property had been sold under the mortgage being foreclosed.—*Mackey v. Bridge*, 183 P. 572.

⚡442(5) (Cal.App.) Written contract between owner and architect giving architect, as compensation for his services, 7 per cent. of the entire cost of the construction of house and garage without stating or limiting the cost of the construction, was incomplete, entitling owner to introduce parol evidence as to limit of cost of construction.—*Hudson v. Barneson*, 183 P. 274.

⚡444(7) (Okla.) Where defendants accepted a draft, and it was indorsed, "We guarantee payment," signed by defendants, the unconditional guaranty was a complete contract, and parol evidence was inadmissible to vary its terms by showing that it was in fact conditional; Rev. Laws, 1910, § 942, providing that written contract supercedes all oral negotiations, etc.—*Shaw v. Hutton*, 183 P. 477.

(D) Construction or Application of Language of Written Instrument.

⚡457 (Okla.) Where a written contract contains words of a technical nature connected with some art, occupation, etc., and unintelligible to the common reader, yet susceptible of a definite interpretation by experts, parol evidence is admissible to explain words, and so effectuate intention of parties.—*Winemiller v. Page*, 183 P. 501.

Suit to enforce plaintiff's rights under an oral contract to procure oil and gas leases, and to be "carried for an eighth" free in first well on each tract and in other wells, the drilling expenses to be paid by other party if nonproducing or out of production, was within rule admitting parol evidence to explain that term among oil men in Oklahoma oil country.—*Id.*

⚡460(3) (Cal.) In action for breaching a contract which compromised defendant's failure to convey certain property, oral testimony identifying the land which it had been agreed to convey held admissible.—*Slankard v. Wagnon*, 183 P. 562.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

⚡471(19) (Okla.) In servant's action for personal injury resulting from failure to furnish a reasonably safe place and reasonably safe appliances in which and with which to work, while he may show every fact essential to support his allegations of negligence, they must be shown by facts and not by statement of mere conclusions.—*Federal Oil & Gas Co. v. Campbell*, 183 P. 894; *Oklmulgee Window Glass Co. v. Bright*, 183 P. 898.

⚡472(1) (Okla.) Generally, a witness cannot give an opinion as to existence of an ultimate fact.—*Federal Oil & Gas Co. v. Campbell*, 183 P. 894; *Oklmulgee Window Glass Co. v. Bright*, 183 P. 898.

⚡498 (Wash.) In an action against a hotel keeper for breach of his contract to furnish garbage to plaintiff for use in fattening hogs, testimony of plaintiff and others qualified as to the amount of pork fat a ton of garbage would reasonably produce, the market for hogs that could be purchased to fatten, etc., held admissible to assist the jury in calculating plaintiff's lost profits.—*Nelson v. Davenport*, 183 P. 132.

⚡501(7) (Idaho) On issue as to market value of land and buildings as a whole, testimony of a witness who expressly stated that he does not know anything about market values, but estimates value as he would in fire insurance losses, is incompetent.—*Ringer v. Wilkin*, 183 P. 986.

(B) Subjects of Expert Testimony.

⚡506 (Okla.) Generally, a witness cannot give an opinion as to existence of an ultimate fact, there being an exception when question of science or peculiar skill is involved so that on facts in evidence one of ordinary understanding and experience cannot draw a proper conclusion, in which case one skilled in that science may state his opinion drawn from facts proven.—*Federal Oil & Gas Co. v. Campbell*, 183 P. 894; *Oklmulgee Window Glass Co. v. Bright*, 183 P. 898.

XIV. WEIGHT AND SUFFICIENCY.

⚡586(2) (Cal.App.) The negative character of testimony affects its weight and sufficiency.—*Exposito v. United Railroads of San Francisco*, 183 P. 576.

⚡596(1) (Cal.App.) Conclusive proof is never necessary to justify the verdict of a jury.—*Exposito v. United Railroads of San Francisco*, 183 P. 576.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⚡499, 502, 519, 553-555, 873, 907, 918; Criminal Law, ⚡1090; New Trial, ⚡139.

II. SETTLEMENT, SIGNING, AND FILING.

⚡43(2) (Cal.App.) Where bill of exceptions was settled on a date beyond the time allowed by law, and appellant failed to incorporate any matter which might excuse its delay, the bill,

though settled, cannot be considered on appeal.—*Rossi v. Scott, Magner & Miller*, 183 P. 263.
 ⚡56(4) (Cal.App.) Order relieving appellants from effect of failure to have bill engrossed within ten days after original proceeding was valid, though made after expiration of six-month period limited by Code Civ. Proc. § 473, where proceedings for obtaining such relief were commenced within such period.—*Doyle v. Bradshaw*, 183 P. 185.

EXCHANGE OF PROPERTY.

See Brokers, ⚡38, 82, 100; Vendor and Purchaser, ⚡15, 65.

⚡3(1) (Cal.App.) One cannot have a contract for exchange of land for corporate stock annulled on the ground that the other party made false representations, where such representations were not relied on.—*Arendt v. McConnell*, 183 P. 202.

⚡11 (Cal.App.) An action, treated as one for rescission of exchange of contracts for lands, held barred by laches, being brought 3½ years after plaintiff had demanded rescission and defendant had refused unless he should be paid a certain sum, and after defendant had disposed of the property obtained from plaintiff.—*Ramsdell v. Raymond*, 183 P. 569.

⚡13(3) (Cal.App.) Fraudulent representations in exchange of contracts for lands held not shown by evidence in action based on such representations.—*Ramsdell v. Raymond*, 183 P. 569.

EXECUTION.

See Appeal and Error, ⚡240, 1054; Bills and Notes, ⚡485; Forcible Entry and Detainer, ⚡29; Fraudulent Conveyances, ⚡230; Homestead, ⚡3; Pleading, ⚡291; Quiet-ing Title, ⚡10, 43; Wills, ⚡289.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

⚡242 (Or.) L. O. L. § 241, subd. 2, as amended by Laws 1917, p. 64, requires the court to allow the order confirming sale, unless upon hearing it satisfactorily appears that the sale proceedings were substantially irregular to the probable injury of the objector, and service upon the judgment debtors of a motion to confirm is not required by statute, and, where they had knowledge of the final decree directing sale, they cannot be heard to complain of not being served.—*Roseburg Nat. Bank v. Camp*, 183 P. 655.

A court, granting an order of confirmation of sale of real property, may construe its own rules as to requiring service of motion to confirm sale of real property upon the judgment debtor.—*Id.*

(C) Redemption.

⚡302 (N.M.) A judgment debtor's redemption of real estate from an execution sale estops him from questioning the validity of such sale.—*Springer v. Wasson*, 183 P. 898.

(D) Conveyance to Purchaser.

⚡320 (N.M.) Title in purchaser of real estate at execution sale as against execution debtor is prima facie proven by introduction in evidence of a valid judgment, execution issued thereon, a return showing a sale, and the sheriff's deed duly executed.—*Springer v. Wasson*, 183 P. 398.

EXECUTORS AND ADMINISTRATORS.

See Appeal and Error, ⚡193, 231; Descent and Distribution; Evidence, ⚡65; Husband and Wife, ⚡278; Limitation of Actions, ⚡183, 197; Parties, ⚡75, 76; Pleading, ⚡36; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡29(2) (Cal.App.) The issuance of letters of administration by a court having jurisdiction to make the order of appointment is conclusive of the regularity of the appointment when attacked collaterally.—*Bank of Commerce & Trust Co. v. Humphrey*, 183 P. 222.

⚡29(4) (Cal.App.) Where letters of administration in due form have been issued by order of a court having jurisdiction, the administrator's right to sue as such cannot be collaterally attacked on ground that his oath was not sufficient in form.—*Bank of Commerce & Trust Co. v. Humphrey*, 183 P. 222.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

⚡188 (Cal.) A widow is entitled, under Code Civ. Proc. § 1464, to a reasonable allowance for support, although she has not lived in a family relation with her husband for some years prior to his decease, and has been granted an interlocutory decree of divorce.—*In re Gould's Estate*, 183 P. 146.

An interlocutory decree of divorce, requiring the husband to transfer to the wife certain property and allotting all other property of the community to the husband "free and clear of all claim of the wife," held not to defeat her statutory claim to a family allowance on his death.—*Id.*

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

⚡202(1) (Cal.App.) A claim against an estate based upon an instrument executed with the formalities required of contracts may be enforced, although the instrument has been admitted to probate as a will; since a writing may be both a will and a contract.—*Norton v. Norton's Estate*, 183 P. 214.

⚡202(2) (Cal.App.) Under Code Civ. Proc. §§ 1493, 1494, making claims not due or contingent provable against a deceased's estate, a debt contingent upon the claimant living with decedent as his wife until his death became due upon decedent's death and provable against his estate.—*Norton v. Norton's Estate*, 183 P. 214.

⚡221(2) (Wash.) One who seeks to establish a claim against an estate for extra services rendered deceased, where regular payments for services have been received under an original contract, has the burden of showing the clearest and most convincing evidence that there was an agreement for such extra services, either express or implied.—*In re Masterson's Estate*, 183 P. 93.

⚡221(5) (Wash.) In an action against an estate to recover compensation for nursing deceased by one who had, under an original contract, been receiving regular payments for furnishing room and board, evidence held to show that there was an understanding that plaintiff was to receive extra compensation for the nursing.—*In re Masterson's Estate*, 183 P. 93.

VII. DISTRIBUTION OF ESTATE.

⚡315(4) (Cal.App.) To prevent annulling on certiorari of orders vacating orders, duly and regularly made, settling the account, decreeing distribution of decedent's estate and discharging administratrix, the record must show mistake, inadvertence, surprise, or excusable neglect, authorizing the vacation under Code Civ. Proc. § 473; and mere statement in the vacating orders that the vacated orders were made inadvertently is not enough.—*Crane v. Superior Court in and for Los Angeles County*, 183 P. 606.

Vacation of orders for distribution of estate and discharge of administration is not authorized under Code Civ. Proc. § 473, because the

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

court changes its conclusion that the proof on which they were made was sufficient, or because they were based on false representations of administratrix.—Id.

The court has no power to vacate its orders, duly and regularly made, for distribution of estate and discharge of administratrix, save and except under Code Civ. Proc. § 473, authorizing relief from orders made through a party's mistake, inadvertence, surprise, or excusable neglect.—Id.

⇒315(6) (Okl.) A decree of distribution of a county court cannot be successfully attacked in a collateral proceeding for mere irregularities in the proceedings therein.—Gray v. McKnight, 183 P. 489.

X. ACTIONS.

⇒453(4) (Cal.App.) Where an administratrix's claim against the estate is reduced to judgment pursuant to Code Civ. Proc. § 1510, the judgment is not personal, but merely establishes a claim against the estate.—Norton v. Norton's Estate, 183 P. 214.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

⇒524(1) (Okl.) Where N. died in Oklahoma, leaving as sole heir a daughter, and county court in Oklahoma ordered defendant, as N.'s administrator, to disburse certain money to plaintiff, as the New Jersey executor of the daughter, and it was paid to R., an Oklahoma attorney, for executor, and R. paid therefrom to defendant \$5,000 as fees, without authority from plaintiff, he was proper party to sue defendant to recover the \$5,000.—Vinson v. Davis, 183 P. 902.

EXEMPTIONS.

See Homestead; Taxation, ⇒181.

EXPLOSIVES.

⇒7 (Cal.App.) Where a boy surreptitiously entered the storehouse of a telephone company and took dynamite caps, knowing the turpitude of his act, and gave such caps to another boy, who exploded one in a toy pistol and was injured, the telephone company was not liable; the independent act of the boy who took the caps having been the proximate cause of the injury.—Hale v. Pacific Telephone & Telegraph Co., 183 P. 280.

In an action against a telephone company for injuries to a boy, caused by his explosion in a toy pistol of a dynamite cap stolen from the company's storehouse by another boy, complaint alleging that both plaintiff and the other boy, by reason of their extreme youth, were ignorant of the dangerous character of such caps, etc., held sufficient as against general demurrer.—Id.

If a telephone company knowingly permitted a child to take dangerous dynamite caps from its premises, it was charged with the duty to anticipate the probable result that they would be exploded by himself or his playmates, causing injury.—Id.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

⇒3 (Cal.App.) A state policeman's assault upon a railroad passenger who had not paid his fare and the taking of him into custody for evading his fare, having been unwarranted, constituted false imprisonment, or some wrong other than malicious prosecution.—Squires v. Southern Pac. Co., 183 P. 695.

⇒7(1) (Cal.App.) Complaint, under Pen. Code. § 492, for larceny of deed, on which was issued

warrant under which arrest was made, held to state an offense, so that there was no false imprisonment; it alleging stealing of deed executed by A. to J., conveying a certain lot, of a certain value, and the personal property of A.—Stubbs v. Abercrombie, 183 P. 458.

FALSE PRETENSES.

See Criminal Law, ⇒400, 641, 1173; Larceny, ⇒14.

⇒4 (Cal.App.) To constitute the offense of obtaining money by false pretenses, there must be an intent to defraud, actual fraud must be committed, false pretenses must be used to perpetrate the fraud, and it must be accomplished by means of false pretenses, which are the cause of inducing the owner to part with his money.—People v. Rose, 183 P. 874.

⇒7(1) (Cal.App.) The representation of defendant, subsequently charged with obtaining money by false pretenses on a check, that the check was good, made when he presented it for indorsement to the party defrauded, necessarily carried with it the representation that the check was good for its face, or \$200.—People v. Rose, 183 P. 874.

⇒12 (Cal.App.) Where defendant represented to the owner of potatoes that he was a buyer for cash, and so obtained possession of the potatoes conditional on immediate payment, and stole them, he was not guilty of obtaining goods under false pretenses, rather than larceny, in which the owner has no intent to part with his title, though he may intend to part with possession, while in false pretenses the owner does intend to part with title.—People v. Mills Sing, 183 P. 865.

⇒49(1) (Cal.App.) In a prosecution for drawing a check upon a banking corporation in which accused had insufficient funds, it is sufficient to prove the de facto existence of the banking corporation.—People v. Patterson, 183 P. 209.

⇒49(1) (Cal.App.) Evidence held to sustain conviction of having obtained money by false pretenses from the innocent indorser of a forged check.—People v. Rose, 183 P. 874.

FEDERAL EMPLOYERS' LIABILITY ACTS.

See Appeal and Error, ⇒930; Constitutional Law, ⇒245; Jury, ⇒32; Master and Servant, ⇒264, 284, 291; Statutes, ⇒117.

FEDERAL SAFETY APPLIANCE ACT.

See Jury, ⇒32; Master and Servant, ⇒284, 291.

FELLOW SERVANTS.

See Master and Servant, ⇒170-177.

FENCES.

⇒6 (Okl.) Under and by virtue of Rev. Laws 1910, § 6645, adjoining landowners are mutually bound to maintain line fences between their lands, where the lands of both are inclosed.—Hejduk v. Snyder, 183 P. 923.

FERÆ NATURÆ.

See Animals, ⇒69, 71, 74; Pleading, ⇒35.

FIRE LIMITS.

See Constitutional Law, ⇒320.

FIRES.

See Carriers, ⇒114; Replevin, ⇒124; Sales, ⇒90, 199.

FISH.

See Sales, ¶261, 280, 288, 441.

¶13(1) (Or.) Where parties convicted of violating Laws 1917, p. 403, § 2, stipulated that, in purse net fishing, removing the net from the water and emptying it of the catch of fish is a necessary part of the fishing operation, one permitting his seine to drift with the tide across the dead line into the forbidden territory, and there causing same to be lifted from the water to the vessel, is guilty of violation of such statute, although the fish entered the seine outside of the forbidden territory and the seine was closed before drifting across the line.—State v. Marco, 183 P. 653.

FIXTURES.

¶4 (Cal.App.) Whether fig cuttings, planted on land of another under an agreement, became annexed to the real estate, so as to pass with it, depends on the parties' intention.—Kirkman Nurseries v. Sargent, 183 P. 591.

¶5 (Cal.App.) Under agreement whereby plaintiff delivered fig cuttings to another, to be raised on the latter's land and redelivered to plaintiff, as they developed into trees of a certain size and condition, at a certain price per thousand, the cuttings remained plaintiff's personal property.—Kirkman Nurseries v. Sargent, 183 P. 591.

¶27(3) (Cal.App.) A purchaser with knowledge of contract between his grantor and plaintiff, under which his grantor was raising cuttings on the land for plaintiff, had no greater rights as to the cuttings than his grantor had.—Kirkman Nurseries v. Sargent, 183 P. 591.

FOOD.

See Sales, ¶261, 280, 288, 441.

FORCIBLE ENTRY AND DETAINER.

See Joint Tenancy, ¶10; Landlord and Tenant, ¶291.

I. CIVIL LIABILITY.

¶29(4) (N.M.) In forcible entry and detainer for two city lots, claimed by plaintiff by virtue of a sheriff's deed upon an execution sale on plaintiff's judgment against defendant, evidence held to support court's finding that defendant unlawfully detained the property involved.—Springer v. Wasson, 183 P. 398.

FOREIGN CORPORATIONS.

See Corporations, ¶666.

FORFEITURES.

See Insurance, ¶198; Vendor and Purchaser, ¶86, 93, 94, 95, 101, 334, 386; Witnesses, ¶306.

FORMER JEOPARDY.

See Criminal Law, ¶178.

FRAUD.

See Appeal and Error, ¶1221, 1222; Bankruptcy, ¶303; Banks and Banking, ¶111; Brokers, ¶38, 82, 102; Constitutional Law, ¶70; Contracts, ¶268, 305; Divorce, ¶165; Equity, ¶65; Evidence, ¶135, 434; Exchange of Property, ¶3, 13; Executors and Administrators, ¶315; Frauds, Statute of; Fraudulent Conveyances; Husband and Wife, ¶49½, 278, 281; Insurance, ¶508½; Joint Ventures, ¶4, 7; Judgment, ¶509, 512, 682; Limitation of Actions, ¶177, 179; Malicious Prosecution, ¶18; Partnership, ¶327; Patents, ¶214, 215; Public Lands, ¶139; Taxation, ¶611; Vendor and Purchaser, ¶35, 44, 144, 242.

FRAUDS, STATUTE OF.

See Brokers, ¶85.

VII. SALES OF GOODS.**(B) Acceptance of Part of Goods.**

¶89(3) (Or.) Where the oral buyer of 2,500 cords of wood received and accepted at least 150 cords, the case came within the exception to the statute of frauds (L. O. L. § 808, subd. 5) providing that an agreement for the sale of personality at a price not less than \$50 must be in writing unless the buyer accepted and received some part of the property.—Newman v. Multnomah Fuel Co., 183 P. 1.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

¶106(1) (Wyo.) Memorandum of sales contract, in order to satisfy statute of frauds, must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence.—Burley-Winter Pottery Co. v. Onken Bros. & West Co., 183 P. 747.

¶109 (Wyo.) Order for goods, describing them as "stoneware as per orders shown for same," held insufficient memorandum of sales contract under statute of frauds; description of subject-matter being too indefinite.—Burley-Winter Pottery Co. v. Onken Bros. & West Co., 183 P. 747.

¶118(2) (Wyo.) Memorandum of sales contract, in order to satisfy statute of frauds, must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence; and when reference is made to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another.—Burley-Winter Pottery Co. v. Onken Bros. & West Co., 183 P. 747.

¶118(3) (Wash.) A written contract of sale satisfying the statute of frauds may be gathered from letters passing between the parties.—Jones-Scott Co. v. Ellensburg Milling Co., 183 P. 113. Letters between the seller and buyer of wheat held to constitute a complete contract in writing sufficient to satisfy the statute of frauds.—Id.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶158(2) (Wyo.) In seller's action for breach of sales' contract, a memorandum of the contract, which does not satisfy the statute of frauds, is inadmissible in evidence.—Burley-Winter Pottery Co. v. Onken Bros. & West Co., 183 P. 747.

FRAUDULENT CONVEYANCES.

See Bankruptcy, ¶185; Lis Pendens, ¶22; Quieting Title, ¶10, 43.

I. TRANSFERS AND TRANSACTIONS INVALID.**(C) Property and Rights Transferred.**

¶47 (Nev.) The main purpose of the Bulk Sales Law is to protect wholesalers.—Escalle v. Mark, 183 P. 387.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.**(A) Original Parties.**

¶172(1) (Cal.App.) Only one who was a creditor at the time a conveyance was made can attack it as being fraudulent as to creditors; the conveyance being good between the parties.—Wangenheim v. Garner, 183 P. 670.

¶172(1) (Nev.) Bulk Sales Law, declaring certain sales "void," does not preclude the

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seller from recovering the purchase price of a sale made in violation of its terms; "void," as used in the statute, meaning "voidable."—Escalle v. Mark, 183 P. 387.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

—206(1) (Cal.App.) Only one who was a creditor at the time a conveyance was made can attack it as being fraudulent as to creditors.—Wangenheim v. Garner, 183 P. 670.

(B) Remedies on Ground of Nullity of Transfer.

—230 (Cal.App.) Under Code Civ. Proc. § 700, as to execution sale of real property, where land fraudulently conveyed was sold under execution in favor of a creditor, and bid in by him, he acquired, by virtue of the sheriff's certificate and the sale, the legal title, and not merely an equitable interest in the land.—Wangenheim v. Garner, 183 P. 670.

(C) Evidence.

—296 (Cal.App.) A finding of invalidity of a deed as being in fraud of creditors will not be reversed, as not supported by sufficient evidence, because respondent's proof that the attacking creditor was a creditor at the time of the conveyance is not "clear and satisfactory," but substantial evidence of the fact is sufficient.—Wangenheim v. Garner, 183 P. 670.

GAME.

See Animals, —69, 71, 74; Fish.

GARNISHMENT.

See Appeal and Error, —479.

I. NATURE AND GROUNDS.

—1 (Wash.) Under Rem. Code 1915, §§ 680, 681, providing when garnishment proceedings may be instituted, a garnishment proceeding is not an original, but an ancillary, proceeding.—State v. Superior Court for King County, 183 P. 74.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

—196 (Wash.) Under Rem. Code 1915, §§ 693, 696, providing that garnishees shall not be required to pay when defendant secures a favorable judgment, etc., the garnishment proceedings terminate upon entry of judgment for the original defendant.—State v. Superior Court for King County, 183 P. 74.

GAS.

See Action, —50; Customs and Usages, —18; Evidence, —457; Joint Adventures, —5; Jury, —14; Limitation of Actions, —65; *Lis Pendens*, —24, 26.

GESTATION.

See Evidence, —6, 51.

GIFTS.

See Husband and Wife, —47, 49½; Insurance, —586; Mortgages, —224; Principal and Agent, —43.

I. INTER VIVOS.

—10 (Cal.App.) A life policy, which authorized insured to change his beneficiary, may be given to the beneficiary.—McEwen v. New York Life Ins. Co., 183 P. 373.

—30(1) (Cal.App.) That there was found among decedent's personal effects a bankbook showing a deposit of \$2,500 and a paper on which was written in German, "Money and all that I have give you to," certain persons, *held*

not to show a gift of the bank deposit *inter vivos* or *causa mortis* by decedent to such persons.—Green v. Hynes, 183 P. 568.

II. CAUSA MORTIS.

—66(1) (Cal.App.) That there was found among decedent's effects a bankbook showing a deposit of \$2,500 and a paper on which was written in German, "Money and all that I have give you to," certain persons, *held* not to show a gift of the bank deposit *causa mortis* by decedent to such person.—Green v. Hynes, 183 P. 568.

GRAND JURY.

See District and Prosecuting Attorneys, —3.

—2 (Okla.Cr.App.) The law of the state as to selecting and impaneling a grand jury is directory and in view of Rev. Laws 1910, § 3701, a substantial compliance therewith is sufficient.—Middleton v. State, 183 P. 626.

—8 (Okla.Cr.App.) Where there is not a sufficient number of names in jury box from which to draw a grand jury, the superior court, under Rev. Laws 1910, §§ 1798, 1802, 3690, and 3692, may order jury commissioners to convene and select 80 names to be placed in jury box from which to draw and select a grand jury.—Middleton v. State, 183 P. 626.

—33 (Okla.Cr.App.) Where grand jury sought to have county attorney remove an assistant and appoint a designated person to vacancy, and, on his refusal, reported to court for its assistance, and on its refusal drafted a complaint against county attorney, who knowing thereof, and on promise of reappointment on adjournment, caused assistant's resignation and appointment of another to vacancy, who appeared and advised grand jury, there was no such misconduct of grand jury and county attorney as to require setting aside indictment.—Middleton v. State, 183 P. 626.

—34 (Okla.Cr.App.) Regardless of grand jury's pressure on county attorney to secure resignation of an assistant and appointment of another to fill vacancy, the person so appointed, and who duly qualified, was a de jure assistant county attorney, who might lawfully attend upon grand jury, and advise as to finding of indictment, and his attendance, etc., was no ground for setting aside indictment found by grand jury.—Middleton v. State, 183 P. 626.

—39 (Okla.Cr.App.) Under Rev. Laws 1910, § 5780, the presence of an unauthorized person in grand jury room while testimony is being taken, but not while grand jury is deliberating or voting upon an indictment, will not invalidate the indictment, unless it is reasonably probable that accused was prejudiced thereby in some substantial right.—Middleton v. State, 183 P. 626.

GUARANTY.

See Banks and Banking, —260, 261; Evidence, —444; Indemnity.

I. REQUISITES AND VALIDITY.

—1 (Cal.App.) A guaranty is a promise to answer for the debt of another.—Withers v. Bousfield, 183 P. 855.

—21 (Cal.App.) Guarantors of purchaser's note to vendors, by consenting to and requesting ratification agreement ratifying original agreement between purchaser and vendors referring to note as representing purchase money, were estopped from claiming the note to be a penalty, and not evidence of the purchase price.—Withers v. Bousfield, 183 P. 855.

II. CONSTRUCTION AND OPERATION.

—34 (Cal.App.) There is no privity or mutual liability or joint liability between the principal debtor and guarantors who by independent contract have guaranteed payment of debt.—Withers v. Bousfield, 183 P. 855.

§35 (Cal.App.) The liability of guarantors of payment of purchase-money note was not affected by any infirmity in a trust to convey created to secure payment of purchase price; the guarantors being liable on independent contract of guaranty, and not being parties to the trust.—Withers v. Bousfield, 183 P. 855.

§45 (Cal.App.) A guaranty is a promise to answer for the debt of another, and may be enforced upon default of the principal without any previous demand or notice.—Withers v. Bousfield, 183 P. 855.

§46 (Cal.App.) A guaranty is a promise to answer for the debt of another, and may be enforced upon default of the principal without any previous demand or notice.—Withers v. Bousfield, 183 P. 855.

III. DISCHARGE OF GUARANTOR.

§54 (Cal.App.) Alteration of note, obligating maker to pay 7 per cent, instead of 6, as originally agreed to, without guarantor's consent, discharged guarantor's liability, under Civ. Code, § 2819, notwithstanding section 2820, providing that creditor's void or voidable promise does not alter obligation or suspend or impair creditor's remedy against principal, within former statute, providing that such alteration of obligation or impairment of remedy exonerates guarantor.—Nissen v. Ehrenfort, 183 P. 956.

§70 (Cal.App.) In action against guarantors of payment of purchase-money note, mere delay by vendors in proceeding against purchaser was no defense.—Withers v. Bousfield, 183 P. 855.

V. RIGHTS AND REMEDIES OF GUARANTOR.

§100 (Cal.App.) Where the guarantor of a note, through an indorsee acting as his agent, paid the face value of a note to the payee, there was a payment precluding guarantor's subsequent recovery against the maker by means of suit by indorsee, in view of contract limiting guarantor's right of reimbursement to selection of nursery trees from maker's nursery at a stipulated price.—Roush v. Kirkman, 183 P. 353.

GUARDIAN AND WARD.

See Indians, §6; Infants, §102, 105; Judgment, §800; Lis Pendens, §22.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§17 (Okl.) Where county court appointed a stranger, to the exclusion of the mother, a single woman, as guardian of a minor under 14 years, and irregularly in such an appointment, in view of Rev. Laws 1910, §§ 3331, 6489, 6522, 6523, 6530, cannot be shown upon collateral attack.—Tucker v. Leonard, 183 P. 907.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§95 (Okl.) Notwithstanding Rev. Laws 1910 § 6532, relating to appointment of guardian and to requirement of bond, conditioned to make and return an inventory, the guardian's failure to return an inventory does not render a sale of the ward's land under proper orders of the county court void.—Tucker v. Leonard, 183 P. 907.

§96 (Okl.) Notice of guardian's sale of minor's land, pursuant to order of and subject to confirmation by county court of Wagoner county, situated in that county and being the S. W. ¼ of the S. W. ¼ of section 3, township 17 N., range 7 E., and the S. W. ¼ of the S. E. ¼ of section 7, township 17 N., range 17 E., and the W. ½ of the S. W. ¼, section 33, township 18 N., range 8 E., in Creek county, was a substantial compliance with Rev. Laws 1910, § 6383,

which would have misled no one as to location of land.—Tucker v. Leonard, 183 P. 907.

§107 (Okl.) After a county court obtains jurisdiction of a guardianship sale proceeding, and in view of Rev. Laws 1910, §§ 6384, 6386, 6563, all nonjurisdictional irregularities and defects between acquirement of jurisdiction and order of confirmation are cured by order, to extend that order may not be collaterally attacked on account of such irregularities.—Tucker v. Leonard, 183 P. 907.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

§175 (Okl.) Sureties on a guardian's bond for the sale of real estate, executed pursuant to Rev. Laws 1910, § 6564, are not liable for guardian's misappropriation of funds not arising from such sale.—Knox v. Cruel, 183 P. 427.

§182(6) (Okl.) In a joint action against sureties on several general guardian's bonds and surety on his bond for sale of realty, executed pursuant to Rev. Laws 1910, § 6564, where record shows that county court found amount misappropriated by guardian, the surety on sale bond, attempting to avoid liability because there was no misappropriation while its bond was in force, had burden of establishing such defense.—Knox v. Cruel, 183 P. 427.

HABEAS CORPUS.

See Divorce, §182.

I. NATURE AND GROUNDS OF REMEDY.

§30(3) (Cal.App.) The complaint of defendant, convicted of murder in the second degree and sentenced to imprisonment for life, that his punishment is more severe than it should have been, is a matter which can be considered only by the proper authorities in the case of commutation of sentence, parole, or pardon, and not on defendant's application for writ of habeas corpus to secure his release on the ground that, convicted of murder in the second, he was in reality sentenced for murder in the first, degree.—Ex parte Acevedo, 183 P. 952.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§92(1) (Nev.) On an original petition for habeas corpus by an attorney at law, convicted on failure to pay occupation tax, petitioner cannot be permitted to show that the facts proven on the trial at which he was convicted were not sufficient to constitute the crime charged.—Ex parte Dixon, 183 P. 842.

In an original application for habeas corpus by one convicted of violation of an occupation tax law, the court cannot consider the abuse of the lower court's discretion in refusing to grant a continuance of the trial in which the petitioner was convicted, or an objection to evidence as incompetent, or the exclusion of evidence offered in petitioner's behalf.—Id.

§99(3) (Wash.) The writ of habeas corpus, as it may refer to the custody of minor children, does not involve the question of personal freedom, and the court is not bound by a purely legal right, but is called on to give consideration to claims founded on human nature, having in view the welfare of the child.—State v. Superior Court of Yakima County, 183 P. 63.

HARMLESS ERROR.

See Appeal and Error, §1036-1073; Criminal Law, §1163-1173.

HAWKERS AND PEDDLERS.

See Landlord and Tenant, §51.

HEALTH.

Sec Licenses, **42**; Municipal Corporations, **63**, 216, 604, 605.

II. REGULATIONS AND OFFENSES.

21 (Or.) An ordinance enacted to protect the public health, but which has no real or substantial relation to the subject-matter, and is an unreasonable and unwarranted interference with a lawful business, is unconstitutional.—*City of Portland v. Traynor*, 183 P. 933.

HEAT.

See Landlord and Tenant, **48**; Trial, **397**.

HIGHWAYS.

See Boundaries, **20**; Constitutional Law, **283**; Dedication, **19**, 31; Municipal Corporations, **269**, 278, 303, 320, 330; Time, **10**.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(H) Establishment by Statute or Statutory Proceedings.

19 (Or.) The saving clause of the county road act of May 20, 1917, providing that, notwithstanding repeal of existing statutes, such statutes should continue in force for purposes of completion of any highway proceedings previously instituted, covers the case of a highway proceeding instituted under Laws 1903, p. 264, § 11 (L. O. L. §§ 6284-6286), the intention of the Legislature having been to preserve all pending proceedings for establishment of roads.—*Rice v. Douglas County*, 183 P. 768.

In view of the saving clause of the Highway Statute of May 20, 1917, after the going into effect of such new statute, repealing prior statutes, the county court, in opening a county road, could follow either the old or the new procedure in a pending proceeding instituted under the old statutes.—*Id.*

30(5) (Or.) In a proceeding to establish a county road instituted under Laws 1903, p. 264, § 11, L. O. L. §§ 6284-6286, and continuing under the new and repealing statute of May 20, 1917 (Laws 1917, p. 588), posting of notices in three public and conspicuous places in the vicinity of the road, and one on the bulletin board at the county courthouse, held a compliance with law.—*Rice v. Douglas County*, 183 P. 768.

30(7) (Or.) In a proceeding to establish a county road, instituted under Laws 1903, p. 264, § 11 (L. O. L. §§ 6284-6286), and continuing under the new and repealing statute of May 20, 1917 (Laws 1917, p. 588), posting of notices in three public and conspicuous places in the vicinity of the road, and one on the bulletin board at the county courthouse, held a compliance with law, so that an affidavit stating that one copy of the notice was posted in a public and conspicuous place near the center of the proposed road was sufficient proof, the center of a road being a point in the middle of the road equidistant from the termini.—*Rice v. Douglas County*, 183 P. 768.

41(1) (Or.) The recital in the report of viewers of a proposed county road or highway that before commencing their labors they took an oath faithfully and impartially to discharge the duties of their appointment is sufficient showing that the viewers qualified as required.—*Rice v. Douglas County*, 183 P. 768.

41(2) (Or.) Where field notes of the county surveyor and viewers of a proposed county road showed the beginning point and terminus of the road, and every angle, direction, and distance between the point of beginning and the terminus, their preliminary report substantially complied with the act of May 20, 1917 (Laws 1917, p. 588), and the road was duly establish-

ed by order to that effect; the placing of permanent monuments, etc., not being necessary to constitute the road a public highway, while failure to make final survey and to monument the road does not avoid the order of establishment.—*Rice v. Douglas County*, 183 P. 768.

58(1) (Or.) The right to review proceedings to establish a county road or highway is not waived by an appeal from the assessment of damages to premises through which the road is laid out.—*Rice v. Douglas County*, 183 P. 768.

68 (CalApp.) In an action by a bank to enjoin a county from constructing a roadway on its land, in view of the descriptions of the land as found in the pleadings, a resolution of the board of supervisors of the county declaring a certain road a public highway held inadmissible as constituting a material variance.—*Title Ins. & Trust Co. v. Los Angeles County*, 183 P. 683.

II. HIGHWAY DISTRICTS AND OFFICERS.

90 (Cal.) In levying, collecting, and holding a tax for highway improvement under Pol. Code, §§ 2745-2773, as to permanent road divisions, county officials act in their capacities as such, and not as ex officio officers of a corporate entity separate from the county; there being no provision that road divisions shall have corporate existence, and no necessity for implying such existence, the whole tenor of the act indicating that a road division was regarded merely as a territorial subdivision of the county for purpose of a county tax for road improvements in the district.—*Anaheim Sugar Co. v. Orange County*, 183 P. 809.

Under Pol. Code, §§ 2745-2773, as to permanent road divisions, presentation and publication of a sufficient petition prepared by landowners in the proposed division, giving its boundaries, so that it may be determined therefrom what lands are included, is indispensable to hearing and action thereon by the county board of supervisors.—*Id.*

In the absence of other words qualifying their meaning, the words "east" and "west," in a petition under Pol. Code, §§ 2745-2773, for formation of a permanent road division, describing boundaries by courses and distances, mean due east and due west.—*Id.*

The description by courses and distances in a petition under Pol. Code, §§ 2745-2773, of the boundaries of a proposed permanent road division, being followed by statement that the boundaries are more particularly shown by an attached map, to which reference is hereby made, and such map deviating materially from the description by courses and distances, the map under Code Civ. Proc. § 2077, controls, so that, neither it nor the courses or distances indicated therein being published with the petition, publication was insufficient to give the county board of supervisors jurisdiction.—*Id.*

There was not the necessary publication of the petition for establishment of a permanent road division, under Pol. Code, §§ 2745-2773, to give the board of county supervisors jurisdiction to act thereon, where the attached map containing the controlling showing of boundaries was not published, and thereafter there was published merely a notice that a petition, with incorrect statement of boundaries had been presented, and that description in the notice was correct.—*Id.*

The record of the board of county supervisors on the final hearing for establishment of a road division, required by Pol. Code, § 4039, to be made, having contained a description of an altogether different parcel of land from that included in the division by the board's final order, such error was fatal to the tax voted by the electors; they having a right to rely on the record, and not being bound to corroborate it by examination of the board's files.—*Id.*

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

☞121 (Cal.) Intent to make the tax for a road improvement provided for in Pol. Code, §§ 2745-2773, as to permanent road divisions, a general tax, *held* clear; the burden being imposed on all property, real and personal, in the district, according to its value, whereas special assessments can be levied only on the specific property benefited, and on the basis of special benefit.—*Anaheim Sugar Co. v. Orange County*, 183 P. 809.

The legislative intent that the tax provided for in Pol. Code, §§ 2745-2773, as to permanent road divisions, on the property in such a division, for highway improvements therein, shall be a general tax, rather than a special assessment, controls.—*Id.*

☞122 (Cal.) The tax under Pol. Code, §§ 2745-2773, as to permanent road divisions on the property in a division, for highway improvements therein, being a general tax, does not amount to a taking of property without due process, because not in proportion to benefits.—*Anaheim Sugar Co. v. Orange County*, 183 P. 809.

☞127(1) (Cal.) Pol. Code, § 2756, providing that elections to vote on a special tax for highway improvements in a road division shall be held in all respects as nearly as practicable in conformity with the general election laws, *held* not to require that election precincts be established 90 days before the election, as required by section 4041, subd. 3, in case of a general election.—*Anaheim Sugar Co. v. Orange County*, 183 P. 809.

It appearing from the notice of election, stating purpose of election to be to determine whether a special tax should be levied to be raised in one, two, and three successive years, that the election was to be held under the Road Division Act, omission to state what proportion was to be raised in any given year was immaterial; Pol. Code, § 2754, providing the proportion to be raised in each year.—*Id.*

The polls for a special tax election for a road division, which Pol. Code, § 2756, requires to be held in all respects as nearly as practicable in conformity with the general election, having been kept open only from 8 a. m. to 4 p. m., while the requirements of section 1160, as to general elections, is from 8 a. m. to 7 p. m., the deviation is great, requiring one seeking to uphold the election to show affirmatively that the result was not affected thereby.—*Id.*

☞128 (Cal.) The tax under Pol. Code, §§ 2745-2773, as to permanent road divisions, being essentially a county tax for a special purpose, the county is the only proper defendant to action to recover such a tax paid under protest.—*Anaheim Sugar Co. v. Orange County*, 183 P. 809.

Pol. Code, § 2759, providing that the special tax for improvement of highways in a road division shall be computed and collected in the same manner as state and county taxes, incorporates into the Road Division Act the provisions of section 3819, part of the general scheme for collection of taxes, for payment under protest and recovery of an illegal tax.—*Id.*

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

☞177 (Cal.App.) Under St. 1915, pp. 406, 409, §§ 20, 22, automobiles must be driven on highways in a prudent manner, at a reasonable speed, not exceeding 30 miles per hour.—*Randolph v. Hunt*, 183 P. 358.

☞183 (Cal.App.) An automobile owner who lends his machine to another, but becomes a passenger in it, must, if possible, prevent the driver from operating the machine in a reckless manner.—*Randolph v. Hunt*, 183 P. 358.

☞184(1) (Cal.App.) A complaint that an automobile, owned and occupied by defendant,

ran down a pedestrian on a highway, is not fatally defective, in absence of a special demurrer for uncertainty, for failure to allege that defendant was either driving the car, or retained control of its operation, especially where complaint was regarded as sufficient upon trial.—*Randolph v. Hunt*, 183 P. 358.

☞184(2) (Cal.App.) Where a defendant's automobile overtook and killed a pedestrian on a highway, defendant has the burden of proving deceased was guilty of contributory negligence.—*Randolph v. Hunt*, 183 P. 358.

☞184(3) (Cal.App.) Evidence that defendant's automobile, while running at a high rate of speed on a highway, overtook and killed a pedestrian, etc., made the driver's negligence a jury question.—*Randolph v. Hunt*, 183 P. 358.

Evidence regarding circumstances under which an automobile, traveling at high speed on a highway, ran down a pedestrian, *held* to make the pedestrian's contributory negligence a jury question, although he was on left-hand side of road.—*Id.*

☞184(6) (Cal.App.) Under the Motor Vehicle Act in force at the time an infant was struck by an automobile (St. 1913, p. 646, § 20), a motorist, though he was driving on the left side of the highway, the right being occupied by the tracks of a trolley, cannot be conclusively presumed negligent and to have been violating the act, though there was no express finding that it was not practicable for him to drive on the right side of the road.—*Todd v. Orcutt*, 183 P. 963.

In an action on behalf of an infant run down on a highway by a motorcar, *held*, that the general finding that the motorist was not guilty of negligence was not in conflict with a special finding that he was driving on the left-hand side of the road, it being found that the right-hand side was occupied by a trolley line, for it may well be assumed in favor of the general finding that it was not practicable to drive a motorcar on the right-hand side of the road, and so the motorist did not violate the Motor Vehicle Act.—*Id.*

HOLIDAYS.

See Time. ☞10.

HOMESTEAD.

See Public Lands, ☞35, 128, 185; Statutes, ☞167.

I. NATURE, ACQUISITION, AND EXTENT.

(A) Nature, Creation, and Duration of Estate or Right in General.

☞3 (Cal.) Stats. 1867-68, p. 116, relating to homesteads, and providing that a party entitled, if in exclusive occupation, should have his right though the land was held in joint tenancy, tenancy in common, etc., was abrogated by the adoption of the Codes, January 1, 1873.—*In re Carragher's Estate*, 183 P. 161.

☞3 (Or.) The homestead exemption statute does not lose its natural effect, standing by itself, as a remedial statute, of applying to decrees, though in terms exempting from judicial sale for satisfaction of any judgment, because put in L. O. L. as sections 221-226, while section 415 provides that sections 213-220, which apply to the constituent elements of executions, and 227-258, which cover exemptions as they were codified before enactment of the homestead statute, shall apply to enforcement of a decree, so far as its nature may require or admit of it.—*Paulson v. Hurlburt*, 183 P. 937.

(C) Acquisition and Establishment.

☞33 (Or.) Under L. O. L. § 221, declaring family homestead exempt from judicial sale for satisfaction of any judgment, and requiring only that it must be the actual abode of, and owned by, such family, or a member thereof,

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and section 224, providing that when an officer shall levy on it the owner may notify him that he claims it as his homestead, the owner of land, a member of a family, contracting for erection of house thereon, while living with her family on rented premises, but moving into the house before foreclosure of liens for labor and material entering into it, may claim exemption against execution on foreclosure decree, having done nothing to lose or waive homestead right.—Paulson v. Hurlburt, 183 P. 937.

(D) Property Constituting Homestead.

☞84 (Cal.) A probate homestead cannot be created or set apart from property owned by the husband or wife and a third party as tenants in common or joint tenants.—In re Caragher's Estate, 183 P. 161.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

☞171 (Or.) One's right to claim homestead exemption is not affected by her executing an instrument on its face an absolute conveyance of the property; it being accompanied by a defeasance in writing showing it was a security as to certain claims, and so constituted a mortgage, not divesting title from grantor.—Paulson v. Hurlburt, 183 P. 937.

HOMICIDE.

See Criminal Law, ☞366, 413, 722½, 730, 814, 829, 922, 980, 1114, 1130, 1134, 1186; Habeas Corpus, ☞30; Witnesses, ☞287, 349, 350, 372, 404.

III. MANSLAUGHTER.

☞45 (Cal.App.) If defendant shot decedent upon a sudden and unpremeditated impulse of passion caused by decedent's vilification, abuse, and threats, a verdict of guilty of manslaughter might have been rendered against defendant.—People v. Luttrell, 183 P. 681.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

☞109 (Okla.Cr.App.) To maintain the plea of self-defense, it must be made to appear that accused was free from fault in bringing on the difficulty, had reasonable ground to believe that he was in imminent danger of death or great bodily harm at hands of deceased, and that there was a necessity to kill to save himself therefrom.—Waldon v. State, 183 P. 637.

☞116(3) (N.M.) Requested instruction that one assailed without his own fault, and having reason to apprehend death or great bodily harm unless he killed assailant, was erroneous, as defendant must entertain such belief and must act upon it.—State v. Parks, 183 P. 433.

VI. INDICTMENT AND INFORMATION.

☞135(1) (Okla.Cr.App.) Information charging commission of homicide by a neck yoke of a wagon about three feet long, with which defendants inflicted mortal wound, charged the length of the yoke and not of the wagon, and that defendants used the yoke and not the wagon, so that demurrer on ground that information did not charge offense because not alleging manner of use and size of yoke and location of wound was properly overruled, in view of Rev. Laws 1910, § 5739.—Boyer v. State, 183 P. 620.

☞135(4) (Okla.Cr.App.) Information charging commission of homicide by a neck yoke of a wagon about three feet long, with which defendants inflicted mortal wound, charged the length of the yoke and not of the wagon, and that defendants used the yoke and not the wagon, so that demurrer on ground that information did not allege manner of use, was properly overruled, in view of Rev. Laws 1910, § 5739.—Boyer v. State, 183 P. 620.

☞136 (Okla.Cr.App.) Information charging commission of homicide by a neck yoke of a wagon about three feet long, with which defendants inflicted mortal wound, demurrer on ground that information did not allege location of wound was properly overruled, in view of Rev. Laws 1910, § 5739.—Boyer v. State, 183 P. 620.

Where a homicide is committed by blows inflicted on body of deceased with a neck yoke of a wagon, it is not necessary that information charge the particular parts of body of deceased on which blows were inflicted.—Id.

☞139 (Cal.App.) An indictment or information for murder must cover, not only both degrees thereof, but also the crime of manslaughter.—People v. Paraskevopolis, 183 P. 585.

VII. EVIDENCE.

(B) Admissibility in General.

☞173 (Cal.App.) In determining the intention, at the time of the killing, of defendant, charged with the homicide, the jury is entitled to consider the means used in making the fatal assault.—People v. Hopper, 183 P. 836.

☞199 (Cal.App.) In a prosecution for homicide, evidence of drunkenness can be considered only to determine the degree of the crime, the weight to be given which is a matter for the jury to determine in connection with all the other evidence and circumstances.—People v. Hopper, 183 P. 836.

(E) Weight and Sufficiency.

☞244(1) (Cal.App.) Evidence in homicide case held to justify jury's finding against self-defense.—People v. Trigaros, 183 P. 668.

☞244(2) (Okla.Cr.App.) Where defendant, on trial for homicide, testified that he killed deceased partly on account of his wrongful treatment of defendant's mother, his plea of self-defense was not sustained.—Waldon v. State, 183 P. 637.

☞250 (Okla.Cr.App.) Evidence in a homicide case held sufficient to warrant a conviction of murder.—Wilson v. State, 183 P. 613.

☞254 (Cal.App.) In a prosecution for murder, defendant setting up self-defense, evidence held to justify verdict of guilty of murder in the second degree, in that decedent was in retreat and was going away and had abandoned his quarrel with defendant when he was shot and killed.—People v. Luttrell, 183 P. 681.

☞255(3) (Okla.Cr.App.) Evidence held to sustain a conviction of manslaughter in the first degree.—Waldon v. State, 183 P. 637.

VIII. TRIAL.

(B) Questions for Jury.

☞268 (Cal.App.) In a prosecution for manslaughter, the weight of the evidence as to the cause of death, whether influenza or an assault by defendant, was for the jury.—People v. Bray, 183 P. 712.

☞282 (Cal.App.) In a prosecution for homicide, it was for the jury to determine the degree or character of the crime, if any, whether murder or manslaughter, which had been committed.—People v. Luttrell, 183 P. 681.

(C) Instructions.

☞290 (Cal.App.) In a prosecution for homicide, in defining murder of the first and second degrees, and manslaughter, the trial court properly stated that in determining defendant's intention it was important to consider the means used to accomplish the killing.—People v. Hopper, 183 P. 836.

☞300(3) (Cal.App.) In a prosecution for murder, wherein defendant set up self-defense, instructions on such issue, fully advising the jury that, if defendant as a reasonable man believed he was about to suffer great bodily injury at the hands of decedent, he was justifi-

fied in using his deadly weapon, and killing decedent, *held* sufficient.—*People v. Luttrell*, 183 P. 681.

☞300(3) (Okla. Cr. App.) Instruction that self-defense could not be pleaded by an aggressor or one voluntarily entering into a difficulty, and that if defendant sought and voluntarily entered into fatal difficulty he could not set up such defense, was erroneous as not sufficiently stating what acts would deprive defendant of such right, and as not correctly defining right of self-defense.—*Boyer v. State*, 183 P. 620.

☞300(9) (Cal. App.) There being no evidence that deceased was known as a dangerous character, there was no occasion for giving the requested instruction, in homicide, as to apprehension of danger from one of rash and violent disposition.—*People v. Trigaros*, 183 P. 668.

☞308(3) (N.M.) Though state contended that defendants lay in wait for deceased in a shed, from which they shot him, and that crime was murder in the first degree an instruction on murder in the second degree was proper, where there was evidence of defendants' footprints and of empty cartridges near shed, and killing with a deadly weapon was admitted.—*State v. Parks*, 183 P. 433.

☞308(5) (Cal.) Refusing a requested instruction that accused could be convicted only of second degree murder if jury had reasonable doubt as to degree of his guilt is not erroneous, where accused was clearly guilty of first degree murder, and only defense was that of mistaken identity, although issue as to second degree murder was submitted to jury.—*People v. Lapara*, 183 P. 545.

(D) Verdict.

☞314 (Okla. Cr. App.) Evidence in homicide case, though sufficient to warrant conviction of murder, *held* insufficient to warrant extreme penalty of death.—*Wilson v. State*, 183 P. 613.

X. APPEAL AND ERROR.

☞325 (N.M.) Exceptions to instructions on self-defense, using term "a man of ordinary prudence, firmness, and courage," because "not correctly stating law of self-defense and on other sufficient grounds," and because not applicable to facts proven, were insufficient to require review.—*State v. Parks*, 183 P. 433.

☞332(8) (Okla. Cr. App.) Where there was evidence to sustain a conviction of manslaughter in the first degree, though the evidence was in conflict, the Criminal Court of Appeals would not disturb the verdict, as the weight of the evidence was for the jury.—*Boyer v. State*, 183 P. 620.

☞332(3) (Okla. Cr. App.) Where the evidence as to self-defense is conflicting, but there is evidence to support a conviction, the Criminal Court of Appeals will not disturb it.—*Waldon v. State*, 183 P. 637.

☞341 (Cal. App.) Where defendant was convicted of manslaughter only, he cannot complain of the court's act in omitting to give part of his requested instruction enumerating the facts on which a reasonable doubt should cause acquittal of murder.—*People v. Hopper*, 183 P. 838.

☞347 (Okla. Cr. App.) Evidence in homicide case, though sufficient to warrant conviction of murder, *held* insufficient to warrant extreme penalty of death, and under Rev. Laws 1910, § 6003, would be modified to imprisonment for life.—*Wilson v. State*, 183 P. 613.

XI. SENTENCE AND PUNISHMENT.

☞352 (Cal. App.) Language of trial judge, in passing sentence of imprisonment for life, that he saw no way out of it except to punish defendant for the crime of murder, not of the second degree, but of the first degree, *held* merely a declaration that in his opinion, based on the evidence, defendant, who had been found guilty of murder in the second degree, merited pun-

ishment equal to that fixed for murder in the first degree.—*Ex parte Azevedo*, 183 P. 952.

☞354 (Cal. App.) Under Pen. Code, § 190, providing every person guilty of murder in the second degree is punishable by imprisonment for not less than 10 years, it was within the power of the trial court to sentence one convicted of murder in the second degree to imprisonment in the state prison for life.—*Ex parte Azevedo*, 183 P. 952.

HOSPITALS.

See Contracts, ☞176, 208, 277.

HUSBAND AND WIFE.

See Animals, ☞70; Certiorari, ☞28, 37; Deeds, ☞195, 211; Descent and Distribution, ☞69, 71; Divorce; Executors and Administrators, ☞188, 202; Homestead, ☞84; Pleading, ☞192, 354; Witnesses, ☞349, 372.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

☞47(1) (Okla.) A husband may convey land to his wife or have it conveyed to her, either as a gift outright or in payment of a debt owed to her.—*Kent v. Tallent*, 183 P. 422.

☞49½(6) (Okla.) In absence of fraud or interests of creditors, the presumption of law is in favor of a husband's conveyance of land to his wife, either as a gift outright or otherwise.—*Kent v. Tallent*, 183 P. 422.

☞49½(8) (Cal. App.) In a widow's action to secure a judgment determining that the sole ownership of certain notes secured by mortgages was in her, the fact that the notes were made to the wife, with the incidental mortgages, is some evidence of a gift by her husband.—*Hale v. Kennedy*, 183 P. 723.

It is not necessary that a husband should in terms and formally declare that he presented his interest in property consisting of notes and mortgages to his wife, but circumstances consisting of conduct, words and admissions may be sufficient to establish the fact of a gift.—*Id.*

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

☞119(3) (Okla.) Where a husband, entitled to a reconveyance of title to land, expressed a desire that the deed of reconveyance be made to his wife, which was done, she acquired title to the land, and her deed vested title in her grantees.—*Kent v. Tallent*, 183 P. 422.

☞131(2) (Cal. App.) In an action brought to secure judgment determining certain promissory notes secured by mortgages, to be the sole property of plaintiff, the presumption under Civ. Code, § 164, that where conveyance is made to a married woman, title is vested in her as her separate property, *held* to apply to notes and mortgages, the proceeds of certain property sold, the question for the trial judge being whether the presumption had been overcome.—*Hale v. Kennedy*, 183 P. 723.

☞133(1) (Cal. App.) In widow's action to determine that the sole ownership of certain promissory notes secured by mortgages was in plaintiff, *held* that testimony as shown by a statement of the cause shows some substantial evidence to sustain the findings of the trial judge for plaintiff.—*Hale v. Kennedy*, 183 P. 723.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

☞278(1) (Cal.) Property settlements between husband and wife when there is no fraud are highly favored in the law.—*Hensley v. Hensley*, 183 P. 445.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⇒278(1) (Cal.) Neither petition of widow to set aside probate of will, nor her petition to determine heirship, nor her objection to the final account, brings into issue the validity of the separation and settlement agreement between her and deceased; but this can be raised only in a direct proceeding attacking it.—In re McClelland's Estate, 183 P. 798.

⇒279(4) (Cal.) Separation and settlement agreement between husband and wife held to bar her right to inherit from him.—In re McClelland's Estate, 183 P. 798.

⇒281 (Cal.) Where the husband and wife had been living apart for years, and the wife acted upon the advice of her attorneys in making a property settlement, there was no presumption of confidential relation, and the wife had the burden of proving fraud, if any, in the agreement.—Hensley v. Hensley, 183 P. 445.

Evidence held insufficient to show fraud of the husband in securing property settlement with his wife.—Id.

⇒285½ (Nev.) A wife may maintain an action against her husband for support and maintenance without applying for divorce, under St. 1913, c. 97.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 817.

The object of St. 1913, c. 97, giving wife right of action against husband for support and maintenance without applying for a divorce, is to give the wife a sure and speedy remedy through an independent action when she has any cause of action for divorce against her husband, or when he has deserted her for a period of ninety days, and, being remedial, must be liberally construed with a view to promote its object, the jurisdiction of the court being neither limited nor restricted.—Id.

⇒288 (Cal.) Alimony may be awarded a wife in a separate maintenance action, although both she and defendant husband were at fault.—Mattson v. Mattson, 183 P. 443.

⇒289 (Nev.) The requirement as to residence in section 7 of St. 1913, c. 97, giving wife right of action against husband for support and maintenance without applying for a divorce, relates to the venue of the action and not to jurisdiction of the parties, and such residence need be such only that an ordinary action could be maintained by her according to the statute regulating the venue of civil action, so enlarged as to permit her to sue in the county where the husband may be found.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317.

⇒296 (Cal.) A wife's separate maintenance complaint need not allege her residence.—Mattson v. Mattson, 183 P. 443.

⇒297 (Cal.) Corroboration is unnecessary in a wife's action for maintenance without divorce, since Civ. Code, § 130, requires corroboration only in actions where a divorce is granted.—Mattson v. Mattson, 183 P. 443.

In a wife's action for separate maintenance, conflicting evidence held to sustain trial court's finding that plaintiff wife did not circulate false reports regarding defendant and his daughter-in-law.—Id.

⇒297 (Nev.) To entitle a wife to recover in an action under St. 1913, c. 97, for support and maintenance, without applying for divorce, it is incumbent upon her to make a showing of the marriage relation, her needs, and the ability of her husband, as in a suit for divorce.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317.

⇒298½ (Cal.) In a separate maintenance action, findings that plaintiff wife did not accuse defendant of improper relations with his daughter-in-law, and that none of plaintiff's statements had brought defendant into contempt, etc., held a sufficient finding upon the issue whether plaintiff circulated false reports regarding defendant and his daughter-in-law.—Mattson v. Mattson, 183 P. 443.

188 P.—66

IX. ABANDONMENT.

⇒308 (Nev.) Prosecution of husband for desertion and nonsupport of wife and child under Act Pa. March 13, 1903 (P. L. 26), need not be instituted at place of his residence, or county in which offense is alleged to have been committed, but may be instituted wherever relief may be needed; such statute, in view of section 2, and in view of Act April 13, 1867 (P. L. 78), to which it is supplementary, being remedial as well as penal, with purpose of affording relief to dependent wives and children.—Ex parte Brennen, 183 P. 310.

ILLEGITIMATE CHILDREN.

See Bastards.

IMMUNITY.

See Constitutional Law, ⇒206.

IMPROVEMENTS.

See Contracts, ⇒302; Highways, ⇒90, 121, 122, 128; Levees, ⇒9; Mechanics' Liens, ⇒75; Municipal Corporations, ⇒269-530; Pleading, ⇒406; Vendor and Purchaser, ⇒109, 203.

IN BANC.

See Appeal and Error, ⇒838.

INDEMNITY.

See Guaranty.

⇒8 (Cal.App.) Where a lumber company and defendants agreed to indemnify plaintiff surety company for any payments made under any bond issued at the request of the lumber company and defendants, defendants were not liable to indemnify the surety company on a bond issued at the request of the lumber company alone and without defendants' knowledge.—National Surety Co. v. Wilcox, 183 P. 701.

INDIANS.

See Taxation, ⇒181.

⇒2 (Ok.) The acts of Congress and agreements between the various Indians have always been construed liberally in favor of the Indians.—Hudson v. Hopkins, 183 P. 507.

⇒6 (Ok.) Assuming that section 4, Original Creek Agreement, was not superseded by Act Cong. May 27, 1908, yet when county court appointed one L. as guardian of C., a Creek minor, and its records are silent as to L.'s citizenship, it will be presumed that the court, in proper discharge of its duty, upon inquiry, adjudged that he possessed requisite qualifications, and such judgment is not subject to collateral attack.—Tucker v. Leonard, 183 P. 907.

⇒18 (Ok.) Where a full-blood Choctaw Indian woman died in 1906 possessed of an allotment, and her nearest relatives on her father's side were an uncle and a cousin, and on her mother's side cousins, all being Indians by blood, Mansf. Dig. Ark. § 2531, controls, and an undivided half of the allotment goes to the maternal heirs, and the other half to the paternal heirs.—Palmer v. King, 183 P. 411.

⇒18 (Ok.) The devolution of an allotment on behalf of deceased Creek citizen, not selected or made until after Supplemental Creek's Agreement of June 30, 1902 (32 Stat. 500, c. 1323), went into effect is governed by Arkansas laws of descent and distribution, which by section 6 of that act, and by Act May 27, 1902, were substituted for Creek tribal laws of descent recognized by the Original Creek Agreement of March 1, 1901 (31 Stat. 861, c. 676, § 28).—Hamilton v. Balansen, 183 P. 413.

A Creek citizen, dying before receiving his allotment, is not seized at his death of an

inheritable estate in lands afterwards allotted to him or to his heirs, and the descent is cast when the certificate of allotment is issued, and is governed by the law then in effect.—Id.

Where Dawes Commission, having on file in allotment record of one M., deceased, a reservation plat and memorandum slip, pending ratification of Original Creek Agreement of March 1, 1901, thereafter issued an "original memorandum of selection" and a certificate of allotment, both dated October 20, 1902, the date of such certificate is controlling as to devolution of estate.—Id.

Where a "reservation plat and memorandum slip," on file with Dawes Commission, in allotment record of one M., was made prior to ratification of Original Creek Agreement of March 1, 1901, and where M. had died July 7, 1899, and where there was no authority for such reservation and no law permitting allotment to deceased at that time nor to his heirs, the exhibit gave the heirs no inheritable estate.—Id.

§18 (Okl.) Under Act Cong. Feb. 28, 1891, § 5 (U. S. Comp. St. § 4222), the illegitimate child of an allottee by an Indian woman, whether born as the result of cohabitation in accordance with Indian customs or not, is entitled to inherit rights in his father's allotment as his heir.—Gray v. McKnight, 183 P. 489.

Where a white man by Kiowa, Comanche, and Apache Agreement June 6, 1900, c. 813, 31 Stat. 676, was awarded same benefit as members of tribes, and died after issuance of trust patent, but before final patent, and Secretary of the Interior, as authorized by Indian Appropriation Act of March 3, 1903, issued a patent to his heirs without naming them, they took the estate by inheritance, and not by grant from United States.—Id.

§28 (Okl.) After death of allottee in Kiowa, Comanche, and Apache reservation under trust patent and during trust period, county courts cannot determine his heirs, but after issuance of patent, removal of restrictions, and withdrawal of federal supervision, and where heirship has not been determined by Secretary of Interior during trust period, county court having jurisdiction of estate may determine under the state law the allottee's heirs and distribute estate accordingly.—Gray v. McKnight, 183 P. 489.

County courts, under their probate jurisdiction, may determine who are the heirs of a decedent for purposes of distribution, except in cases involving Indian allotments, where Congress has not relinquished its supervisory control or delegated such authority to such courts.—Id.

§39 (Okl.) Where a conveyance of realty was executed prior to statehood, and while the statutes of Arkansas were in force in the Indian Territory, the rights of the parties were fixed by the statutes then in force, and not by Rev. Laws Okl. 1910, §§ 1140-1188.—Kent v. Tallent, 183 P. 422.

INDICTMENT AND INFORMATION.

See Assault and Battery, §78; Criminal Law, §1032, 1044, 1088, 1134, 1184; Embezzlement, §26; Escape, §9; Homicide, §135-139; Intoxicating Liquors, §211; Larceny, §28, 32, 40; Malicious Prosecution, §18.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§71 (Cal.App.) If the facts stated are not capable of two constructions, and are such as to plainly show to a person of common understanding a crime has been committed, the information or indictment will be held sufficient.—Ex parte Rankin, 183 P. 686.

§110(3) (Cal.App.) Indictment or information is sufficient, where crime is substantially alleged in the words of the statute, or their equivalent.—Ex parte Rankin, 183 P. 686.

§110(25) (Cal.App.) Information charging attempt to commit the infamous crime against nature in the words of the statute (Pen. Code, § 286) denouncing such crime held sufficient, as against objection that the terms of the statute are unintelligible, uncertain, ambiguous, and general, since every person of ordinary intelligence understands what the crime against nature with a human being is.—Ex parte Rankin, 183 P. 686.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§125(30) (Wash.) In information against a police officer for larceny of outlawed whisky, charges that he took the whisky from the prosecuting witness with the intent to defraud him of the same, etc., or that he appropriated the same after having taken it into his custody under the law, were not inconsistent theories, and were properly included in one information.—State v. Donovan, 183 P. 127.

§125(40) (Okl.Cr.App.) Count of indictment alleging that one W., as treasurer of a county, officially received certain public moneys, funds, etc., for the state, etc., and willfully and feloniously embezzled a certain amount thereof, and that defendant knowingly and feloniously procured, aided, and abetted the embezzlement, charged but one offense, the embezzlement by W. and the aiding and abetting by defendant.—Middleton v. State, 183 P. 626.

§125(42) (Wash.) An information against a police officer for grand larceny of outlawed whisky held to charge an original taking of the whisky by defendant with intent to defraud the owner thereof, as well as an embezzlement of the same after taking under Rem. Code 1915, § 2601, subd. 3, the taking and subsequent appropriation constituting one continuous transaction.—State v. Donovan, 183 P. 127.

§132(2) (Cal.App.) Where defendant planned to steal 252 sacks of potatoes, by representing that he was buying for cash and so getting possession, and it took three days to haul the potatoes away from the sellers' ranch, there was nevertheless but one larceny, not a distinct offense at the time of each of the three haulings, requiring an election by the prosecutor.—People v. Mills Sing, 183 P. 865.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§133(6) (Okl.Cr.App.) Under Code of Criminal Procedure the method of attacking an information sufficient for all purposes, but, not verified, so as to authorize a warrant of arrest, must be by motion to quash or set aside information, and such question is not properly raised by a demurrer, especially by a demurrer on ground that it does not state facts sufficient to constitute a public offense.—Thayer v. State, 183 P. 931.

VIII. AMENDMENT.

§159(3) (Okl.Cr.App.) Amendment of information for unlawfully transporting intoxicating liquor, made on motion of county attorney, changing place to which liquor was alleged to have been conveyed from intersection of Western and G. avenues to a place about a quarter of a mile west of that intersection, did not materially change offense charged in original information.—Thayer v. State, 183 P. 931.

INDUSTRIAL DISTRICT.

See Municipal Corporations, §600.

INFANTS.

See Animals, §74; Appeal and Error, §931, 991; Constitutional Law, §250, 258; Courts, §202; Criminal Law, §18, 1213; Divorce, §182; Explosives, §7; Guardian and Ward; Habeas Corpus, §99;

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Highways, **⌋**184; Judgment, **⌋**800; Lds Pends, **⌋**22; Negligence, **⌋**85, 142; Parent and Child; Statutes, **⌋**86, 118; Witnesses, **⌋**40.

II. CUSTODY AND PROTECTION.

⌋12 (Cal.App.) Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not contrary to Const. U. S. Amend. 14, § 1, though other sections of the Penal Code relating to crimes against children, such as sections 272, 273, 273g, and 650½, made the condemned acts misdemeanors only.—*People v. Camp*, 183 P. 845.

⌋20 (Cal.App.) Verdict that defendant was guilty of the crime of lewd and lascivious conduct with a male child under the age of 14 years, a felony, as charged in the indictment, which must be presumed on collateral attack to have sufficiently stated the offense as defined by Pen. Code, § 288, by following substantially the language of the statute, *held* sufficiently to have found that the crime was committed upon or with the body of a child, as prohibited by the statute and as charged by the indictment.—*People v. Camp*, 183 P. 845.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not impliedly repealed by Juvenile Court Law, § 28; there being no inconsistency between them.—*Id.*

In view of Pen. Code, § 671, despite section 18, the court had jurisdiction to sentence to imprisonment for more than five years defendant, convicted of lewd and lascivious conduct upon a child under 14, in violation of section 288.—*Id.*

VII. ACTIONS.

⌋102 (Cal.App.) In action by guardian ad litem of an infant, it is proper for the complaint to allege, and the court to find, the age of the infant; for, unless the infancy exists, suit could not be brought by guardian ad litem.—*Todd v. Orcutt*, 183 P. 963.

⌋105 (Cal.App.) A ward who, suing by guardian ad litem, had recovered a judgment on becoming of age was competent to sign satisfaction of the judgment; the fact of majority, under Code Civ. Proc. § 1760, alone terminating the guardianship.—*City Properties Co. v. Fitzmaurice*, 183 P. 267.

INFLUENZA.

See Criminal Law, **⌋**366, 367, 1114; Homicide, **⌋**268.

INJUNCTION.

See Action, **⌋**48; Appeal and Error, **⌋**1107; Divorce, **⌋**169; Highways, **⌋**68; Landlord and Tenant, **⌋**51, 167; Municipal Corporations, **⌋**604, 628; Nuisance, **⌋**72; Pleading, **⌋**343.

I. NATURE AND GROUNDS IN GENERAL.

(A) Nature and Form of Remedy.

⌋1 (Cal.App.) Equity has inherent power in aid of its jurisdiction to grant injunctions, and the exercise of the power rests very largely in the discretion of the chancellor.—*Davies v. Ramsdell*, 183 P. 702.

(B) Grounds of Relief.

⌋9 (Cal.) A resident of a city, who was not a user of water which came from a source from which the city had not been given a permit by the state board of health to obtain water, as provided by St. 1913, p. 793, could not maintain an action under such statute to enjoin the city from using the water.—*Hart v. City of Los Angeles*, 183 P. 347.

⌋11 (Cal.) A civil service examination notice, stating that certain deductions would be made if an applicant's experience was not considered satisfactory, does not authorize an injunction

without a showing that the commission is threatening to abuse its discretionary power.—*Pratt v. Rosenthal*, 183 P. 542.

⌋24 (Cal.) It must be presumed that the Legislature, when it granted permission, under St. 1913, p. 793, to any citizen or consumer using the water, the right to enjoin a water company or municipality from supplying water without a permit from the State Board of Health, did not intend to change in any other respects the principles of equity regarding injunctions; and hence, where the water furnished is wholesome and sanitary, an injunction will not issue to protect the technical unsubstantial right of the consumer that a permit be obtained, where the effect of issuing an injunction and stopping the city from supplying its inhabitants will cause the greatest imaginable inconvenience to the city and its inhabitants, and will be of no benefit to the plaintiff consumer.—*Frost v. City of Los Angeles*, 183 P. 342.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

⌋26(1) (Cal.App.) An alleged debtor may enjoin the prosecution of 648 separate actions and compel their litigation in a single action, all being between the same plaintiff and defendant on claims arising in the same manner, involving like or similar proof, if there is a conspiracy and combination between plaintiff and the justice of the peace to force a settlement and payment by reason of the prohibitive cost of defending them, since the remedy by change of venue would involve prepayment of costs (Code Civ. Proc. § 836), which would be greater than the total amount of claims, and still subject defendant to multiplicity of suits and indefinite future costs in another tribunal.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 183 P. 824.

(B) Property, Conveyances, and Incumbrances.

⌋34 (Wash.) One whom the owner of a building impliedly invites to enter and do business with his tenants, has privileges in the premises, and can recover for personal injuries caused by the owner's negligence, and can enjoin the latter from interfering with his right of entry.—*Konick v. Champneys*, 183 P. 75.

(C) Contracts.

⌋57 (Cal.App.) The employment of workmen under a contract by a glass manufacturer for the season of 1917 and 1918, *held* subject to protection by injunction against interference by third persons, and not an employment at will of such persons, although no number of months of the season were specified, and it was agreed that the workmen could be discharged or could quit on seven days' notice, so that the contract was terminable under Civ. Code, § 1999, at the will of either party.—*Patterson Glass Co. v. Thomas*, 183 P. 190.

⌋63 (Cal.App.) An employer may enjoin third persons from inducing employes, by threats or otherwise, from breaching their contracts of employment.—*Patterson Glass Co. v. Thomas*, 183 P. 190.

(D) Public Officers and Boards and Municipalities.

⌋74 (Wash.) Courts of equity will not review proceedings of subordinate political or municipal tribunals; and, where matters are left to the discretion of such bodies, the exercise thereof in good faith will not be disturbed, in absence of fraud.—*Columbia River Timber & Logging Co. v. Commissioners of Diking Dist. No. 2 of Wahkiakum County*, 183 P. 134.

III. ACTIONS FOR INJUNCTIONS.

⌋118(3) (Cal.App.) In an action by an employer to enjoin third persons from inducing employes to breach their contract of employ-

ment, complaint *held*, as against a general demurrer, to sufficiently allege that defendants had knowledge that a contract of employment existed.—*Patterson Glass Co. v. Thomas*, 183 P. 180.

In an action to enjoin members of a labor union from inducing plaintiff's employees from breaching their contracts, complaint *held* to sufficiently allege that defendants conspired together for the purpose of inducing the employees to break their contract, and were engaged in an effort to induce them to abandon their employment.—*Id.*

⚡126 (Cal.) In an action to enjoin civil service examinations, the court cannot assume that the proposed method of examination is impractical.—*Pratt v. Rosenthal*, 183 P. 542.

INNKEEPERS.

See Landlord and Tenant, ⚡48; Trial, ⚡397.

INSANE PERSONS.

See Deeds, ⚡68; Evidence, ⚡87; Wills, ⚡52, 289, 302.

II. INQUISITIONS.

⚡26 (Cal.App.) A judgment declaring one judicially insane and committing him establishes insanity only as of the date of the judgment, for there is a legal presumption of sanity in regard to every man, and proof of insanity at one time carries no presumption of its past existence.—*Avery v. Avery*, 183 P. 453.

INSOLVENCY.

See Bankruptcy; Brokers, ⚡64; Contracts, ⚡310.

INSTALLMENTS.

See Limitation of Actions, ⚡69.

INSTRUCTIONS.

See Criminal Law, ⚡770-829; Trial, ⚡187-296.

INSURANCE.

See Appeal and Error, ⚡195, 1051, 1060, 1068; Evidence, ⚡276; Gifts, ⚡10; Trial, ⚡108½.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

⚡76 (Or.) A declaration or statement made by an agent of an insurance company to the effect that he is authorized to collect premiums is of no effect and not binding upon the company.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

⚡90 (Or.) Provisions in a life insurance policy to effect that agents shall not have authority to collect renewal premiums, and that company shall not be responsible for act of agent in accepting notes and extending payment thereon, are valid and binding between the insurer and the insured.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

V. THE CONTRACT IN GENERAL.

(B) Construction and Operation.

⚡146(3) (Ok.) Where the meaning of language in a life policy is ambiguous or susceptible of two different conclusions, it will be strictly construed against the insurer, and that construction adopted which is most favorable to insured.—*Federal Life Ins. Co. v. Lewis*, 183 P. 975.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

⚡186(3) (Or.) An instruction relative to authority of a general state agent of an insurance

company to accept payment of premiums, "but you are further instructed that, if the officers had an opportunity to inform themselves of the facts and circumstances * * * and failed to do so, it would be equivalent to such knowledge," was erroneous, being too broad; the mere opportunity to acquire knowledge not being equivalent to knowledge.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

To establish that an agent outside of the home office of the insurance company had authority to accept renewal premiums on behalf of the company, it must be proved that either such agent was actually authorized by insurance company, or by his contract from the home office, or that the insurance company represented or held out the agent as having the authority; and also that the insured knew of and relied on the representations.—*Id.*

No payment of premiums to other than an authorized agent of an insurance company, or one held out as having authority, can be considered as a valid premium payment, unless the same was actually received by and consented to and ratified by the insurer.—*Id.*

⚡198(5) (Or.) If an insurance company wrongfully declared a policy forfeited and refused to accept a premium when duly tendered, the insured may consider the policy at an end and bring an action to recover the just value of the policy, in which case the measure of damages is the amount of premiums paid with interest on each from the time it was made.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(C) Matters Relating to Person Insured.

⚡297 (Cal.App.) Where a question in a life insurance application regarding applicant's daily consumption of wines, spirits, or malt liquors was answered by "No daily habit—occasional beer," the response is not a representation that applicant did not drink whisky, but merely that he did not use it daily.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

In a life insurance application, in question whether applicant had ever used intoxicating liquors to "excess," the quoted word is largely a matter of opinion, depending upon the individual's capacity, etc.—*Id.*

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(E) Nonpayment of Premiums or Assessments.

⚡349(1) (Or.) Where the premium on a life insurance policy is not paid when due, and the payment thereof is not waived or extended by the insurer, the insurer may cancel the policy and retain premiums paid.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

If a renewal premium was paid or extended by the execution of a premium note, and such note was not paid at maturity or at time to which it was extended, if extended, the insurer could cancel the policy.—*Id.*

⚡362 (Ok.) Provisions in life policy that if insured furnished due proof of total permanent disability preventing him from pursuing any gainful occupation the insurer would regularly pay premiums, and that if insured was thereafter able to engage in such occupation insurer's obligation should cease, were ambiguous and contradictory, and, construed together, meant that, on probable total disability for life, the insurer was bound to pay premiums.—*Federal Life Ins. Co. v. Lewis*, 183 P. 975.

⚡364 (Or.) A policy of life insurance automatically lapses without any further action on the part of the insurer, if the insured fails to pay a premium when the same becomes due, and

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

within the time allowed by the terms of the policy.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

Time is of the essence of a life insurance contract, and if insured fails to perform any condition on the date when it is due to be performed, then, without any further notice or act of the insurer, the policy lapses automatically, where no leeway or days of grace are allowed the insured.—*Id.*

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

☞372 (Or.) Provisions in a policy of life insurance limiting authority of agent and providing that agent has no authority to accept renewal premiums or accept notes, or grant extensions, etc., may be waived or modified by the insurer.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

☞508½ [New, vol. 4 Key-No. Series] (Cal.App.) A fidelity insurer is not liable for any acts of fraud or dishonesty committed by the employe, after the employer became aware of any act which might be made the basis of a claim.—*Los Angeles Athletic Club v. United States Fidelity & Guaranty Co.*, 183 P. 174.

XIV. NOTICE AND PROOF OF LOSS.

☞539(5) (Cal.App.) Noncompliance with the provision of fidelity insurance policy, requiring prompt notice after the employer should become aware of any act, which might be made the basis of a claim, cannot be excused on the ground that it was an immaterial provision, and that therefore, under Civ. Code, § 2611, a violation did not avoid the policy.—*Los Angeles Athletic Club v. United States Fidelity & Guaranty Co.*, 183 P. 174.

☞542(6) (Cal.App.) In an action on fidelity insurance policy for loss by reason of dishonesty of an employe, itemized statement of claim held sufficient.—*Los Angeles Athletic Club v. United States Fidelity & Guaranty Co.*, 183 P. 174.

☞559(2) (Ok.) Provision of a life policy that if insured furnished due proof, within a definite time, of total permanent disability to pursue any gainful occupation, the insurer would regularly pay premiums, was waived by its denial of liability within such time upon other grounds than failure to furnish such proof.—*Federal Life Ins. Co. v. Lewis*, 183 P. 975.

XVI. RIGHT TO PROCEEDS.

☞586 (Cal.App.) Where a life insurance policy authorizes insured to change the beneficiary, the beneficiary ordinarily has no vested interest in the policy until insured's death.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

A life policy, which authorized insured to change his beneficiary, may be given to the beneficiary, so as to give her an absolute vested interest in the policy while insured is still living.—*Id.*

XVIII. ACTIONS ON POLICIES.

☞646(8) (Cal.App.) Answers to questions contained in a life insurance application are presumably true, and defendant insurance company has the burden of proving the contrary.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

☞646(8) (Cal.App.) In an action by an athletic club against a company insuring it against loss by reason of the dishonesty of the club manager, who, it was charged, in violation of his contract of employment, consumed without payment large amounts of liquors belonging to the stock of the club, held that the club had the burden of proving that the manager did not pay for the liquors consumed.—*Los Angeles Ath-*

letic Club v. United States Fidelity & Guaranty Co., 183 P. 174.

☞665(3) (Cal.App.) Evidence held to sustain jury finding that an answer in a life insurance application regarding the date applicant had last consulted a physician was true.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

Evidence held to sustain jury finding that insured's statement in his life insurance application that he had never spat blood was true.—*Id.*

In an action on a life insurance policy, conflicting evidence held to sustain jury findings that the insured was not addicted to the daily use of intoxicating liquors and had never used them to excess.—*Id.*

☞665(7) (Cal.App.) In an action on fidelity insurance policy, which required the employer to give notice by registered letter, addressed to the president of the insurance company at its office promptly after becoming aware of any act which might be made the basis of the claim, evidence held insufficient to show that the employer promptly gave notice after its executive officers received knowledge of the employe's dishonesty.—*Los Angeles Athletic Club v. United States Fidelity & Guaranty Co.*, 183 P. 174.

☞666(6) (Cal.App.) The materiality of representations made by a life insurance applicant presents a question of law and not of fact.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

☞668(7) (Cal.App.) Whether insured used intoxicating liquors to excess, contrary to his representation to the insurer, is a question of fact for the jury.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

☞668(8) (Or.) Where an insurance company ratified the unauthorized act of a general state agent in accepting notes in payment of premiums and granting extensions, it became a question of fact as to whether the company, by such acts and conduct, had authorized and empowered the general agent to make and accept other premium notes and grant other extensions.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

In an action against an insurance company to recover premiums paid, where insurance company had canceled the policies, whether defendant's general state agent had apparent authority to accept premium notes and grant extensions, contrary to the provisions of a life policy, held for the jury.—*Id.*

☞669(7) (Cal.App.) In action on a life policy, an instruction that insured's representation regarding his previous diseases and accidents was false, if a certain accident not mentioned in the application occurred and had a tendency to affect his length of life, held prejudicial error, because allowing the jury to disregard the false answer, if they considered it did not affect deceased's longevity.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

☞670 (Cal.App.) In an action on a fidelity insurance policy, held that, while the court had the right to arrive at an estimate of the employe's misappropriations, which consisted largely of consuming the employer's stock of liquor, by an approximation of the daily articles consumed, the finding of the court was insufficient, where it did not show what proportion of the value taken by the employe accrued prior to the discovery of his dishonest acts.—*Los Angeles Athletic Club v. United States Fidelity & Guaranty Co.*, 183 P. 174.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

☞697 (Cal.App.) Under a fraternal association's constitution and by-laws, providing that local courts or lodges could not voluntarily surrender their charters except under certain conditions, and that upon dissolution all funds should be delivered to the permanent secretary, etc., held, that funds must be surrendered upon the voluntary disbanding of a court as well as upon its involuntary dissolution, since "dissolu-

tion" means surrendering the charter and disbanding.—Subsidiary High Court of Ancient Order of Foresters v. Pestarino, 183 P. 297.

The constitution and by-laws of a fraternal association constitute a contract between the parent order and a subsidiary court or lodge and the members thereof.—Id.

INSURRECTION.

See Statutes, ¶251.

¶2 (Cal.) Act April 30, 1919 (St. 1919, p. 281), defining criminal syndicalism and sabotage, and prescribing penalties, is not beyond the legislative powers, at least in so far as its provisions are material in case in which the prisoner is charged with the offense defined by section 2, subdiv. 3.—Ex parte McDermott, 183 P. 437.

INTEREST.

See Appeal and Error, ¶269; Chattel Mortgages, ¶85, 90; Evidence, ¶80; Insurance, ¶198; Limitation of Actions, ¶155; Replevin, ¶79, 83, 124; Taxation, ¶526; Trial, ¶340; Usury; Wills, ¶734.

III. TIME AND COMPUTATION.

¶43 (Cal.App.) Where antedated commission contract provided for payment of commissions pro rata upon payment of purchase price, with interest on commissions "payable as received," without specifying date from which interest was to be computed, interest was to be computed, not from time of default merely, but from date of the commission agreement and from the real, not apparent, date of the execution of the agreement.—Ratzlaff v. Trainor-Desmond Co., 183 P. 269.

INTOXICATING LIQUORS.

See Counties, ¶139; Criminal Law, ¶815, 1163; Indictment and Information, ¶125, 159; Insurance, ¶297, 665, 668, 670; Larceny, ¶5, 18, 28; Statutes, ¶220; Witnesses, ¶306, 307.

IV. LICENSES AND TAXES.

¶69 (Wyo.) The power of a board of county commissioners, under Comp. St. 1910, §§ 2835, 2836, to grant, refuse, or revoke a retail liquor license, is not one of unlimited discretion, but is limited to the causes stated in the statutes.—Peterson v. Incorporated Town of Guernsey, in Platte County, 183 P. 645.

¶96 (Wyo.) A grantee of a saloon license from the board of county commissioners cannot recover an unearned portion of a license fee voluntarily paid and turned over to the town treasurer in accordance with statute, where the license was revoked by the county board, and the revocation was without fault on the part of defendant city, in view of Comp. St. 1910, §§ 2826, 2835, 2836, and particularly Laws 1911, c. 13, § 1, providing that no liquor license money shall be refunded to licensee.—Peterson v. Incorporated Town of Guernsey, in Platte County, 183 P. 645.

¶106(1) (Wyo.) The power of a board of county commissioners under Comp. St. 1910, §§ 2835, 2836, to revoke a retail liquor license, is not one of unlimited discretion, but is limited to the causes stated in the statutes.—Peterson v. Incorporated Town of Guernsey, in Platte County, 183 P. 645.

VII. CRIMINAL PROSECUTIONS.

¶211 (Okla.Cr.App.) Information charging that defendant on July 27, 1916, and between that date and May 29, 1916, possessed certain liquor with intent to violate prohibitory liquor law (Rev. Laws 1910, § 3605), but not averring possession of all of such liquor at one and the same time, was too indefinite to sustain a judgment thereon, and was demurrable, in view of

Const. art. 2, § 20, and Rev. Laws 1910, §§ 5738 and 5739.—Killough v. State, 183 P. 430. ¶233(2) (Okla.Cr.App.) In a prosecution for unlawful possession of intoxicating liquor, it was error to permit prosecution to prove that three or four weeks after filing of information the officers found intoxicating liquors at same place.—Phillips v. State, 183 P. 521.

¶236(1) (Okla.Cr.App.) Testimony of a police captain that on certain date he met defendant near corner of Third and Santa Fé Streets, and said to him, "Charley, I want that whisky," and searched defendant, and found a quart and two half pints of whisky on him, supported a conviction for unlawful conveyance of whisky to corner of Third and Santa Fé streets.—Jones v. State, 183 P. 519.

¶236(7) (Okla.Cr.App.) In a prosecution for possession of intoxicating liquor with intent to sell it, evidence held to sustain a conviction.—Belchner v. State, 183 P. 925.

¶238(4) (Okla.Cr.App.) Evidence in a prosecution for possession of intoxicating liquors with intent to sell them held to make defendant's guilt a question for the jury.—Freeman v. State, 183 P. 626.

JEOPARDY.

See Criminal Law, ¶178.

JOINT ADVENTURES.

¶4(1) (Cal.App.) The tendency of modern decisions is to regard the rights of joint adventurers, as between themselves, as practically governed by the rules fixing the rights of partners, and, the relation between joint adventurers being fiduciary in character, each must be held strictly to account to his coadventurers, and will not be permitted to enjoy any unfair advantage.—Menefee v. Oxnam, 183 P. 379.

The failure of one of several joint adventurers in an enterprise, looking to the purchase of property, to share with his coadventurers any secret advantage given by their vendor for inducing the purchase, is such a breach of confidence as amounts to a constructive fraud, and will entitle his coadventurers either to rescind the contract, or to maintain an action for damages against either or both parties to the secret understanding.—Id.

Where one party to a joint adventure, which contemplates the purchase of property, receives an advantage which he does not share with his coadventurers, it is not necessary that those adventurers, complaining of the breach of faith, should have been actually injured; for, while it is a general rule that fraud without injury is no ground for relief, it is unnecessary for the defrauded party to show more than a slight injury, and the very breach of confidence causes injury.—Id.

¶5(2) (Okla.) Trial court's finding, in suit to enforce equitable rights arising under oral contract whereby plaintiff was to procure oil and gas leases, as to the terms of the contract sued on, held not against the clear weight of the evidence.—Winemiller v. Page, 183 P. 501.

Trial court's finding, in suit to enforce equitable rights arising under oral contract to procure oil and gas leases for another and to be "carried for an eighth," that that phrase had a well-defined meaning in the oil business, and that among persons familiar therewith, it gave plaintiff no interest in leases so taken, but only passed after sale or operation, after payment of cost of procuring leases and operation, held not against clear weight of evidence.—Id.

¶5(2) (Okla.) In action to establish plaintiff's right to an undivided one-half interest in certain oil and gas leases under a contract to obtain leases to be the joint property of plaintiff and defendant, judgment for plaintiff held not to be clearly against the weight of the evidence.—Turben v. Douglass, 183 P. 881.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⚡7 (Cal.App.) Where a vendor of property, which was acquired by joint adventurers, by secret agreement gave one of them an advantage not shared by the others, the vendor was a party to the constructive fraud as much as the adventurer receiving the benefit, and hence upon discovery those adventurers not parties to the agreement were entitled to rescind.—*Menefee v. Oxniam*, 183 P. 379.

While parties must promptly rescind on discovery of the facts entitling them to the relief, joint adventurers cannot be held remiss for failing to rescind a contract of purchase until they learned that one of their number was benefited by a secret agreement between himself and the vendor of the property which they acquired.—*Id.*

Where joint adventurers, because of the existence of negotiations between the executrix of their vendor and themselves, delayed for five weeks in giving notice of election to rescind the contract, after discovery that one of their number was given advantage of a secret profit, such delay in giving notice of rescission was not unreasonable.—*Id.*

⚡8 (Cal.App.) A complaint by all but one of the parties to a joint adventure, seeking a rescission of contract of purchase on the ground that one of them did not share with his coadventurers the profit from a secret agreement, which he made with the vendor of the property which was purchased, *held* to sufficiently allege damage under the liberal rule of Code Civ. Proc. § 452.—*Menefee v. Oxniam*, 183 P. 379.

A complaint by joint adventurers, seeking rescission of the contract for purchase of a mining claim, *held* not open to demurrer on the ground that there was not an offer to return some of the bullion extracted from the claim while adventurers were in possession, and before they discovered the fraud which entitled them to rescind.—*Id.*

A complaint by joint adventurers seeking to rescind a contract for purchase on ground that the vendor gave one of them an advantage not shared by the others, *held* to state a cause of action and to be good against demurrer.—*Id.*

JOINT TENANCY.

See Homestead, ⚡3, 84; Statutes, ⚡167; Tenancy in Common.

⚡10 (Cal.App.) Though a joint tenant or tenant in common may maintain an action of forcible entry and detainer against a cotenant who has ejected him, his right to restitution is restricted to his right of reinstatement to the common possession only.—*Noble v. Manatt*, 183 P. 823.

JOURNAL ENTRY.

See Criminal Law, ⚡1184.

JUDGES.

See Appeal and Error, ⚡605, 612, 624; Criminal Law, ⚡1009; Evidence, ⚡348; Justices of the Peace; Mandamus, ⚡44.

IV. DISQUALIFICATION TO ACT.

⚡40 (Okl.) Under Const. art. 2, § 6, courts should scrupulously maintain the right of every litigant to impartial and disinterested tribunals for determination of his rights, and the presiding judges should be unbiased, impartial, and disinterested, and all doubt or suspicion to the contrary must be jealously guarded against, and, if possible, eliminated.—*State v. Fullerton*, 183 P. 979.

⚡49(2) (Okl.) A signed statement by respondent, before he became district judge, criticizing judgment of the then district judge in the trial of the matter to be retried before respondent, and his expressed opinion that court's finding of facts against a party who was to be principal witness for defendants was untrue, disqualified

him to act as judge in such suit.—*State v. Fullerton*, 183 P. 979.

⚡51(4) (Okl.) Where a district judge is disqualified to hear and determine a cause pending before him, he should certify his disqualification.—*State v. Fullerton*, 183 P. 979.

JUDGMENT.

See Certiorari, ⚡37; Constitutional Law, ⚡145; Courts, ⚡202; Evidence, ⚡67, 135, 178, 348; Execution; Justices of the Peace, ⚡128; Limitation of Actions, ⚡130; Lis Pendens, ⚡22; Pleading, ⚡343; Prohibition, ⚡8.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

IV. BY DEFAULT.

(A) Requisites and Validity.

⚡113 (Nev.) Where defendant was in default, the fact that the court made findings and entered judgment without notice is no ground of objection, for after default it would be a useless thing to require service of notice on defendant.—*U. S. Fidelity & Guaranty Co. v. Reno Electrical Works*, 183 P. 386.

(B) Opening or Setting Aside Default.

⚡162(4) (Okl.) Petition under Rev. Laws 1910, § 5267, to vacate a default judgment foreclosing a mortgage, for unavoidable casualty preventing a defense, occasioned by withdrawal of counsel for defendants therein in their absence and without cause or notice, *held* supported by the evidence.—*McLaughlin v. Nettleton*, 183 P. 416.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

⚡300 (Okl.) An application to amend or correct a judgment is addressed to the sound discretion of court wherein it was entered.—*Co-wok-ochee v. Chapman*, 183 P. 610.

An order of county court overruling a motion, filed after the term, to correct entry of a judgment formerly entered therein, *held* not an abuse of county court's discretion.—*Id.*

⚡306 (Okl.) Mere clerical misprisions in entering judgments are subject to amendment, as well after the term as during the term; but to enable court to correct a mistake in a judgment entry, summarily, on motion, it must appear to be a mere clerical misprision, and not an error of court.—*Co-wok-ochee v. Chapman*, 183 P. 610.

⚡324 (Okl.) Court wherein a judgment is rendered, to make its record speak the truth, may correct judgment on any evidence satisfactory to it, and it is for it to decide the kind and amount of evidence requisite to show that amendment should be made, though, where there is no record or quasi record evidence, it should act with great caution.—*Co-wok-ochee v. Chapman*, 183 P. 610.

Evidence in district court *held* not to have sufficient weight and cogency to warrant a reversal of county court's overruling of a motion, filed after term, to correct entry of a judgment formerly entered in that court.—*Id.*

⚡328 (Okl.) Where a motion under Rev. Laws 1910, § 5268, upon reasonable notice to adverse party or his attorney, in proceeding to correct a mistake or omission of clerk or irregularity in obtaining a judgment, is denied, the remedy of party aggrieved is not by renewing it, or asking for a rehearing thereof, but by appeal.—*Co-wok-ochee v. Chapman*, 183 P. 610.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⚡423 (Or.) An erroneous decree of the Supreme Court cannot be set aside, merely be-

cause erroneous, by an original suit, where the court had jurisdiction of the parties and of the cause.—*Ralston v. Bennett*, 183 P. 766.

XI. COLLATERAL ATTACK.

(B) Grounds.

⚡509 (Ok.). The fraud which will vitiate a judgment in an independent proceeding must be extraneous to the issues, and such as would deprive the party of a fair opportunity to present his case.—*Gray v. McKnight*, 183 P. 489.

⚡512 (Ok.). Not every kind of fraud will vitiate a judgment in an independent proceeding, as to investigate character of testimony upon which a judgment was obtained would be to retry the issue submitted in trial at which judgment was obtained so that there would be no end to the litigation.—*Gray v. McKnight*, 183 P. 489.

(C) Proceedings.

⚡518 (Cal.App.). In an action by a reclamation district to foreclose assessment liens already validated by a judgment, an objection that the assessment for levees was greater than that embraced in the plans and estimates, *held* a collateral attack upon the warrants issued in payment of the levies, the validity of which having been settled by the former judgment, could not be so challenged.—*Reclamation Dist. 785 v. Lovdal Bros. Co.*, 183 P. 598.

In an action by a reclamation district to collect an assessment which had previously been judicially declared valid, objection to the legality of the action by the trustees, in purchasing for the district their own lands, constitutes a collateral attack upon the validating judgment, in which all presumptions are in favor of the judgment and proceeding leading thereto, and there being no presumption of unfairness, illegality, or fraud, the legality of such transaction must be *held* *res adjudicata*.—*Id.*

XII. CONSTRUCTION AND OPERATION IN GENERAL.

⚡524 (Cal.). Words in a judgment or decree should not be construed independently, but should be considered in relation to the context in which they are found and in the light of the circumstances under which they were used.—*In re Gould's Estate*, 183 P. 146.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

⚡650 (Cal.App.). Where the time for appeal had not expired the judgment had not become final, and was properly excluded as incompetent.—*Williamson v. Williamson*, 183 P. 301.

(B) Persons Concluded.

⚡674 (Cal.App.). Decision on appeal that authority attempted to be given by statute to superintendent of banks to maintain action to enforce liability of bank's stockholders to creditors was not within the title of the act is the law of the case in second action by him against the same defendants, with the bank, an unnecessary party, added, brought pending appeal in the first case, but after an amendment of statute merely defining more specifically his powers.—*Williams v. Carver*, 183 P. 669.

⚡682(1) (Cal.App.). In ejectment defendants cannot attack, on the ground of fraud, a judgment rendered against their grantor in a prior suit by plaintiff to quiet title.—*Shattuck v. Palmer*, 183 P. 259.

⚡682(1) (Cal.App.). An action by a reclamation district to validate an assessment lien is one in rem, and is binding upon the lands assessed, and therefore concludes all subsequent purchasers.—*Reclamation Dist. 785 v. Lovdal Bros. Co.*, 183 P. 598.

(C) Matters Concluded.

⚡713(3) (Ok.). To make a matter *res adjudicata* there must be identity in the thing sued for, identity of the cause of action, identity of the persons, and identity of the quality in the persons for or against whom the claim is made.—*Hill v. Buckholts*, 183 P. 42.

⚡746 (Cal.App.). Plaintiff, in an action to foreclose a reclamation district assessment lien, does not waive the estoppel created by a judgment validating the assessment lien by introducing evidence in support of the issues raised in that action.—*Reclamation Dist. 785 v. Lovdal Bros. Co.*, 183 P. 598.

XV. LIEN.

⚡800(1) (Cal.App.). When a transcript of judgment has been filed in another county than that of its rendition, under Code Civ. Proc. § 674, the lien thereby placed on all the real property of the judgment debtor in such county of filing is not discharged by the recordation of a copy of the clerk's docket, showing satisfaction of judgment, but is discharged by the satisfaction itself.—*City Properties Co. v. Fitzmaurice*, 183 P. 267.

Where a ward, suing by guardian ad litem, recovered judgment, transcript of which was recorded in another county where the judgment debtor owned realty, and after the ward reached her majority she filed satisfaction of judgment, which was recorded in the county where the property was situated, those dealing with the property were not charged to look further than the fact that the judgment had been satisfied in manner and form meeting all requirements.—*Id.*

Lien upon judgment debtor's property in county other than that of suit having been discharged by satisfaction of judgment, it could not be restored except by the recordation anew of a transcript of judgment as required by Code Civ. Proc. § 674.—*Id.*

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⚡948(2) (Ok.). It is error to dismiss an action to foreclose a mortgage lien on a motion alleging former adjudication; but if, on proper proof, the plea of *res judicata* is sustained, judgment should be for defendants upon the merits.—*Webb v. Vaden*, 183 P. 480.

⚡951(1) (Ok.). The burden of proof rests upon the party who alleges a former adjudication.—*Webb v. Vaden*, 183 P. 480.

JUDICIAL POWER.

See Constitutional Law, ⚡68-70.

JUDICIAL SALES.

See Appeal and Error, ⚡240; Evidence, ⚡135; Execution, ⚡242; Guardian and Ward, ⚡95, 96; Partition, ⚡77; Pledges, ⚡55, 56.

JURY.

See Appeal and Error, ⚡684, 709, 1060; Criminal Law, ⚡1166½, 1186; Trial, ⚡108½.

II. RIGHT TO TRIAL BY JURY.

⚡14(2) (Ok.). An action for judgment on notes and to foreclose a mortgage securing their payment, wherein issue is joined as to the indebtedness due, is properly triable before a jury, being one "for the recovery of money" within Rev. Laws 1910, § 4993.—*Holmes v. Halstid*, 183 P. 969.

⚡14(4) (Ok.). An action to foreclose a mortgage where no personal judgment is sought, in which defendant files an unverified answer, is properly triable to court without a jury, notwithstanding Rev. Laws 1910, § 4993.—*Jacksor v. Levy*, 183 P. 505.

⌚14(6) (Ok.) In action for cancellation of oil and gas lease, where accounting for oil and gas produced during litigation is ancillary to main cause of action, parties brought into action by supplemental bill for purpose of accounting are not entitled to a trial by jury, under Rev. Laws 1910, § 4993.—*Probst v. Bearman*, 183 P. 886.

⌚32(4) (Ok.) In action by railroad employe for personal injury, brought under federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623) nine or more of jury concurring may return a verdict.—*St. Louis & S. F. Ry. Co. v. Frazer*, 183 P. 478.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

⌚118 (Ok.Cr.App.) A challenge to a panel because of a material departure from prescribed forms as to selection, drawing, and return of panel, and because panel was not a fair, impartial panel, to defendant's material prejudice, was properly denied under Rev. Laws 1910, § 5843, because not specifying facts showing how panel was not summoned as prescribed by law.—*Wilson v. State*, 183 P. 613.

⌚133 (Ok.Cr.App.) On an examination of a juror as to his qualifications when challenged for cause by defendant, the court should resolve all doubts, under the evidence, in favor of defendant as to the competency of the juror.—*Middleton v. State*, 183 P. 626.

If upon the examination of a juror as to his qualifications when challenged by defendant for cause, the court resolves all doubt arising on the evidence in defendant's favor, and it appears that juror would not be an impartial juror, as required by Const. art. 2, § 20, the challenge should be sustained.—Id.

JUSTICES OF THE PEACE.

See Animals, ⌚100; Criminal Law, ⌚144.

IV. PROCEDURE IN CIVIL CASES.

⌚69 (Cal.App.) The justice court could not consolidate 648 actions on claims against the defendant railroad company for overcharges on freight shipments, under Const. art. 12, § 21, relating to long and short hauls, which claims had been assigned to plaintiff, and try them together.—*Achison, T. & S. F. Ry. Co. v. Smith*, 183 P. 824.

⌚128(1) (Ok.) A court of equity may order a new trial after judgment by default before a justice of the peace, where it appears that the prevailing party in action at law obtains the judgment before the time when it otherwise should have been rendered by violating a stipulation for a continuance, and that defendant had a good defense.—*N. S. Sherman Machine & Iron Works v. Elzo*, 183 P. 608.

⌚128(3) (Ok.) Evidence in action to enjoin collection of judgment rendered by justice of the peace for defendant held not to show defendant's violation of agreement for a continuance.—*N. S. Sherman Machine & Iron Works v. Elzo*, 183 P. 608.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

⌚144 (Ok.) Laws 1913, c. 135, limiting appeals from justices of the peace in causes of action involving less than \$20, has no application to special proceedings before a justice, instituted in conformity with Rev. Laws 1910, §§ 153, 154, relating to restraining of stock for trespassing.—*Hejduk v. Snyder*, 183 P. 923.

KNOWLEDGE.

See Escape, ⌚5.

LABOR DISPUTES.

See Insurrection, ⌚2.

LACHES.

See Equity, ⌚87.

LANDLORD AND TENANT.

See Action, ⌚48; Contracts, ⌚310; Deeds, ⌚149; Joint Adventures, ⌚5; Lis Pendens, ⌚24; Mandamus, ⌚14; Master and Servant, ⌚316, 318, 322; Principal and Surety, ⌚88, 99, 105; Public Lands, ⌚187½; Sales, ⌚456; Trial, ⌚397.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

⌚33 (Cal.App.) Checks given by tenants for a reduced amount of rent, and receipts given therefor by the landlord in full payment, were not evidence of any contract on the landlord's part to reduce the rent; the landlord's agreement, therefore, to receive a reduced rent for a limited time, was not in writing, and, being without consideration, was ineffectual to modify the lease.—*Dodge v. Chapman*, 183 P. 966.

(B) Construction and Operation.

⌚48(2) (Cal.App.) In action by hotel lessee against lessor for breach of covenant because of inadequate heating facilities, etc., evidence that some patrons had left the hotel, but not showing what portion of lessee's losses were due to the causes of which he complains, held to sustain an award of only nominal damages.—*Weichers v. Dehail*, 183 P. 187.

⌚49(1) (Cal.App.) A lease provision, authorizing lessor to employ men to properly care for the premises, etc., is for lessor's benefit, and does not prevent a damage recovery against lessee for failure to maintain premises, nor does the lessor's employment of men constitute an election of remedies precluding recovery of damages from lessee.—*Doi v. McMurry*, 183 P. 211.

III. LANDLORD'S TITLE AND REVERSION.

(A) Rights and Powers of Landlord.

⌚51 (Wash.) If a building, fitted for business or office uses and rented in sections to tenants, is open, and there is nothing to indicate that strangers are not wanted, any person may enter without becoming a trespasser, but such person is only a licensee, unless he enters on some business in which a tenant has an interest.—*Konick v. Champneys*, 183 P. 75.

When the owner of a building fits it up for business or office uses and leases rooms therein to tenants, retaining control over the entranceways, he impliedly invites all persons to enter the building whose entry is naturally incident to the business carried on by the tenant, provided the invitee enters at a reasonable hour and conducts himself in orderly manner, but the invitation does not extend to a peddler or solicitor or a person seeking a purchaser for something he has to sell; such persons being mere licensees, whose right of entry is subject to be revoked by the owner at any time.—Id.

The owner of an apartment building when he leases the rooms therein confers rights in the tenants in the common entranceways, subject to reasonable regulations, including the right to carry through such entranceways the commodities necessary for their sustenance.—Id.

One who rents rooms in an apartment house can, in the absence of a special covenant to the contrary, confer his right to use the common passageways to another, and he does so when he orders goods from a grocer with the understanding that they are to be delivered, and the grocer may enjoin the owner of the building from interfering with his right to make such deliveries.—Id.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(E) Injuries from Dangerous or Defective Condition.

⚡167(1) (Wash.) One whom the owner of a building impliedly invites to enter and do business with his tenants has privileges in the premises, and can recover for personal injuries caused by the owner's negligence, and can enjoin the latter from interfering with his right of entry.—*Konick v. Champneys*, 183 P. 75.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

⚡29(14) (Wash.) Landlord is entitled to double damages in unlawful detainer action, under Rem. Code 1915, § 827, although verdict of the jury for landlord is not founded on nonpayment of rent.—*Swanson v. Stubbs*, 183 P. 91.

LARCENY.

See Criminal Law, ⚡112, 423, 465, 519, 596, 823, 829, 989, 1159; Explosives, ⚡7; Indictment and Information, ⚡125, 132; Injunction, ⚡34.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡3(2) (Cal.App.) In embezzlement, there is no intent at the time of taking to steal or wrongfully appropriate the property, but accused, having rightfully come into possession thereafter, forms the intent fraudulently to convert the property to his own use, while in larceny the person taking it has at the time an intent to steal or feloniously appropriate.—*People v. Mills Sing*, 183 P. 865.

⚡5 (Wash.) Outlawed whisky may be the subject of grand larceny, where taken from one claiming ownership, although the law would not afford any one damages for its taking or give any one relief looking to its recovery.—*State v. Donovan*, 183 P. 127.

⚡7 (Cal.App.) Pen. Code, § 484, defining "larceny" as stealing the personal property of another, applies to stealing such property from any ownership, as that of a county, though a county is not strictly a corporation, which by provision of section 7 is included in the word "person".—*People v. Diamondstein*, 183 P. 679.

⚡8 (Cal.App.) Where title to potatoes remained in the persons who grew them, the potatoes were subject to larceny by defendant, though he had obtained their possession by representing himself as a buyer for cash, and so obtained delivery conditional on payment.—*People v. Mills Sing*, 183 P. 865.

⚡14(1) (Cal.App.) Where defendant represented to the owner of potatoes that he was a buyer for cash, and so obtained possession of the potatoes, conditional on immediate payment, and stole them, he was not guilty of obtaining goods under false pretenses, rather than larceny, in which the owner has no intent to part with his title, though he may intend to part with possession, while in false pretenses the owner does intend to part with title.—*People v. Mills Sing*, 183 P. 865.

⚡18 (Wash.) A police officer who has taken whisky into his custody is guilty of larceny, if he "shall secrete, withhold, or appropriate the same to his own use" before it is lawfully ordered to be destroyed.—*State v. Donovan*, 183 P. 127.

⚡27 (Okla.Cr.App.) A person who aids another, at his request, to gather up and drive cattle which are stolen, in the absence of evidence that such person so acted with guilty knowledge of the larceny, is not an "accomplice" in the larceny of such cattle.—*Cole v. State*, 183 P. 734.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

⚡28(1) (Wash.) An information for grand larceny, charging that defendant by trick and device, appearing as a police officer, took the property, consisting of whisky, *held* not to show upon its face that the liquor was taken into the custody of the law.—*State v. Donovan*, 183 P. 127.

⚡28(3) (Cal.App.) An information for larceny may charge its commission in the county into which the goods were taken.—*People v. Mills Sing*, 183 P. 865.

⚡32(1) (Cal.App.) Alleging in information for larceny ownership in the county, even if it should be laid in the taxpayers, is within Pen. Code, § 956, providing that when an offense involves commission of private injury, and is otherwise described with sufficient certainty to identify the act, an erroneous allegation as to person injured is immaterial.—*People v. Diamondstein*, 183 P. 679.

⚡32(1) (Cal.App.) In larceny, the name of the owner of the stolen property is not a material part of the offense charged, being required only to identify the transaction, so that defendant by proper plea may protect himself against another prosecution, as he could do on a charge of feloniously stealing sacks of sweet potatoes, the property of three named Japanese.—*People v. Mills Sing*, 183 P. 865.

⚡40(5) (Cal.App.) An information for larceny may charge its commission in the county into which the goods were taken, and the first larceny in another county, though not alleged in the information, may be given in evidence.—*People v. Mills Sing*, 183 P. 865.

(B) Evidence.

⚡55 (Okla.Cr.App.) Evidence *held* sufficient to sustain a conviction for grand larceny based on the theft of harness.—*Davis v. State*, 183 P. 431.

⚡55 (Wyo.) In a larceny prosecution, where the only evidence upon which the jury could rightfully find the defendant guilty was testimony of a witness who had himself pleaded guilty to the larceny of a horse, considering witness' character, the improbability of his story, and his being directly contradicted by several witnesses on material matters, following the rule that judgment will not be reversed if supported by substantial credible evidence, *held* that evidence was neither substantial nor credible, was insufficient to sustain a conviction, and warranted reversal.—*Jones v. State*, 183 P. 745.

⚡60 (Cal.App.) Evidence in larceny *held* sufficient to show that ownership of the electric motor stolen was in a certain county, as alleged in information.—*People v. Diamondstein*, 183 P. 679.

⚡60 (Cal.App.) In a prosecution for larceny of potatoes, possession of which was obtained by defendant on the pretense of buying for cash, evidence *held* to warrant the jury in inferring that the seller did not intend to waive payment as a condition to the passing of title to the potatoes.—*People v. Mills Sing*, 183 P. 865.

⚡64(7) (Cal.App.) Evidence of defendant's presence in the neighborhood the night of the theft, his possession of the property the day after, employment of his truck in moving it, his active participation in selling it, and his interest in the proceeds, *held* sufficient to connect him as a participant in the theft.—*People v. Diamondstein*, 183 P. 679.

⚡65 (Okla.Cr.App.) Evidence *held* sufficient to sustain a conviction for grand larceny.—*Ashburn v. State*, 183 P. 521.

(C) Trial and Review.

⚡79 (Cal.App.) Defendant convicted of grand larceny was not harmed by failure of instructions to give Code definition of it, the portion

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of the section showing the difference between it and petit larceny being given, and there being no dispute but that the property was stolen or but that its value was such as to make the crime grand larceny.—*People v. Diamondstein*, 183 P. 679.

LAUNDRIES.

See Municipal Corporations, ¶600.

LEASE.

See Landlord and Tenant.

LEGISLATIVE POWER.

See Constitutional Law, ¶63.

LEVEES.

¶9 (Wash.) Diking district, when lawfully created, under Rem. Code 1915, §§ 4091 to 4136—5, becomes a legal entity as a public corporation, and its board of commissioners possess the usual discretionary powers of managing boards of public corporations as far as its powers and duties under sections 4091, 4097, 4102, 4103, 4104, and 4122 are concerned.—*Columbia River Timber & Logging Co. v. Commissioners of Diking Dist. No. 2 of Wahkiakum County*, 183 P. 134.

Commissioners of diking district, constructing improvements at cost of \$168,000, held not to have abused discretion in payment of \$3,000 to attorney for district for rendering all necessary legal services incident to construction of improvement, acquiring of rights of way, and assessment of benefits and damages by eminent domain and assessment proceedings in court.—Id.

¶11 (Wash.) In action to have acts of commissioners of diking district declared void upon ground of fraud between commissioners and their attorney, and unreasonableness, expense, and impracticability of the plans and specifications adopted by the commissioners, evidence held insufficient to show fraud or arbitrary or capricious action on part of commissioners in employment of attorney or engineers or in adoption of plans and specifications.—*Columbia River Timber & Logging Co. v. Commissioners of Diking Dist. No. 2 of Wahkiakum County*, 183 P. 134.

LEWDNESS.

See Constitutional Law, ¶250, 258; Criminal Law, ¶13, 1213; Infants, ¶12, 20; Statutes, ¶86, 118.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

¶9(9) (Cal.) A statement of a publishing company in its newspaper that policy holders who had taken out policies through a firm of insurance brokers had been somewhat mystified by the receipt of cancellation notices for policies on the occasion of the disappearance of the broker's agent, when he was short in his accounts, held not libelous per se as to the brokers.—*Mahana v. Echo Pub. Co.*, 183 P. 800.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

¶86(4) (Cal.) Unless an article published by defendant in its newspaper was of such a nature that, in view of extrinsic facts alleged and proved, it conveyed to readers charges of dishonesty and financial irresponsibility on the part of plaintiffs, the innuendo would not give it such sinister significance.—*Mahana v. Echo Pub. Co.*, 183 P. 800.

(D) Damages.

¶121(1) (Cal.) Verdict for \$1,500, recovered by insurance agents for libel against a publish-

ing company, though reduced by the trial court to \$1,000, held grossly excessive; any injury to the agents' business having resulted more from the dishonesty of their local representative than from the libelous statement.—*Mahana v. Echo Pub. Co.*, 183 P. 800.

LICENSES.

See Animals, ¶81; Assault and Battery, ¶24; Constitutional Law, ¶88; Habeas Corpus, ¶92; Intoxicating Liquors, ¶69, 96, 106; Landlord and Tenant, ¶51; Municipal Corporations, ¶597; Negligence, ¶32; Physicians and Surgeons, ¶2; Statutes, ¶220.

I. FOR OCCUPATIONS AND PRIVILEGES.

¶5 (Nev.) The imposition of a license tax upon an occupation is not illegal, because not expressly authorized by the state Constitution, but is permissible, unless prohibited thereby.—*Ex parte Dixon*, 183 P. 642.

¶7(1) (Or.) Any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession, without regard to the qualification of the applicant, is void.—*City of Portland v. Traynor*, 183 P. 933.

¶7(2) (Nev.) A city ordinance, imposing a tax upon the occupation of attorney at law, held not in violation of Const. art. 10, § 1, providing for an equal and uniform rate of taxation.—*Ex parte Dixon*, 183 P. 642.

¶11(1) (Nev.) An admission to the bar of a state is a vested and valuable right, but subject to taxation, including a city occupation tax.—*Ex parte Dixon*, 183 P. 642.

¶42(2) (Or.) The contention that the medical examiners of the city are careless and negligent in the discharge of their duties goes only to the administration and not to the validity of an ordinance requiring, as a condition to issuance of a license, medical examination of persons owning or working in food and soft-drink establishments, and is not a defense to a charge of having violated the ordinance by operating such an establishment without a license.—*City of Portland v. Traynor*, 183 P. 933.

LIENS.

See Divorce, ¶267; Drains, ¶90; Judgment, ¶518, 748, 800; Municipal Corporations, ¶530; Pleading, ¶406; Taxation, ¶453.

LIFE ESTATES.

¶15(2) (Cal.) The determination of the directors of a corporation as to the source of its dividends has no binding or persuasive effect upon the court when it is required to decide whether a stock dividend constitutes income which goes to the tenant for life or for years or is principal to be held for the benefit of the remaindermen.—*In re Duffill's Estate*, 183 P. 337.

If the funds out of which a dividend is paid accrued before the life estate arose, it is principal belonging to the corpus of the estate, but if the fund was earned after the life estate arose it is income belonging to the life tenant.—Id.

LIMITATION OF ACTIONS.

See Adverse Possession; Bastards, ¶37; Death, ¶38; Equity, ¶87; *Lis Pendens*, ¶26.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

¶31 (Cal.App.) An action against a physician and surgeon for injuries resulting from want of knowledge and unskillfulness is within Code Civ. Proc. § 340, subd. 3, requiring the

action to be begun within a year.—Kelsey v. Tracy, 183 P. 688.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

⚡47(2) (Okla.) Where grantee remains in undisturbed possession of land conveyed by a general warranty deed, which is afterwards canceled by a final judgment of a court of competent jurisdiction, the statute of limitations does not begin to run in favor of grantor on warranty of title until after date of such judgment.—Rennie v. Gibson, 183 P. 483.

Eviction, either actual or constructive, is necessary to set in motion the statute of limitations as to general covenants or warranty of title.—Id.

⚡51(2) (Cal.App.) Where installments were due under written contract, and creditor charged amounts accruing under contract and credited payments in memorandum period of limitations ran from date installment was due under contract, and not from date of last entry in memorandum; the action being based upon the contract and not upon the memorandum account.—People v. Magee, 183 P. 289.

⚡53(1) (Cal.App.) The limitation of four years upon a cause of action on book account under Code Civ. Proc. §§ 337, 344, applies from the date of the last item charged.—Wright v. Allen, 183 P. 261.

(B) Performance of Condition, Demand, and Notice.

⚡65(1) (Cal.App.) Where plaintiff's right of action depends upon some act to be performed by him preliminarily to commencing suit, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act.—People v. Magee, 183 P. 289.

⚡65(2) (Okla.) Where oil and gas is purchased pending a suit to cancel the lease under which it is produced, by persons having knowledge thereof and of purpose of adverse party to insist upon his rights, the statute of limitations does not begin to run against the right to compel such purchasers to account for oil and gas until final determination of suit to cancel the lease.—Probst v. Bearman, 183 P. 886.

⚡69 (Cal.App.) Action to recover installments due under written contract was barred for failure to bring action within four years after installments became due, under Code Civ. Proc. § 337, subd. 1, though defendant was in hands of a receiver, and permission from court to bring action was obtained within the four-year period.—People v. Magee, 183 P. 289.

(G) Pendency of Legal Proceedings, Injunction, Stay, or War.

⚡110 (Cal.App.) The appointment of a receiver does not affect the running of the statute of limitations.—People v. Magee, 183 P. 289.

(H) Commencement of Action or Other Proceeding.

⚡130(12) (Cal.App.) Where an award of compensation to a widow under the Workmen's Compensation Act for death of her husband was annulled by the Supreme Court on a writ of certiorari, such annulment was not the "reversal of judgment on appeal" within the provisions of Code Civ. Proc. § 355, providing that where judgment is reversed on appeal, plaintiff may commence a new action within one year.—Anderson v. National Ice & Cold Storage Co., 183 P. 273.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

⚡155(3) (Okla.) Payment of interest and partial payments by principal debtor on a note stipulating that if not paid at maturity, makers and indorsers agree to extensions and partial

payments before or after maturity without prejudice to holder, tolls the statute of limitations as to an indorser on a note executed and due before passage of Negotiable Instruments Law.—Schreiner v. City Nat. Bank of McAlester, 183 P. 905.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡177(3) (Cal.) A complaint based upon a fraud, outlawed by statute of limitations except for fact that plaintiff had only recently discovered it must plead facts excusing failure to make an earlier discovery.—Nichols v. Moore, 183 P. 531.

⚡179(2) (Cal.) A complaint based upon defendant's misrepresentations that land conveyed to plaintiff 12 years previously was timbered, and showing that plaintiff knew there was timber in the vicinity, but had not learned that this particular tract was burned over land until recently, etc., held to state facts excusing failure to earlier discover fraud sufficiently to avoid statute of limitations.—Nichols v. Moore, 183 P. 531.

⚡179(2) (Cal.App.) Under Code Civ. Proc. § 838, enumerating the kind of actions which must be commenced within three years, subdivision 4, specifying an action for relief on the ground of fraud or mistake, the cause of action not accruing until discovery of the facts, where a complaint for partition was silent as to when the fraud or mistake on account of which it was sought to reform the contract between the parties was discovered, since it failed to show such discovery within three years prior to the bringing of the action, it was obnoxious to demurrer.—Vollmer v. Wheeler, 183 P. 264.

⚡183(1) (Cal.App.) In an executrix's action on open book account to recover for legal services rendered by her decedent, answer held to have presented an issue of the statute of limitations on the cause of action first set forth in the amended complaint, properly presenting an issue covering the date on which the original complaint was filed.—Wright v. Allen, 183 P. 261.

⚡197(1) (Cal.App.) In an executrix's action on open book account to recover for legal services rendered by her decedent, evidence held to justify the trial court's finding that the last charge against defendants was entered in the books of plaintiff's decedent not later than March 27, 1911, so that the cause of action was barred by the limitation of four years, under Code Civ. Proc. §§ 337, 344.—Wright v. Allen, 183 P. 261.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

See Drains, ⚡90; Lis Pendens, ⚡26.

⚡22(2) (Cal.App.) Filing of notice of the pendency of a new action to set aside satisfaction by award of judgment obtained by her in suit by guardian ad litem as fraudulent to the creditors of the ward was not sufficient to put on notice persons dealing with the land of the judgment debtor situated in a county other than that of suit, but where transcript of judgment had been filed pursuant to Code Civ. Proc. § 674, the title having previously been legally transferred by the judgment debtor, defendant in the original action.—City Properties Co. v. Fitzmaurice, 183 P. 267.

⚡24(1) (Okla.) One purchasing an oil and gas lease from a party to a pending action involving the title thereto acquires no greater rights in the lease than his assignor had at the time of the assignment.—Turben v. Douglass, 183 P. 881.

⚡26(2) (Okla.) Where oil and gas is purchased pending a suit to cancel the lease under which it is produced, by persons having knowledge

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thereof and of purpose of adverse party to insist upon his rights, the statute of limitations does not begin to run against the right to compel such purchasers to account for oil and gas until it would begin to run against their vendor, which would be upon final determination of suit to cancel the lease.—*Probst v. Bearman*, 183 P. 886.

⚡26(3) (Okla.) The cost of improvements and operations incurred by holder of an oil and gas lease, purchased pendente lite and with actual notice of adverse claims and of purpose of adverse claimant to insist upon his rights, will not be deducted when requiring a holder to account to successful adverse party for oil and gas produced and sold from premises, in view of Rev. Laws 1910, § 2875.—*Probst v. Bearman*, 183 P. 886.

LIVERY STABLE AND GARAGE KEEPERS.

See Municipal Corporations, ⚡625.

LOGS AND LOGGING.

See Public Lands, ⚡38.

LOST INSTRUMENTS.

See Evidence, ⚡178; Records, ⚡17.

LOT.

See Boundaries, ⚡33.

LUNATICS.

See Insane Persons.

MALICIOUS PROSECUTION.

See False Imprisonment, ⚡8.

II. WANT OF PROBABLE CAUSE.

⚡16 (Cal.App.) There can be no recovery as for malicious prosecution in the absence of evidence to show the prosecution by defendant was malicious, and without probable cause.—*Squires v. Southern Pac. Co.*, 183 P. 696.

⚡16 (Utah) In an action for malicious prosecution, it is necessary to allege and prove that the proceeding complained of as ground for the action was without probable cause, was malicious, and was finally terminated in favor of complainant.—*Kennedy v. Burbidge*, 183 P. 325.

⚡18(5) (Utah) The mere fact that information upon which a prosecutor acted in having a person arrested was false does not show that he acted without probable cause, but where it is shown that prosecutor either knew that information was false, or had no personal knowledge of the truth, or made no investigation as to its accuracy before instituting a prosecution, there was want of probable cause.—*Kennedy v. Burbidge*, 183 P. 325.

⚡24(4) (Utah) A judgment of conviction is not evidence of probable cause in an action for malicious prosecution, where based upon testimony which was untrue, regardless of whether or not such testimony was given unlawfully and corruptly.—*Kennedy v. Burbidge*, 183 P. 325.

⚡24(5) (Utah) A judgment of conviction followed by a reversal, when offered as evidence in a case for malicious prosecution, is at least prima facie evidence of probable cause.—*Kennedy v. Burbidge*, 183 P. 325.

A judgment of conviction, followed by a reversal, is not evidence of probable cause, where procured by fraud, perjury, or other undue or unfair means employed by the defendant.—*Id.*

V. ACTIONS.

⚡49 (Utah) Complaint, in action for malicious prosecution, showing that plaintiff was

convicted in proceeding complained of, and that prosecution was dismissed on appeal, fails to state a cause of action, unless it goes farther and alleges some fact or facts, the legal effect of which is to impeach the validity of the judgment and render it worthless as evidence of probable cause.—*Kennedy v. Burbidge*, 183 P. 325.

A complaint in an action for malicious prosecution held sufficient to show that judgment of conviction, which was reversed, was founded upon testimony which was false and untrue.—*Id.*

MANDAMUS.

See Municipal Corporations, ⚡511.

I. NATURE AND GROUNDS IN GENERAL.

⚡1 (Okla.) Power of Supreme Court to grant mandamus and to hear and determine the same, as authorized by Const. art. 7, § 2, will be exercised only when questions involved are public juris, or when some unusual situation exists, so that a refusal to entertain jurisdiction would work great wrong or a practical denial of justice.—*State v. Ross*, 183 P. 918.

⚡4(5) (Okla.) Where mandamus by state, on relation of Attorney General, against county superintendent of public instruction, is brought in district court, which erroneously refuses to entertain jurisdiction to compel performance of superintendent's ministerial duty under Laws 1913, c. 219, art. 7, § 2, and any appeal to Supreme Court would greatly delay opening of public schools, that court, in view of Const. art. 13, § 1, and under chapter 219, art. 7, § 2, will exercise its original jurisdiction by mandamus to prevent a denial of justice.—*State v. Ross*, 183 P. 918.

⚡4(5) (Wash.) Mandamus will lie to compel county commissioners and county auditor to draw a warrant for legal services rendered county pursuant to contract, since Rem. Code 1915, § 3909, authorizing appeals from rejection of claims by county commissioners, specifically provides that such remedy shall not prevent enforcing claims by direct action.—*State v. Urquhart*, 183 P. 121.

⚡14(1) (Wash.) Where the auditor of a county, subject to the approval of the commissioner of public lands, accepted the highest bids for leases of school indemnity grazing lands granted to the state by an enabling act of Congress, providing that they might be leased in quantities not exceeding one section to any one person or company, the Supreme Court, on applications of the next highest bidders for writs of mandate, cannot compel the land commissioner to issue to such bidders a lease of the lands on the allegation that the successful bidders were under agreement to hold title for the benefit of parties who had previously obtained the beneficial interest in leases of more than one section, the unsuccessful bidders, though making formal protest, not having demanded a hearing on the question which might have been afforded under Rem. Code, §§ 6611, 6612, 6616, 6688.—*State v. Savidge*, 183 P. 111.

⚡14(1) (Wash.) Mandamus will not issue to compel a county treasurer to pay a warrant where no such warrant has been presented to him for payment, and there is no allegation that finances of county are sufficient to make payment possible.—*State v. Urquhart*, 183 P. 121.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

⚡44 (Okla.) Where a district judge is disqualified to hear and determine a cause pending before him, and refuses to certify his disqualification when requested in the manner provided by law, mandamus will lie.—*State v. Fullerton*, 183 P. 979.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§79 (Okl.) Where petition in proceeding for dissolution of consolidated school district under Laws 1915, c. 202, purporting to contain signatures of one-half or more of legal voters, is accepted as sufficient by county superintendent, who calls an election resulting in a vote for dissolution, the superintendent, in a mandamus action to compel performance of his duty under section 2, cannot attack sufficiency of petition or qualification of voters at election, where proceedings were a prima facie compliance with statutes.—*Rasure v. Sparks*, 183 P. 495.

Laws 1915, c. 202, § 2, imposing duties on county superintendent as to declaring a consolidated school district dissolved and the filling of vacancies in "devised school district," leaves no discretion to superintendent, but imposes purely ministerial duties, the performance of which may be compelled by mandamus.—*Id.*

§79 (Okl.) The duties imposed upon county superintendent by Laws 1913, c. 219, art. 7, § 2, as to declaring school districts disorganized, and a consolidated district composed thereof organized, involve exercise of no discretion on his part, but are purely ministerial, and their performance may be enforced by mandamus brought in Supreme Court in proper cases.—*State v. Ross*, 183 P. 918.

§102(1) (Cal.App.) In view of Pol. Code, § 1543, as amended by Amendments to the Codes 1880, p. 31, St. 1906, p. 528, St. 1915, p. 746, and section 1700, a county auditor's duty, in relation to the allowance of an order for payment from the school fund of a district signed by two trustees is discretionary and not merely ministerial so that mandamus will not lie to compel him to draw warrant for payment unless an abuse of discretion is shown the term "allow," as used in section 1543, as applied to a demand implying the right to examine the claim and in proper case to disallow.—*Cook v. Reid*, 183 P. 820.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§154(2) (Okl.) Petition in original mandamus to Supreme Court by state, on relation of Attorney General, to compel performance of duties of county superintendent under Laws 1913, c. 219, art. 7, § 2, as to declaring consolidated district organized, alleging that report of secretary of meeting duly signed by him, was presented to superintendent, in view of admissions by answer, stated a cause of action entitling relator to a peremptory writ.—*State v. Ross*, 183 P. 918.

§164(3) (Okl.) In mandamus against county superintendent to compel performance of duties imposed by Laws 1913, c. 219, art. 7, § 2, an answer that he was not in a position to admit or deny material allegations, and therefore asking that plaintiff be required to make proof thereof, does not traverse or deny facts alleged in petition, and in effect is an admission thereof, in view of Rev. Laws 1910, § 4745.—*State v. Ross*, 183 P. 918.

In view of Rev. Laws 1910, § 4745, allegations of a petition in mandamus are admitted by the failure to properly put them in issue, and an answer to a paragraph of the petition, which is in form a negative pregnant, admits the averments of that paragraph.—*Id.*

§168(2) (Cal.App.) Where the official duty involved was discretionary, the burden is on petitioner for mandamus against the officer to prove that his refusal to act was unjustifiable.—*Cook v. Reid*, 183 P. 820.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

See Criminal Law, §727; Divorce; Husband and Wife; Pleading, §148; Wills, §656.

MASTER AND SERVANT.

See Admiralty, §20; Animals, §82; Appeal and Error, §837, 930, 1005, 1050, 1170; Constitutional Law, §245, 301; Damages, §132, 143, 187; Evidence, §424, 471; Injunction, §57, 63, 118; Insurance, §508½, 539, 542, 646, 665, 670; Insurrection, §2; Jury, §32; Landlord and Tenant, §49; Limitation of Actions, §130; New Trial, §108; Statutes, §117, 226, 251.

I. THE RELATION.**(B) Statutory Regulation.**

§11 (Ariz.) Employers' Liability Law is constitutional.—*United Verde Copper Co. v. Wiley*, 183 P. 737; *Swansea Lease, Inc. v. Molloy*, *Id.* 740.

§16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.**(A) Nature and Extent in General.**

§87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

§88(8) (Ariz.) A contract by which plaintiff's intestate and others agreed to sink a shaft for defendant according to specifications and at a price per foot, they to have full control over the manner and method of doing the work, reserving to defendant a right to inspect and direct changes of work not done according to agreement, nor in workmanlike manner, requiring continued maintenance of three shifts and providing against employment of persons objectionable to defendant held to make intestate an "independent contractor," and not a servant, within Employer's Liability Law.—*Swansea Lease, Inc. v. Molloy*, 183 P. 740.

Plaintiff's intestate, who with others contracted to sink a shaft for defendant at a price per foot, held to be an independent contractor, and not a servant, within Employers' Liability Law, notwithstanding defendant's deduction of hospital fees and the violent act of its superintendent in running away two of intestate's employes, not done under lawful power to discharge, its insuring against injuring intestate, it having agreed to do the hoisting, and its payment for the work at time of paying employes and ordering waste dumped in another place, but not directing manner of work in extending a trestle, in doing which intestate was killed.—*Id.*

(B) Tools, Machinery, Appliances, and Places for Work.

§101, 102(1) (Wash.) It is master's duty to furnish servants with reasonably safe appliances.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

§106(1) (Wash.) Stevedoring company load in a vessel under contract with owner is liable for injury to a stevedore from a defective winch, though winch was in place and part of vessel's equipment at time contract was entered into, the winch being, nevertheless, an appliance furnished by the company to its employes with which to work, and company in furnishing winch to employes having duty of seeing that it was in good condition.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

(E) Fellow Servants.

⇒170 (Okla.) A master must exercise reasonable care in the selection and retention of servants.—*Kanotex Refining Co. v. Bonifield*, 183 P. 971.

⇒177 (Okla.) Master must exercise reasonable care in the selection and retention of servants, and when he has done so he is not liable for injury to another servant from negligence of fellow servants.—*Kanotex Refining Co. v. Bonifield*, 183 P. 971.

(F) Risks Assumed by Servant.

⇒204(1) (Cal.App.) Relative to defense that injury to servant was caused solely by his negligence, the effect of Employers' Liability Act on the defenses of assumption of risk and contributory negligence is immaterial.—*Lemmermann v. Pope & Talbot*, 183 P. 467.

⇒204(2) (Okla.) Though a coal miner impliedly waives compliance with Rev. Laws 1910, §§ 3983, 3984, requiring mine operator to furnish sufficient props, and agrees to assume the risk by continuing in service, a court will not recognize or enforce such agreement, as to do so would nullify the statutes and be against public policy.—*Whitehead Coal Mining Co. v. Schneider*, 183 P. 49.

⇒204(2) (Okla.) The defense of assumed risk is not an available plea to a charge of a violation of a master's statutory duty, though a valid defense to the violation of a common-law duty.—*Okmulgee Window Glass Co. v. Bright*, 183 P. 898.

⇒216(6) (Cal.App.) A foreman does not assume the risk of another employé doing a thing negligently and contrary to instructions.—*Ward v. Southern Pac. Co.*, 183 P. 594.

⇒217(2) (Cal.) A servant is deemed to have assumed the risk when he knows, not only the defects in instrumentalities used by him, but the dangers and risks arising therefrom.—*Thompson v. Southern Pac. Co.*, 183 P. 153.

(G) Contributory Negligence of Servant.

⇒228(1) (Cal.App.) Relative to defense that injury to servant was caused solely by his negligence, the effect of Employers' Liability Act on the defenses of assumption of risk and contributory negligence is immaterial.—*Lemmermann v. Pope & Talbot*, 183 P. 467.

⇒228(2) (Okla.) In action for damages for injuries from the violation of a statutory duty imposed upon a master, the servant's contributory negligence may be urged as a defense, unless excluded by the statute.—*Okmulgee Window Glass Co. v. Bright*, 183 P. 898.

⇒245(5) (Cal.App.) Order of master to experienced employé to get down from lumber pile to wagon by means of a plank extending between the two, with one end held by the master, did not excuse employé from negligence in so doing, there being no evidence that it amounted to coercion or duress, the danger of the course being as apparent to the employé as to the master, and there being no question but that he could have adopted other and safer methods of going between the two objects.—*Lemmermann v. Pope & Talbot*, 183 P. 467.

(H) Actions.

⇒250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of number sections 346-420, at the end of this topic, where the matter in this and future index-digests will be found.

⇒258(8) (Okla.) Petition in servant's action for injury while constructing floor in plant when the weight of timbers negligently placed thereon caused it to fall was sufficient to bring the case within Rev. Laws 1910, § 3772, imposing certain duties upon master.—*Okmulgee Window Glass Co. v. Bright*, 183 P. 898.

⇒258(17) (Wash.) It is sufficient to allege the master's duty to furnish safe appliances

and breach thereof, without specifically alleging that he knew or by reasonable diligence would have known that he had breached such duty.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

⇒258(20) (Okla.) Petition for injury from negligence of a fellow servant, must aver that he was incompetent, that master negligently employed or retained him with actual or constructive knowledge of his incompetency, that plaintiff was ignorant thereof, and that injury resulted from his negligence.—*Kanotex Refining Co. v. Bonifield*, 183 P. 971.

⇒262(4) (Okla.) In servant's action for injury, an answer, alleging that if he was injured as alleged the injury was due to his contributory negligence sufficiently presented such defense.—*Okmulgee Window Glass Co. v. Bright*, 183 P. 898.

⇒264(10) (Wash.) Where a complaint pleaded a cause of action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and proof showed that plaintiff was not engaged in interstate commerce, but established a case under Laws 1917, p. 96, § 19, making the provisions of the federal act applicable to certain accidents in intrastate commerce, there was no variance or failure of proof requiring dismissal of the complaint.—*Archibald v. Northern Pac. R. Co.*, 183 P. 95.

⇒264(12) (Wash.) In action for injuries to stevedore from defective winch, variance between complaint, alleging that winch was difficult to control by reason of insufficient play in the eccentrics, and proof that the throttle valves caused the difficulty held immaterial under Rem. Code 1915, §§ 299, 301, as employer was not misled.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

⇒265(1) (Ariz.) In action under Employers' Liability Law, defendant cannot be held liable unless the injured person was an employé, and the burden rests upon the plaintiff to prove that relationship.—*Swansea Lease, Inc. v. Molloy*, 183 P. 740.

⇒265(12) (Okla.) Servant, suing for injury from negligence of fellow servant, has the burden of proving his incompetency, master's negligence in employing or retaining him, and injury resulting from such incompetency.—*Kanotex Refining Co. v. Bonifield*, 183 P. 971.

⇒265(14) (Cal.App.) The burden of proof as to contributory negligence is on the master, sued for death of servant.—*Ward v. Southern Pac. Co.*, 183 P. 594.

Relative to contributory negligence of foreman, killed by falling timber in the taking down of railroad snowsheds, the presumption is that he had a justifiable reason for changing his position, as the timber descended in an irregular manner.—*Id.*

⇒265(15) (Cal.App.) It must be presumed that an employé engaged in like occupations for four years had equal knowledge with the master's representative of the danger of going from a lumber pile to a wagon, as ordered by the representative, by a plank extending between the two, held by the representative merely by a lumber hook.—*Lemmermann v. Pope & Talbot*, 183 P. 467.

⇒278(9) (Cal.App.) Evidence in servant's action for injury held insufficient to warrant a finding of negligence of the master in losing hold of plank, while servant was descending on it from lumber pile to wagon.—*Lemmermann v. Pope & Talbot*, 183 P. 467.

⇒278(14) (Wash.) In stevedore's action for injuries sustained by reason of defective winches, evidence showing structural defects in winches, discoverable by putting the winches into actual service, if not by actual inspection, held sufficient to warrant jury in concluding that employer by exercise of reasonable care could have known of defects.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

⇒279(4) (Cal.App.) Evidence in action for death of foreman, killed in the taking down of

a railroad snowshed, *held* to show negligence of another employé in prying off one end of a timber while the other end was attached to the structure, directly contributing to the accident.—Ward v. Southern Pac. Co., 183 P. 594.

—281(1) (Cal.App.) Evidence in action for death of foreman from the falling of timber in taking down a railroad snowshed *held* to sustain verdict against defense of contributory negligence, based on deceased's change of position as timber descended.—Ward v. Southern Pac. Co., 183 P. 594.

—284(1) (Okla.) In cause arising under federal Employers' Liability Act and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623), where there is testimony raising an issue of fact as to whether defendant railroad and plaintiff were engaged in interstate commerce at time of accident, the question is for the jury.—St. Louis & S. F. Ry. Co. v. Fraser, 183 P. 478.

Testimony in cause arising under federal Employers' Liability Act and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623), as to whether plaintiff and defendant at time of accident were engaged in interstate commerce *held* to authorize submission of issue to jury, so that there was no error in overruling defendant's motion for a directed verdict.—Id.

—286(17) (Cal.App.) Evidence in servant's action for injury in descending, on order, from lumber pile to wagon by plank held by lumber hook *held* to warrant nonsuit as showing no negligence of master.—Lemmermann v. Pope & Talbot, 183 P. 467.

—287(4) (Wash.) Evidence that plaintiff machinist helper uncovered his eyes and was struck by flying particles of steel, while shifting his position as instructed by the machinist, who resumed his work of chiseling before plaintiff could protect himself, *held* to make the machinist's negligence a jury question.—Archibald v. Northern Pac. R. Co., 183 P. 95.

—288(16½) (Wash.) Evidence that plaintiff machinist helper uncovered his eyes and was struck by flying particles of steel, while shifting his position as instructed by the machinist, who resumed his work of chiseling before plaintiff could protect himself, *held* to make a jury question whether plaintiff assumed the risk.—Archibald v. Northern Pac. R. Co., 183 P. 95.

—289(37) (Cal.App.) Evidence in servant's action for injury in descending, on order, from lumber pile to wagon by plank held by lumber hook *held* to warrant nonsuit, as showing no negligence of master, by sole negligence of servant in adopting an unsafe instead of a safer method.—Lemmermann v. Pope & Talbot, 183 P. 467.

—291(1) (Okla.) In action under federal Employers' Liability Act and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623), an instruction as to what was meant by the term "interstate commerce" was not confusing, where court in clear language told jury that plaintiff must show that he was assisting in transportation of cars destined for movement from a point in one state to a point in another state.—St. Louis & S. F. Ry. Co. v. Fraser, 183 P. 478.

—295(7) (Cal.) An instruction that knowledge by an employé of the defective or unsafe character of appliances is not a bar to recovery unless it also appears he understood and appreciated the danger, and thereafter consented to use the appliances, is not erroneous as laying on employer the duty to prove employé's state of mind and the extent of his understanding.—Thompson v. Southern Pac. Co., 183 P. 153.

—296(10) (Cal.) An instruction that it is not contributory negligence for an employé to neglect to investigate conditions as to the safety of appliances, and in such case he assumes only the risk of danger which he has knowledge of, or one so obvious he must know of it, or as to which he has been put upon inquiry by suggestion of danger, and which by gross carelessness

he has neglected to notice, *held* not erroneous, as being too great a limitation on the doctrine of assumption of risk.—Thompson v. Southern Pac. Co., 183 P. 153.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

—302(1) (Cal.App.) The doctrine of respondeat superior applies only where the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong, at the time and in respect to the very transaction out of which the injury arises.—Luckie v. Diamond Coal Co., 183 P. 178.

—302(1) (Cal.App.) Neither ownership of an auto, nor the fact that the use and care of it was intrusted by the owner to an employé, renders the owner liable for injuries inflicted by it while in use by the employé for a purpose entirely unconnected with the owner's business.—Martinelli v. Bond, 183 P. 461.

—302(6) (Cal.App.) Where a chauffeur, instead of proceeding from the garage to his master's house, disobeyed instructions by driving several miles in the opposite direction on a personal errand, and negligently collided with plaintiff on the return trip, he was not acting within the scope of his employment so as to render his master liable.—Gousse v. Lowe, 183 P. 295.

—311 (Wash.) An intermediate servant is not liable for a negligent injury to a subordinate servant, where he is guilty of no independent wrong, and is but carrying out the directions of the common master.—Lund v. Griffiths & Sprague Stevedoring Co., 183 P. 123.

(B) Work of Independent Contractor.

—315 (Cal.App.) The word "allow," as used in St. 1913, p. 646, § 19, providing that no person shall allow a motor vehicle owned by him or under his control to be operated in violation of the statute, means to acquiesce in, and since knowledge, express or implied, is essential to guilt, a motor vehicle owner is not liable for the absence of a rear red light at night while the vehicle is in the hands of an independent contractor.—Luckie v. Diamond Coal Co., 183 P. 178.

—316(1) (Cal.App.) Whether a motortruck lessee employed by the lessor to haul coal is a servant or independent contractor, at the time of injury to a third person, must be determined not alone from the written contract of employment, but from the subsequent conduct of each, known to and acquiesced in by the other.—Luckie v. Diamond Coal Co., 183 P. 178.

Where the parties to a written contract of employment by mutual consent, inferred from their subsequent conduct, have modified their contract so as to create the relation of contractee and independent contractor, and have acted upon it as modified, it is valid in the modified form to the extent and during the period it was so acted upon and carried out.—Id.

—316(1) (Wash.) Stevedoring company, employing its own means and its own employés in loading a vessel under contract with owner, is an independent contractor, and is liable for injury to a stevedore as result of its negligence in furnishing defective winch, regardless of question of whether owner is also liable.—Lund v. Griffiths & Sprague Stevedoring Co., 183 P. 123.

—318(1) (Cal.App.) A conditional vendee and lessee of a motortruck, who is under a contract of employment to haul coal for the lessor, who has no right to control and direct the manner in which the hauling should be done, is an independent contractor, for the negligence of whose servants the lessor is not liable.—Luckie v. Diamond Coal Co., 183 P. 178.

The mere fact that a contract of employment gives employer right to terminate it at any time he chooses does not necessarily show that the

person employed is not an independent contractor.—Id.

That a contract of employment of a motor-truck lessee and his truck, for making deliveries for the lessor, required that the lessee drive the truck, does not necessarily lead to the conclusion that he was a servant and not an independent contractor.—Id.

(C) Actions.

⇒330(1) (Cal.) The prima facie case made by one damaged by negligent driving of an automobile, when he proves that the automobile belonged to defendant and that the driver was the employé of defendant, is based on an "inference," and not on any "presumption" declared by law, that the employé was acting within the scope of his employment.—Maupin v. Solomon, 183 P. 198.

⇒330(1) (Cal.App.) An automobile is presumably operated for the owner's benefit.—Randolph v. Hunt, 183 P. 358.

⇒330(3) (Cal.) Where plaintiff shows that he was damaged by defendant's automobile through the negligence of defendant's employé in driving, an inference arises that the employé was acting within the scope of his employment, but such inference disappears upon the introduction of uncontradicted evidence that the employé was not acting within the scope of his employment, and a verdict for plaintiff, under such circumstances, would be contrary to the evidence.—Maupin v. Solomon, 183 P. 198.

⇒330(3) (Cal.App.) The presumption that an automobile was being operated for owner's benefit, although opposed by testimony that owner had loaned the car to the person who was driving it when a pedestrian on a highway was injured, held to warrant a jury finding in favor of presumption and against testimony.—Randolph v. Hunt, 183 P. 358.

⇒330(3) (Cal.App.) The presumption arising from the prima facie case against the owner of an auto, by proof of his ownership and that the driver, at the time of its collision, was his employé, is overcome, without leaving any conflict of evidence, by uncontradicted proof that the auto was in use by the employé for his personal pleasure.—Martinelli v. Bond, 183 P. 461.

⇒332(2) (Cal.App.) Whether an act was within the scope of a servant's employment should be submitted to the jury only where reasonable men may differ in regard to the facts; and if the facts are admitted, or are capable of but one meaning, the court should declare the law upon the admitted facts.—Gousse v. Lowe, 183 P. 295.

⇒332(3) (Cal.App.) Whether the relation between a coal company and one to whom it had leased a motortruck with option to purchase, compensation under a contract to haul coal for the company to be applied on the truck, was that of master and servant or contractee and independent contractor, held for the jury.—Luckie v. Diamond Coal Co., 183 P. 178.

V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

(A) Civil Liability.

⇒339 (Cal.App.) Although workmen have the right to organize a union of their craft for the purpose of improving the working conditions of the members of such organization, and to maintain such improved conditions by peaceable means, they do not have the right to induce employes, by threats or otherwise, to break their contracts of employment.—Patterson Glass Co. v. Thomas, 183 P. 190.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

⇒349 (Wash.) Where an employé in an extrahazardous occupation was injured before the 183 P.—67

going into effect of Laws 1917, p. 78, amending the Workmen's Compensation Act (Rem. Code 1915, § 6604—5, par. "b"), by providing that in case of total permanent disability, if the workman is rendered physically helpless so as to require a constant attendant, the monthly payment (of from \$20 to \$35 a month) shall be increased \$20 per month so long as the requirement shall continue, an allowance to the workman commencing as of the date of the amendment's taking effect, and to continue so long as he should require an attendant, did not give the amendment a retroactive effect contrary to the legislative intent.—Talbot v. Industrial Insurance Commission, 183 P. 84.

(B) Compensation.

⇒383 (Cal.) Under Workmen's Compensation Act, § 29, requiring an employer to secure payment of compensation in one of specified ways, discretion of commission, when giving consent to self-insure, to require deposit of bond or securities, is not limited to a case where there is reasonable doubt at the time of the employer's ability; a purpose of the act being to secure prompt payment, and such ability being subject to change.—Bank of Los Banos v. Industrial Accident Commission of California, 183 P. 538.

For Industrial Accident Commission, on granting employer certificate of consent to self-insure, under Workmen's Compensation Act, § 29, to require it to deposit \$20,000 in bonds held, in view of magnitude of its business and probability of frequent injuries to its employes, not an abuse of discretion.—Id.

⇒385(1) (Cal.App.) Tips received by employe are "other advantages received by the injured employe as part of his remuneration," within the meaning of Workmen's Compensation Act, § 17b, as amended by St. 1915, p. 1087, § 6, and should be considered in determining the "average weekly earnings" of the employe for the purpose of fixing compensation.—Hartford Accident & Indemnity Co. v. Industrial Accident Commission of California, 183 P. 234.

(C) Proceedings.

⇒401 (Cal.App.) Allegations that plaintiff by its policy of insurance insured one and his employes, and that policy was written under the terms of the Workmen's Compensation, Insurance and Safety Act, held to carry with it an implied allegation that plaintiff was an insurance carrier entitled to be subrogated to the rights of an injured employe against party causing injury.—Royal Indemnity Co. v. Midland Counties Public Service Corporation, 183 P. 960.

⇒405(4) (Cal.) The Industrial Accident Commission is not bound to decide in accordance with opinion evidence as to the speed at which an employe was driving an auto by the overturning of which he was killed; but it is its duty to pass on the evidence, and decide the fact.—United States Fidelity & Guaranty Co. v. Industrial Accident Commission of California, 183 P. 540.

Circumstantial evidence that an employe when killed by overturning of auto was exceeding the speed limit held insufficient, particularly in view of the presumption against commission of crime, to justify annulling of award of Industrial Accident Board as unsupported by evidence.—Id.

⇒405(4) (Utah) Findings of the Industrial Commission that a city employe petitioning for compensation was injured in the course of his employment, and that his injury by a slight blow on the neck with a shovel handle was the immediate cause of a paralytic stroke following shortly after the accident, held supported by evidence given by the attending physician.—Murray City v. Industrial Commission of Utah, 183 P. 331.

§405(8) (Cal.App.) Evidence of plaintiff, insurance carrier under the Workmen's Compensation Act, *held* sufficient to show that a lawful claim had been made by an injured employé and paid by plaintiff, to entitle it to be subrogated to employé's rights against party causing injury.—Royal Indemnity Co. v. Midland Counties Public Service Corporation, 183 P. 960.

§417(7) (Okla.) Under Laws 1915, c. 246, art. 2, § 10, a suit in the Supreme Court to review an award of the state Industrial Commission must be to review an error of law, and not an error of fact.—Raulerson v. State Industrial Commission of Oklahoma, 183 P. 880.

§418(7) (Wash.) A judgment entered upon the going down of a remittitur from the Supreme Court, that defendant Industrial Insurance Department make such an order for compensation to plaintiff employé "as will reasonably cover the difference in the wage-earning power of said plaintiff," *held* to require that award to employé should be in the proportion which the new earning power should bear to the old, as provided in Rem. Code 1915, § 6604—5d, and not that award should be for the full difference between the old and new earning power.—Parker v. Industrial Insurance Department, 183 P. 82.

MECHANICS' LIENS.

See Covenants, §86, 121; Homestead, §33.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§14 (Or.) The homestead exemption statute, L. O. L. §§ 221-226, existing when contract for erection of a dwelling is made, enters into it, and so makes it part of the contract that exemption may be claimed against execution on decree foreclosing lien for labor and material entering into the building.—Paulson v. Hurlburt, 183 P. 937.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

§75(1) (Cal.App.) Under Code Civ. Proc. §§ 1187, 1192, one who stands by and sees another improve his property without putting him on notice of the true ownership of the property, must be held responsible for the value of the improvements, not being an innocent party under the conditions.—Krenwinkel v. Henne, 183 P. 957.

III. PROCEEDINGS TO PERFECT.

§132(1) (Cal.App.) Under Code Civ. Proc. §§ 1187, 1192, where contractors did work on a building with the knowledge, consent, and permission of the owners, no notice of completion of the work having been filed, the contractors had 90 days within which to file their claims for lien.—Krenwinkel v. Henne, 183 P. 957.

§157(1) (Cal.App.) A mechanic's lien notice stating that contract payments were due 30 days from delivery, while contract made them payable 10th of following month, *held* fatally defective under Code Civ. Proc. § 1187, requiring time of payment to be stated, despite section 1203, providing that certain mistakes should not invalidate liens.—Schultheiss Bros. Co. v. Steinberg, 183 P. 347.

§157(1) (Cal.App.) Under Code Civ. Proc. § 1187, as amended in 1911, in actions to foreclose mechanics' liens, the statement in the second claims of lien that there was no contract price, and that the reasonable price was being charged for the work done, *held* not a fatal variance from the first claims of lien, stating the contract was agreed upon and was payable on completion.—Krenwinkel v. Henne, 183 P. 957.

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

§163 (Cal.App.) The liability for mechanic's lien claims of an owner failing to file his build-

ing contract and bond as required by Code Civ. Proc. § 1183, is not limited to the contract price, even as to contracts made before the Supreme Court had clearly announced such liability.—Schultheiss Bros. Co. v. Steinberg, 183 P. 347.

VII. ENFORCEMENT.

§264(1) (Cal.App.) In an action against owner of property for foreclosure of mechanic's lien, where a bonding company was made a party defendant in the complaints of some of the plaintiffs, and the owners in their answers in all of the actions asked that the bonding company be made a defendant, and that judgment be entered in their favor against the bonding company, and the bonding company made answer in the proceedings, the actions having been consolidated, raising issues on the facts necessary to a complete determination of the merits which were fully determined, the bonding company cannot complain that it was not properly before the court, it not appearing that the plaintiffs, who did not first make the bonding company a defendant, did not later join in the owners' request that it be made a defendant.—Hillcrest Co. v. Shrier, 183 P. 239.

In action to foreclose mechanics' liens, defendant owners who have paid contractor in full may call upon contractor's surety to pay as for the default of the contractor in such proceeding, although owners have not paid any of the claims against the property, and they may have the surety made a party defendant, and ask for judgment against him for any sums that might be rendered, in view of Code Civ. Proc. § 578.—Id.

§277(6) (Cal.App.) In actions to foreclose mechanics' liens, defendants, having failed to answer, and thus to put in issue all material allegations of the complaint, particularly those setting forth the contents of the liens, thus having admitted the truth of the allegations, *held* estopped to raise the question of variance between the claim of lien and the proof.—Krenwinkel v. Henne, 183 P. 957.

VIII. INDEMNITY AGAINST LIENS.

§315 (Cal.App.) In action to foreclose mechanics' liens, defendant owners who have paid contractor in full may call upon contractor's surety to pay as for the default of the contractor in such proceeding, although owners have not paid any of the claims against the property.—Hillcrest Co. v. Shrier, 183 P. 239.

MINES AND MINERALS.

See Action, §50; Customs and Usages, §18; Damages, §132; Evidence, §457; Joint Adventures, §5; Jury, §14; Limitation of Actions, §65; Lis Pendens, §24, 26; Master and Servant, §204; Venue, §52.

I. PUBLIC MINERAL LANDS.

(B) Location and Acquisition of Claims.

§9 (Cal.App.) When a patent of public lands to a railroad was canceled by decree of court, the land was restored to the public domain as of the date of the decree, and it was immediately open to the location of a mining claim, and a location then made was valid, and the claim could be held thereunder indefinitely, where the railroad did not appeal from the decree.—Double Eagle Mining Co. v. Hubbard, 183 P. 282.

§14(1) (Cal.App.) The rules of the land department, Nos. 51, 52, and 53, providing that upon the termination of a contest the register and receiver will render a joint report, etc., and the local officers will thereafter take no further action toward affecting the disposal of the land until instructed by the commissioner, have no application to mining claims, which take their origin under authority of the United States statutes, under regulations prescribed by law and according to local customs (Rev. St.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

§ 2319 (U. S. Comp. St. § 4614).—Double Eagle Mining Co. v. Hubbard, 183 P. 282.
 § 15 (Cal.) Rev. St. U. S. § 2318-2320, 2324 (Comp. St. §§ 4613-4615, 4620), with reference to the location of mining claims, recognize the validity of local regulations and customs covering locations, and state statutes are construed to have the same force and effect as such regulations.—Stock v. Plunkett, 183 P. 657.
 § 29(1) (Cal.App.) By the performance of the necessary amount of work annually on his claim, a locator of a mining claim can hold it and work it against the whole world, and for an indefinite period, without obtaining or applying for a patent.—Double Eagle Mining Co. v. Hubbard, 183 P. 282.
 § 29(5) (Cal.) Subsequent locators of a quartz mining claim, having seen and read the prior location notice of the first locator, to which his name was signed, cannot take advantage of the fact that such prior notice was undated or was not recorded as required by Civ. Code, §§ 1426, 1426b, the first locator having fully complied with the laws of the United States pertaining to the location.—Stock v. Plunkett, 183 P. 657.

MINORS.

See Infants.

MONEY RECEIVED.

See Appeal and Error, § 1170; Vendor and Purchaser, § 834.

§ 1 (Cal.App.) The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to plaintiff.—M. H. Hoffman, Inc., v. Bernstein Film Productions, 183 P. 293.

§ 18(3) (Cal.App.) A motion picture film producing company's receipt from a distributing company of \$6,500 held to have covered both a \$1,000 and a \$5,500 payment made to the producing company by its distributor in three states, whose contract had been assumed by the distributing company, so that the producing company received the \$6,500 from the distributor in three states for the use and benefit of the distributing company.—M. H. Hoffman, Inc., v. Bernstein Film Productions, 183 P. 293.

MORTGAGES.

See Adverse Possession, § 113; Appeal and Error, § 1036, 1073, 1170; Bills and Notes, § 485; Building and Loan Associations, § 46; Chattel Mortgages; Evidence, § 442; Homestead, § 171; Husband and Wife, § 49½; Judgment, § 162, 948; Jury, § 14; Pleading, § 291; Reformation of Instruments, § 25; Trusts, § 11.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 1 (Cal.App.) Transaction between vendors, purchaser, and third parties, whereby third parties to whom vendors conveyed land agreed to sell separate tracts of the land upon purchaser's demand and deposit certain per cent. of proceeds in a bank to vendors' credit, was in effect a deed of trust to secure payment of purchase price; the third parties being trustees.—Withers v. Bousfield, 183 P. 855.

§ 27 (Cal.App.) Tripartite agreement between vendors, purchasers, and third parties, whereby vendors conveyed the land to third parties to secure payment of purchase money under third parties' agreement to sell separate tracts of the land upon purchaser's demand, deposit certain per cent. of proceeds in bank to vendor's credit, and convey land to purchasers upon discharge of indebtedness and payment of expenses, if invalid as a trust under Civ. Code, § 857, will be given effect as an equitable mortgage.—Withers v. Bousfield, 183 P. 855.

§ 32(2) (Or.) A deed absolute in form, or any other conveyance, must be construed to be a mortgage subject to redemption, where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate only by way of security.—Smith v. Headlee, 183 P. 20.

§ 32(3) (Okl.) Under the statutes of Arkansas (Manuf. Dig. § 642), as construed by the Supreme Court of that state, a deed absolute on its face, if intended as a security for payment of money, was treated in courts of equity as a mortgage, and rights of parties determined as if it were in fact a mortgage.—Kent v. Tallent, 183 P. 422.

§ 32(5) (Or.) A deed absolute on its face is a mortgage if a pre-existing debt in relation to which it was given was not extinguished, or if a new debt was intended to be created and the conveyance was given as security therefor.—Smith v. Headlee, 183 P. 20.

§ 36 (Or.) The burden of proof rests upon one claiming that a deed absolute in form is a mortgage to show the real character of the transaction; the presumption existing that a deed absolute on its face is what it purports to be.—Smith v. Headlee, 183 P. 20.

§ 36 (Or.) The presumption is that a deed absolute upon its face, is what it purports to be, and is intended as an absolute conveyance; but this presumption may be overcome in a proper case in a court of equity by evidence that the transaction was really a loan and that the deed was intended as a mortgage only.—Mays v. Robert Mays Estate Co., 183 P. 751.

§ 38(1) (Or.) In action to have a deed absolute in form declared a mortgage, evidence held to show that the deed was executed only as security for a pre-existing debt and for advances to be made.—Smith v. Headlee, 183 P. 20.

§ 38(1) (Or.) Evidence held insufficient to sustain claim that an absolute deed was intended as a mortgage to secure loan from grantee to his brother, and that grantee agreed to convey property to brother on brother's repayment of loan.—Mays v. Robert Mays Estate Co., 183 P. 751.

(D) Validity.

§ 82 (Cal.App.) Where vendors, to secure payment of purchase price, conveyed land to third parties under third parties' agreement to sell tracts thereof upon purchasers' demand and deposit certain per cent. of proceeds in bank to vendor's credit, a provision of the trust so created, authorizing third parties to convey to purchasers upon completion of trust, even though invalid under Civ. Code, §§ 847, 857, would not affect the valid provisions of the trust, since the invalidity would not interfere with main scheme.—Withers v. Bousfield, 183 P. 855.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates of Parties Therein.

§ 137 (Okl.) Under the statutes of Arkansas (Manuf. Dig. § 642), as construed by Supreme Court of that state, a mortgage of real estate, as under the common law, conveyed the legal title to mortgagee.—Kent v. Tallent, 183 P. 422.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 224 (Cal.) A mortgagee's assignment of the mortgage to a trustee in consideration of the beneficiary's agreement to care for, nurse, and support the mortgagee during the remainder of his life, which agreement the beneficiary performed, was not a gift, and was not executory, but was a present transfer of title.—Musgrave v. Renkin, 183 P. 145.

§ 253 (Cal.App.) Where land was sold and a collateral agreement was entered into whereby purchaser could require vendor to repurchase within a specified time, and a mortgage, given for

part of the purchase price, was assigned by the vendor, and thereafter the purchaser required the vendor to repurchase, transferring the property to him on return of the actual cash paid, the assignee of the mortgage is entitled to a judgment against the purchaser foreclosing him or any interest in the mortgaged property and not to deficiency judgment; but, as far as the vendor is concerned, the latter is estopped, in view of his implied warranty of the validity of the mortgage under Civ. Code, § 1774, from claiming that the mortgage was rendered ineffective by reason of the repurchase.—Hale v. Pendergrast, 183 P. 833.

⚡258 (Cal.App.) Where a mortgage note was not negotiable when executed in an action to foreclose by assignee, the maker can set up defenses he has against the assignor.—Hale v. Pendergrast, 183 P. 833.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

⚡275 (Cal.App.) Where land was sold subject to the right of the purchaser to demand a repurchase by the vendor and the vendor sold and assigned note and mortgage given on repurchase, being required by the purchaser, it mattered not to the vendor to whom the purchase money should be paid; and, if the purchaser was satisfied that she owed the assignee of the mortgage, the vendor, having assumed the indebtedness, cannot complain on foreclosure that nothing is due on the mortgage.—Hale v. Pendergrast, 183 P. 833.

⚡280(3) (Okla.) In action against signers of note secured by realty mortgage and purchaser, whose deed provided that he should pay mortgage, where purchaser alleged and proved that provision that purchaser should pay mortgage was inserted by scrivener contrary to contract or consent of parties, and want of consideration therefor, the mortgagee could not avail himself of such mistake.—Cushing v. Newbern, 183 P. 409.

⚡280(3) (Or.) Mortgagee cannot avail himself of assumption clause inserted through mistake or oversight of the scrivener, and without the knowledge or consent of either grantor or grantee.—Welch v. Johnson, 183 P. 776.

⚡292(6) (Okla.) In action on note secured by realty mortgage, and against purchaser of the property by deed of conveyance promising to pay the mortgage, who failed to answer after summons, and where plaintiff introduced the note, mortgage and such conveyance, a judgment against plaintiff was error.—Cushing v. Newbern, 183 P. 409.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

⚡309(3) (Cal.) Release of a mortgage, not delivered by the mortgagee in his lifetime, did not take effect.—Musgrave v. Renkin, 183 P. 145.

X. FORECLOSURE BY ACTION.

(F) Pleading and Evidence.

⚡460 (Okla.) In action by assignee to foreclose a mortgage securing a note payable in two years, involving issue whether assignment was made before or after maturity of note, plaintiff, introducing assignment showing on its face that it was before maturity, was assuming the burden of proof, and defendant was not required to assume it, but only to rebut plaintiff's evidence.—Jackson v. Levy, 183 P. 505.

(K) Deficiency and Personal Liability.

⚡559(3) (Cal.App.) Where purchaser of land has the right, under an agreement, to require vendor to repurchase within a specified time, the agreement, where the purchaser chooses to avail himself of it is a good defense to claim for de-

ficiency judgment in an action to foreclose a mortgage given in part payment of the purchase price.—Hale v. Pendergrast, 183 P. 833.

MOTIONS.

See Appeal and Error, ⚡422; Criminal Law, ⚡1182; Execution, ⚡242; Judgment, ⚡300.

MOTORCYCLE.

See Municipal Corporations, ⚡703, 705, 706.

MOTOR VEHICLE ACT.

See Municipal Corporations, ⚡592, 706.

MULES.

See Constitutional Law, ⚡237; Municipal Corporations, ⚡604, 625.

MUNICIPAL CORPORATIONS.

See Appeal and Error, ⚡1010, 1048; Boundaries, ⚡20; Constitutional Law, ⚡237, 820; Counties; Dedication, ⚡19, 31, 34, 85, 37, 39, 41; Estoppel, ⚡62; Health, ⚡21; Injunction, ⚡126; Licenses, ⚡7, 11, 42; Master and Servant, ⚡405; New Trial, ⚡70; Pleading, ⚡406; Schools and School Districts.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(A) Incorporation and Incidents of Existence.

⚡17 (Cal.App.) Where there has been an attempt, under Municipal Annexation Act of 1913 and amendments thereto, to annex one city to another, and where authorities of former city have declared annexation to have been carried at an election held to decide the question, and where such city as an incorporated city has ceased to function, and the latter city has assumed jurisdiction over its territory and inhabitants, the latter city, as to such annexed territory, is a de facto corporation.—Coe v. City of Los Angeles, 183 P. 822.

The requisites of a de facto corporation are a charter or general law under which such a corporation, as it purports to be might lawfully be organized, an attempt to organize thereunder, and actual user of the corporate franchise.—Id.

⚡18 (Cal.App.) Where there has been an attempt, under the Municipal Annexation Act of 1913 and amendments thereto, to annex one city to another, and where the authorities of former city have declared annexation to have been carried at an election held to decide the question, and where such city, as an incorporated city, has ceased to function, and the latter city has assumed jurisdiction over its territory and inhabitants, the latter city as to such annexed territory, is a "de facto corporation," and any attack upon its exercise of the franchise must be by quo warranto proceedings at instance of the state.—Coe v. City of Los Angeles, 183 P. 822.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

⚡63(1) (Cal.App.) It is for the city's legislative body, clothed with police power by direct grant from the Constitution, to determine when and what regulations of a business are essential, and its determination will not be disturbed by the courts unless the regulation has no relation to the protection of health, safety, comfort, or well-being of the community, but is a clear invasion of personal or private rights under the guise of police regulation.—Boyd v. City of Sierra Madre, 183 P. 230.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(A) Meetings, Rules, and Proceedings in General.

§85 (Cal.App.) Proceedings before a municipal board of trustees purporting to ratify its action at a prior illegal meeting in authorizing the purchase of land and directing a warrant to be drawn in payment, *held* insufficient in itself to authorize the purchase of the property, or to constitute the adoption of an original order for the payment of the specified amount.—City of Orange v. Clement, 183 P. 189.

§89 (Cal.App.) Where no written notice of a special meeting of the board of trustees of a municipal corporation was delivered to any member of the board, and one member was absent, the meeting and all proceedings therein were void, in view of Municipal Corporation Act, § 858.—City of Orange v. Clement, 183 P. 189.

Where a municipal board of trustees at a special meeting, invalid because of want of written notice, resolved to purchase certain lots, such action could not be ratified at a subsequent legally constituted meeting; the proceedings at the first meeting being not merely defective, but absolutely void.—Id.

(B) Ordinances and By-Laws in General.

§120 (Cal.App.) Building Law of San Francisco, Ordinance No. 4170, N. S., providing for the demolition of wooden buildings within fire limits, by board of public works upon owner's failure to raze building within specified period after notice, is not retroactive with reference to building constructed in violation of Ordinance No. 1198, describing fire limits and prohibiting construction of wooden building therein.—Maguire v. Reardon, 183 P. 303.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

§124(6) (Cal.App.) Under the charter of Richmond, providing that no member of the council shall hold any other municipal office, that the council shall act as a board of tax equalization, and that the councilmen shall receive \$5 per day while performing that duty, but no other compensation, unless provided by ordinance, they perform the duty of equalization as members of the council, so that an ordinance providing a salary for them increases their compensation, within Const. art. 11, § 9, providing that this shall not be done during their term of office.—Cameron v. City of Richmond, 183 P. 604.

§133 (Cal.) Under the San Francisco City Charter, the Civil Service Commission has a wide discretion regarding the manner in which it performs its duties and exercises its powers.—Pratt v. Rosenthal, 183 P. 542.

(B) Municipal Departments and Officers Thereof.

§192 (Cal.App.) Under City and County of San Francisco Charter, art. 2, c. 1, § 1, and article 6, c. 1, § 9, subd. 5, and article 9, c. 6, § 1, board of supervisors had power by adoption of ordinance, to confer upon board of public works full and complete authority to take and provide required steps to remove wooden building, constructed and maintained within fire limits in violation of Ordinance No. 1198.—Maguire v. Reardon, 183 P. 303.

(C) Agents and Employees.

§216(1) (Cal.) Under the San Francisco City Charter, the board of health and the Civil Service Commission are independent of each other, and the board has no authority to prescribe qualifications for civil service eligibles.—Pratt v. Rosenthal, 183 P. 542.

§216(2) (Cal.) The fact that the Civil Service Commission of a city placed veterinarians

on the same basis as persons experienced in handling meat, fish, and fowl in examinations for market inspectors does not show an abuse of discretion.—Pratt v. Rosenthal, 183 P. 542.

§217(3) (Cal.) A civil service examination notice which stated that copies of certain regulations would be distributed as long as the supply held out does not indicate a violation of San Francisco City Charter, prohibiting special information being furnished any applicant, since it will be presumed that any applicant failing to secure a copy would be allowed to inspect the original records.—Pratt v. Rosenthal, 183 P. 542.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§269(2) (Cal.App.) The City and County of San Francisco, under its Charter, art. 6, c. 1, §§ 3, 9, 22, has authority to improve an accepted street under the direction and control of its board of public works.—Warren Bros. Co. v. Boyle, 183 P. 706.

§278(1/2) (Cal.App.) City and County of San Francisco Charter, art. 6, c. 2, describing the proceedings to be followed by board of public works in the making of street improvements, has reference to improvements the expense whereof is to be assessed against property benefited, and not improvements the entire expense of which is to be paid by city and county, in view of article 2, c. 2, § 9.—Warren Bros. Co. v. Boyle, 183 P. 706.

§278(2) (Cal.App.) Under City and County of San Francisco Charter, art. 2, c. 2, § 1, subd. 2, and § 9, subd. 2, and article 6, c. 2, §§ 1, 2, 8, 9, 23, all that was necessary to legally initiate proceeding for improvement of accepted street at city's expense was that board of public works recommend improvement, and board of supervisors order work done, whereupon board of public works could do work under contract, or by and through its own organization.—Warren Bros. Co. v. Boyle, 183 P. 706.

§278(4) (Cal.App.) City and County of San Francisco Charter, art. 2, c. 1, § 9, authorizing board of public works to improve accepted street "under such ordinances as may from time to time be adopted by the supervisors," *held* to place action of board of public works under the direction and control of board of supervisors.—Warren Bros. Co. v. Boyle, 183 P. 706.

All street work in the city and county of San Francisco, except possibly urgent repairs, shall be done on the order of the board of supervisors.—Id.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§294(4) (Cal.App.) Posted notice of a street improvement in the city of San Francisco *held* sufficient in form, in view of the improvement ordinance which merely required the notice should state briefly the improvement proposed and refer to the resolution of intention for further particulars.—Hutton v. Newhouse, 183 P. 276.

§303(1) (Cal.App.) Board of supervisors of city and county of San Francisco, by fixing and allowing in its budget an item of expenditure for street improvement pursuant to board of public work's recommendation, and appropriating out of budget an amount to be expended for such improvement, did not order the improvement within the Charter, art. 6, c. 2, §§ 1, 2, empowering board of supervisors to "order" improvements.—Warren Bros. Co. v. Boyle, 183 P. 706.

§320 (Cal.App.) Ordinance ratifying, approving, and confirming purchase of paving materials, and conferring authority upon board of public works to do all acts set forth as fully as if authority had been conferred before the doing of the acts, *held* to cure omission of board of supervisors, in the first instance, to order the

street improvement and the purchase of the material.—Warren Bros. Co. v. Boyle, 183 P. 706.

(C) Contracts.

⇒330(1) (Cal.App.) City and County of San Francisco Charter, art. 6, c. 2, § 31, requiring board of public works to invite proposals for contract to supply materials for improvement of street, applies to accepted as well as unaccepted street.—Warren Bros. Co. v. Boyle, 183 P. 706.

⇒330(4) (Cal.App.) In improving accepted street, city and county of San Francisco, under the charter, may use a patented wearing surface mixture.—Warren Bros. Co. v. Boyle, 183 P. 706.

Where right to use of patented pavement has been transferred to city and county of San Francisco under Charter, art. 6, c. 2, § 26, board of public works is in a position to call for sealed bids for contract to furnish necessary quantities of the pavement, for which contract owner of patent and others may compete.—Id.

⇒339(1) (Cal.App.) City's agreement with paving material concern, furnishing city with patented paving material, held a sufficient compliance with City and County of San Francisco Charter, art. 6, c. 2, § 26, providing that, where patented paving material is ordered, owner of patent shall transfer to city and county right to use patent, with privilege to any person to manufacture and lay the pavement upon the streets under contract with the city and county.—Warren Bros. Co. v. Boyle, 183 P. 706.

⇒358(1) (Cal.) Under Improvement Act 1911, § 21, power to accept the work on a street and to make the assessment to cover the cost is vested directly in the street superintendent; the act not providing the assessment shall be ordered or approved by the board of trustees or the city council, except as specified in section 30.—California Portland Cement Co. v. Boone, 183 P. 447.

Improvement Act 1911 does not require a certificate of final acceptance of a street improvement from the street superintendent.—Id.

The fact that the contractor for a street improvement requested that the work be accepted piecemeal, as provided in Improvement Act 1911, § 30, and that the board of trustees of the city granted the request, did not change plain provisions of the statute that the work must in all cases be done under the direction and to the satisfaction of the superintendent of streets (section 18) and that he alone has power to accept the work as completed, though if he refuses the contractor may appeal to the council under section 21.—Id.

⇒365 (Cal.) Resolution of board of trustees of a city ordering an assessment to cover the cost of a street improvement in compliance with the contractor's petition, supported by the certificate of acceptance of the street superintendent, amounted to a legal acceptance of the improvement under the contract as completed, binding as between the city and the contractor, and also binding on a materialman seeking to recover on the contractor's bond.—California Portland Cement Co. v. Boone, 183 P. 447.

⇒365 (Cal.App.) City and county of San Francisco, having accepted, used, and retained pavement material which the board of supervisors had the general power to authorize board of public works to purchase, could not refuse to pay for it upon ground that certain provisions of the charter or ordinances were not strictly complied with.—Warren Bros. Co. v. Boyle, 183 P. 706.

⇒373(3) (Cal.) Street improvement under Improvement Act 1911 held completed on November 11th, as certain witnesses testified, and not on the date of the street superintendent's certificate of final acceptance of the work, made November 30th; the 30-day period within which materialmen and laborers might file claims as provided in section 19 of the act beginning to run from the 11th.—California Portland Cement Co. v. Boone, 183 P. 447.

A materialman on a street improvement is not required to wait for the completion or the acceptance of the work, but can file his claim with the superintendent of streets without waiting for final completion of the entire work.—Id.

(E) Assessments for Benefits, and Special Taxes.

⇒511(2) (Wash.) Upon property owners' appeal under Rem. Code 1915, §§ 7892—22, 7892—23, to the superior court from the levy and confirmation of local assessments by town council, the requirement that the appellant file a transcript consisting of the assessment roll and his objections thereto within ten days from filing of notice of appeal, though jurisdictional, does not warrant dismissal, where the failure was the fault of the appellee city's clerk, and not of appellant.—In re Local Improvement Dists. Nos. 29—37 of Town of Grandview, 183 P. 107.

Affidavits and evidence held to show that appellant's failure to file transcript of the assessment proceedings within the ten days required by statute was not through the fault of appellant, but was caused by the delay of the city clerk.—Id.

Facts in such case held not such that appellant was required to institute mandamus proceedings to compel the making of the transcript provided for by Rem. Code 1915, § 7892—22, to relieve himself from responsibility for delay.—Id.

Such appeal should not be dismissed where appellant's failure to file the assessment roll within time was caused by appellee, since such statute excludes the right to review such proceedings by a suit in equity.—Id.

(F) Enforcement of Assessments and Special Taxes.

⇒530 (Cal.App.) Where property owners in the city of San Francisco did not avail themselves of the privilege of paying the assessment for a street improvement in installments, and did not execute the bond thereon required by the city's improvement ordinance, they were subject to suit for foreclosure of the lien on their property at any time after it had become perfected and within two years after proper recodification.—Hutton v. Newhouse, 183 P. 276.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

⇒589 (Cal.App.) Police power granted municipalities by Const. art. 11, § 11, is as broad as the power possessed by the Legislature itself, except that its exercise by city must be confined to the city, and must not conflict with the general laws of the state.—Boyd v. City of Sierra Madre, 183 P. 230.

⇒592(1) (Cal.App.) A city ordinance requiring vehicle drivers to turn street corners as near the right-hand curb as possible is not invalid, because conflicting with the Motor Vehicle Act, requiring such vehicles to keep to the right of the center of intersecting highways, since the ordinance merely extends the statutory regulation.—Pemberton v. Arny, 183 P. 856.

⇒593 (Cal.App.) City's police power cannot be bartered away by express contract.—Maguire v. Reardon, 183 P. 303.

⇒597 (Or.) Ordinance of the city of Portland, No. 35013, providing if the location of a food establishment is found to be suitable, and in proper sanitary condition, according to the ordinances of the city and the regulations of the United States as to plumbing, etc., the bureau of health shall issue a food establishment permit or license to the applicant, is definite and certain, though there is no specification of what shall constitute physical fitness in an applicant for license, or suitability in the location.—City of Portland v. Traynor, 183 P. 933.

Under its charter giving the city of Portland power to make regulations to prevent the intro-

duction of contagious diseases, etc., the city had power and authority to adopt its ordinance No. 35013, providing for the licensing of food and soft drink establishments on approval of their location, physical examination of the proprietor, and payment of a fee.—Id.

⚡600 (Cal.App.) Los Angeles Ordinance No. 22798 (New Series), a residence district ordinance, and No. 26555 (New Series), providing that in order to establish an industrial district within a residence district it is necessary to get a petition signed by property owners, etc., are constitutional and apply to laundries.—Sam Kee v. Wilde, 183 P. 164.

⚡604 (Cal.App.) In action by keeper of burros and mules for hire to enjoin city from enforcing ordinance prohibiting maintenance of corral for mules and burros in residence district, and requiring permit, for maintenance thereof in business district, it is not material that plaintiff may have kept his corral as clean as possible, and carried on his business in the most approved manner, or that it would be possible for one or more corrals to be maintained without an appreciable risk or peril to the health or safety of a community.—Boyd v. City of Sierra Madre, 183 P. 230.

⚡605 (Cal.App.) The exercise of police power by a city is not limited to the regulation of such things as already have become nuisances, or have been declared such by judgment of a court but extends to everything expedient for the preservation of the safety, health, or comfort of the city's inhabitants.—Boyd v. City of Sierra Madre, 183 P. 230.

A municipality has power by ordinance to divide its territorial limits into business and residence districts, and to prohibit in the residence district the maintenance of any corrals wherein mules and burros are kept for hire; the keeping of such corrals in a populous city or town being a nuisance.—Id.

Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health or obnoxious to the comfort of a community if not suppressed or regulated, the legislative body in the exercise of its police powers may make and enforce ordinances to regulate or prohibit it, although it may never have been obnoxious or injurious in the past.—Id.

⚡611 (Cal.App.) Occupations which by the noise made in their pursuit or the odors they engender are offensive to the senses may be interdicted by law in the midst of populous communities on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community.—Boyd v. City of Sierra Madre, 183 P. 230.

⚡611 (Or.) An ordinance by or under which an occupation lawful, and not injurious to person, property, or public, when lawfully conducted, may be absolutely prohibited at the dictation of any public official, without just cause or reason, is void.—City of Portland v. Traynor, 183 P. 933.

⚡625 (Cal.App.) Ordinance, dividing city into residence and business districts, and prohibiting the keeping of a livery stable or corral for the keeping of horses, mules, etc., for hire, in residence district, and requiring a permit for maintenance thereof in business district, is not arbitrary.—Boyd v. City of Sierra Madre, 183 P. 230.

⚡626 (Cal.App.) For the purpose of regulating occupations causing noise or offensive odors, city may divide its territorial limits into residence and business districts, and prohibit the obnoxious occupation within the former.—Boyd v. City of Sierra Madre, 183 P. 230.

⚡626 (Cal.App.) Building Law, Ordinance of City and County of San Francisco, No. 4170, N. S., authorizing board of public works to demolish wooden building within fire limits upon owner's failure to so do within specified period

after notice, is not discriminatory in providing for the general demolishing and removal of wooden building, and not referring to building of other inflammatory material.—Maguire v. Reardon, 183 P. 303.

⚡628 (Cal.App.) Owner of wooden building constructed within fire limits of city in violation of San Francisco Ordinance No. 1198, passed pursuant to Charter of City and County of San Francisco, art. 2, c. 2, § 1, subd. 5, cannot restrain city from demolishing building under Building Law, Ordinance 4170, N. S., regardless of validity of latter ordinance, since such building constitutes a nuisance, and equity will refuse any relief designed to perpetuate its maintenance.—Maguire v. Reardon, 183 P. 303.

Contracts made by owner of wooden building constructed within fire limits in violation of City and County of San Francisco Ordinance No. 1198, with tenants, must be deemed to have been made with knowledge that the building was illegally maintained, and subject to right of city to remove it at any time.—Id.

City's power to remove wooden buildings erected within fire limits is an exercise of the police power, since it immediately concerns the safety of persons and property.—Id.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

⚡661(2) (Cal.App.) A charter, giving a city "plenary control over all uses of its streets," authorizes a traffic ordinance regulating the manner in which vehicle drivers should turn street corners.—Pemberton v. Aray, 183 P. 356.

⚡703(4) (Wash.) Motorcycle policeman, under traffic ordinances of city of Seattle, had the right of way at street intersection, and was not limited to the speed prescribed for ordinary vehicles.—Clark v. Wilson, 183 P. 103.

⚡705(1) (Cal.App.) Driver of automobile between sidewalk and center of street in which automobiles are parked has duty of proceeding with such reasonable speed, with such warnings, and in such reasonable distance from the rear ends of the parked machines as not to endanger the safety of persons exercising their right to pass from the place of parking to the sidewalk.—Webster v. Motor Parcel Delivery Co., 183 P. 220.

⚡705(1) (Wash.) Motorcycle policeman in approaching street intersection was required to exercise due care, though under traffic ordinances of City of Seattle he had right of way, and was not limited to speed prescribed for ordinary vehicles.—Clark v. Wilson, 183 P. 103.

⚡705(5) (Wash.) Automobile driver who stopped or slowed down after entering street intersection for purpose of allowing motorcycle approaching from intersecting street to pass in front, and thereafter started machine and made effort to drive in front of motorcycle, held negligent.—Clark v. Wilson, 183 P. 103.

⚡705(10) (Cal.App.) Automobile driver who, having parked machine in center of street, stepped to the back of her machine with the intention of looking northerly past the rear end of next automobile to see if street was sufficiently clear to be crossed in a northwesterly direction, and was struck by automobile driven within 3 feet from rear ends of parked machines in southerly direction, was not contributorily negligent.—Webster v. Motor Parcel Delivery Co., 183 P. 220.

⚡705(12) (Cal.App.) By the use of the alternative, "owned by him or under his control," in St. 1913, pp. 645, 646, §§ 13, 19, the Legislature intended to impose the duty of seeing that a motor vehicle carried a rear red light upon the owner when, and only when he is in control of the motor vehicle, personally or through a servant, and to impose that duty upon some other person when such other person is operating the vehicle and it is under his control.—Luckie v. Diamond Coal Co., 183 P. 178.

☞706(5) (Cal.App.) Where automobile driver had 18 feet within which to drive machine between sidewalk and parked automobiles in center of street, the driving of automobile within $2\frac{1}{2}$ to 3 feet from rear ends of parked automobiles was sufficient from which to raise inference of negligence.—Webster v. Motor Parcel Delivery Co., 183 P. 220.

In action for injuries by plaintiff struck by automobile in street after having parked her automobile in center thereof, evidence held sufficient to sustain finding that defendant automobile driver was negligent.—Id.

☞706(5) (Cal.App.) Evidence in connection with requirement of Motor Vehicle Act, § 20g, that driver of motor vehicle, in turning to left at street intersection, shall go beyond the center thereof, passing to its right, before turning to the left, held sufficient to support jury's finding of negligence of driver of auto colliding with plaintiff's motorcycle.—Martinelli v. Bond, 183 P. 463.

☞706(5) (Cal.App.) In an action for personal injuries resulting from an automobile collision, evidence held sufficient to justify a verdict for plaintiff.—Saylor v. Taylor, 183 P. 848, 845.

☞706(6) (Wash.) In action for injuries to motorcycle driver in collision with automobile at street intersection, question of negligence of automobile driver held for jury under the evidence.—Clark v. Wilson, 183 P. 103.

☞706(7) (Cal.App.) In an action for personal injuries from an automobile collision, where defendant was on the wrong side of the street and the machine in which plaintiff was riding was on the right side, and its driver attempted to turn toward the center of the street and avoid defendant, and defendant turned in the same direction, causing the collision, it was a question for the jury whether the driver of plaintiff's automobile, as a reasonably prudent man in the exercise of due care, was justified in so turning his car.—Saylor v. Taylor, 183 P. 843, 845.

☞706(7) (Wash.) Motorcycle policeman, answering an emergency call in line of duty, was not contributorily negligent as a matter of law in traveling at the rate of 35 or 40 miles an hour, upon a dry street with little traffic in immediate vicinity, in section of city where there was much vacant property; the question under the evidence being for the jury.—Clark v. Wilson, 183 P. 103.

☞706(9) (Cal.App.) In an action for injuries sustained in being struck by automobile, court's finding held a sufficient finding of negligence on part of defendant automobile driver to sustain judgment for plaintiff.—Webster v. Motor Parcel Delivery Co., 183 P. 220.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

☞865(2) (Cal. App.) Judgments obtained against municipalities for torts constitute liabilities not within Const. art. 11, § 18, prohibiting cities from incurring liability in excess of the annual income without the assent of two-thirds of the voters.—Metropolitan Life Ins. Co. v. Deasy, 183 P. 243.

St. 1901, p. 794, providing for the payment of final judgments against municipalities, must be construed as constitutional and as applying to judgments not within the provisions of Const. art. 11, § 18, prohibiting cities from incurring liability in excess of annual income.—Id.

(B) Administration in General. Appropriations, Warrants, and Payment.

☞889 (Cal.App.) San Francisco Charter, art. 3, c. 1, §§ 1-5, providing for a budget of amounts estimated to be required for expenses of conducting the public business of the city and county for the ensuing fiscal year, and providing the time of making a tax levy therefor, does

not apply to or embrace obligations in form of final judgments.—Metropolitan Life Ins. Co. v. Deasy, 183 P. 243.

XV. ACTIONS.

☞1038 (Cal.App.) St. 1901, p. 274, relating to procedure for collection of final judgments against municipalities, is not in conflict with San Francisco Charter, art. 3, c. 11, §§ 1-3, providing for payment of judgments from the surplus fund, the two acts being in effect complementary, so that a judgment may be collected under the former, where the city does not choose to pay it under the latter. Const. art. 11, § 6.—Metropolitan Life Ins. Co. v. Deasy, 183 P. 243.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ☞697.

NAMES

See Parties, ☞95.

NATIONAL BANKS.

See Banks and Banking, ☞258-261.

NAVIGABLE WATERS.

See Canals.

NEGLIGENCE.

See Animals, ☞69, 71; Appeal and Error, ☞843, 930, 931, 999, 1050, 1066, 1071; Carriers, ☞215; Electricity, ☞14, 18, 19; Evidence, ☞135, 424; Highways, ☞184; Injunction, ☞34; Landlord and Tenant, ☞167; Master and Servant, ☞88-332; Municipal Corporations, ☞705, 706; Pleading, ☞35; Railroads, ☞348-350; Reformation of Instruments, ☞25; Trial, ☞252; Waters and Water Courses, ☞172, 179.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

☞32(1) (Wash.) The duty of care which the owner of a building owes to invitees differs from the duty of care he owes to a mere licensee, the duty to an invitee being to keep the ways reasonably safe for him and open to entry at all reasonable hours, and the duty to a licensee being only the negative one of not wantonly injuring him.—Konick v. Champneys, 183 P. 75.

II. PROXIMATE CAUSE OF INJURY.

☞56(1) (Cal.App.) A defendant is not liable for damages from an injury, unless it is made to appear that its negligence was the proximate cause.—Hale v. Pacific Telephone & Telegraph Co., 183 P. 280.

☞62(3) (Cal.App.) Where the original negligence of a defendant is followed by an independent act of a third person, which results in direct injury to plaintiff, defendant's negligence may constitute the proximate cause of the injury, if defendant should have known the intervening act was likely to happen; otherwise, if the act was one which defendant should not have reasonably anticipated.—Hale v. Pacific Telephone & Telegraph Co., 183 P. 280.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

☞72 (Cal.App.) An instruction that if deceased, who was struck by an automobile, was suddenly put in peril by defendant's fault, he might be excused for omitting some precautions or making an unwise choice, and running directly into danger while bewildered, held correct.—Randolph v. Hunt, 183 P. 358.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⚡74 (Cal.App.) One is not guilty of contributory negligence in attempting to rescue another placed in peril by the negligent act of third person, unless he acts with a recklessness unwarranted by the judgment of a prudent man.—*McClure v. Southern Pac. Co.*, 183 P. 248; *Scherrer v. Same*, Id. 250.

(B) Children and Others Under Disability.

⚡85(1) (Cal.App.) The defense of contributory negligence may be invoked in actions on behalf of children who are of an age sufficient to exercise discretion for the avoidance of an injury to themselves, the age of discretion depending on the circumstances and the intelligence and capacity of the child.—*Todd v. Orcutt*, 183 P. 968.

⚡85(2) (Cal.App.) A child is only required to exercise the degree of care expected from a child of his age and capacity under like circumstances.—*Todd v. Orcutt*, 183 P. 963.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

⚡111(1) (Cal.App.) An allegation that defendant so carelessly and negligently drove and managed his automobile that it struck the automobile in which plaintiff was riding was sufficient, though in general terms.—*Saylor v. Taylor*, 183 P. 843, 845.

⚡111(1) (Cal.App.) A complaint charging negligence in general terms is sufficient.—*Todd v. Orcutt*, 183 P. 963.

(C) Trial, Judgment, and Review.

⚡136(8) (Wash.) Contributory negligence is a question for the jury, though the facts are not in dispute, if different minds may honestly draw different conclusions from them.—*Kent v. Walla Walla Valley Ry. Co.*, 183 P. 87.

⚡136(9) (Cal.App.) Where reasonable minds may draw different conclusions on the question of negligence, the issue is for the jury and its finding conclusive.—*Randolph v. Hunt*, 183 P. 358.

⚡142 (Cal.App.) Where the complaint on behalf of an infant run down by a motorcar alleged that he was a child of tender years, but did not allege that he was non sui juris in so far as legal accountability for contributory negligence is concerned, no such issue was tendered, and no finding thereon was necessary.—*Todd v. Orcutt*, 183 P. 963.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

See Deeds, ⚡149.

NEW TRIAL.

See Appeal and Error, ⚡110, 502, 782, 837, 856, 867, 877, 933, 1005, 1024, 1078, 1172, 1177; Criminal Law, ⚡922-939, 1099, 1124; Justices of the Peace, ⚡128.

II. GROUNDS.

(F) Verdict or Findings Contrary to Law or Evidence.

⚡70 (Cal.App.) Where the jury found in favor of a motorist who ran down plaintiff at a much-traveled corner, where there was evidence that the motorist was proceeding at a speed of 25 miles an hour, and his claim was that plaintiff stepped back into his path to avoid another car proceeding in the same direction at an equal or greater speed, *held*, that an order granting a motion for new trial on the ground that the motorist was proceeding at a negligent rate of speed was proper.—*Clohan v. Kelso*, 183 P. 349.

⚡71 (Cal.) In a jury trial, a party is entitled to two decisions on the evidence, one by the

jury and one by the trial court, and the latter is not bound by a conflict in the evidence.—*Smith v. Royer*, 183 P. 660.

⚡76(2) (Cal.App.) Where plaintiff recovered \$1,250 for damages for trespass by cattle resulting in the destruction of certain fig trees, *held*, that trial court would not abuse its discretion in granting a new trial on ground that the amount of damages awarded was entirely disproportionate to the actual loss.—*Leach v. Klein*, 183 P. 703.

(H) Newly Discovered Evidence.

⚡99 (Cal.App.) Denial of a motion for new trial for newly discovered evidence is left largely to discretion of trial court.—*Nadeau v. Lynch*, 183 P. 278.

⚡104(1) (Cal.App.) The test as to whether a new trial shall be granted for proposed new evidence objected to as cumulative is whether it would probably change the result.—*Leach v. Klein*, 183 P. 703.

⚡108(5) (Ariz.) In a servant's action for loss of an eye, where defendant master secured a continuance to obtain evidence that plaintiff had lost the sight of such eye previously, and later, after announcing ready for trial, introduced evidence thereon, *held*, that defendant was not entitled to a new trial for newly discovered evidence, where the full contents of the letter of new witness to former injury were not in the record, and the court is not satisfied that a different verdict would have resulted, had such witness testified.—*United Verde Copper Co. v. Wiley*, 183 P. 737.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

⚡128(5) (Cal.App.) Plaintiff's specification of particulars in which the evidence was claimed to be insufficient to support verdict for defendant that there was no evidence to sustain the verdict was an insufficient specification under Code Civ. Proc. § 659, before its amendment in 1915.—*Cormond v. United Railroads of San Francisco*, 183 P. 218.

⚡139 (Cal.App.) Where the bill of exceptions was made up and agreed to by the parties, and contained all the proceedings and material evidence and testimony, and stipulated that all the evidence was used and referred to at the hearing of plaintiff's motion for new trial, defendant waived the defect in the notice of intention to move for new trial that it insufficiently specified the particulars in which the evidence was claimed to be insufficient to sustain the verdict for defendant.—*Cormond v. United Railroads of San Francisco*, 183 P. 218.

⚡159 (Cal.App.) On plaintiff's motion for new trial on ground of insufficiency of evidence to sustain judgment for defendant, the latter is not entitled to have evidence disregarded, though it was improperly admitted.—*Globe Grain & Milling Co. v. Drenth*, 183 P. 285.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NOTICE.

See Animals, ⚡70, 81, 82; Appeal and Error, ⚡422, 428, 502, 553, 856, 1039; Attorney and Client, ⚡76; Bills and Notes, ⚡370, 498, 526; Brokers, ⚡10, 44; Carriers, ⚡218; Certiorari, ⚡37, 46; Chattel Mortgages, ⚡60, 85; Corporations, ⚡121; Covenants, ⚡88; Dismissal and Nonsuit, ⚡60; Divorce, ⚡181; Execution, ⚡242; Guaranty, ⚡45, 46; Guardian and Ward, ⚡96; Highways, ⚡30, 90, 127; Injunction, ⚡57; Insurance, ⚡364, 539, 665; Joint Ventures, ⚡7; Judgment, ⚡

113; *Lis Pendens*, ¶22; *Mechanics' Liens*, ¶132, 157; *Mines and Minerals*, ¶29; *Municipal Corporations*, ¶89, 217, 294; *New Trial*, ¶139; *Records*, ¶17; *Sales*, ¶285, 441; *Vendor and Purchaser*, ¶85, 86, 101, 229, 231, 334, 336.

NOVATION.

See *Husband and Wife*, ¶285½.

NUISANCE.

See *Constitutional Law*, ¶237; *Municipal Corporations*, ¶604, 605, 611, 625, 626, 628; *Waters and Water Courses*, ¶182.

II. PUBLIC NUISANCES.

(B) Rights and Remedies of Private Persons.

¶72 (Cal.) To entitle a private party to sue to enjoin a public nuisance, he must allege and prove facts showing that it causes special injury to himself in person or property, and of a character different in kind from that suffered by the general public.—*Frost v. City of Los Angeles*, 183 P. 342.

OATH.

See *Executors and Administrators*, ¶29.

OBLIGATION OF CONTRACTS.

See *Constitutional Law*, ¶145.

OFFICERS.

See *Attorney General*; *Chattel Mortgages*, ¶85; *Constitutional Law*, ¶82, 63; *Corporations*, ¶422; *Counties*, ¶74; *Criminal Law*, ¶519; *District and Prosecuting Attorneys*; *Embezzlement*, ¶26; *Indictment and Information*, ¶125; *Insurance*, ¶665; *Judges*; *Justices of the Peace*; *Larceny*, ¶18; *Levees*, ¶9, 11; *Mandamus*, ¶4, 14, 102, 168; *Municipal Corporations*, ¶124, 216, 358, 365, 703, 705, 706; *Receivers*; *Schools and School Districts*, ¶36.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

¶96 (Cal.App.) A statutory provision that a certain duty shall be performed by a specified officer means that such officer, and no other person, is chargeable with the performance of such duty, and when performed by the officer or by his authorized deputy the law regards the duty as performed by the officer, and a statutory provision for full per diem compensation of such public officer fixes the amount to be paid, regardless of who actually performs the service.—*Sarter v. Siskiyou County*, 183 P. 852.

¶100(1) (Wash.) Under Const. art. 2, § 25, and article 11, § 8, forbidding that "compensation of any public officer be increased" during his term of office, and in view of article 4, § 13, and article 3, § 25, payment to port district commissioners elected to serve without compensation, under Laws 1911, p. 412 (Rem. Code 1915, §§ 8165—1 et seq.), of \$3,000 a year salary, pursuant to election to pay commissioners a salary, under section 5, as amended by Laws 1917, p. 502, § 2, held violative of spirit, if not letter, of Constitution.—*State v. Wardall*, 183 P. 67.

¶100(2) (Cal.App.) The provision of Const. art. 11, § 9, that compensation allowed by law to county officers cannot be increased during the term for which he was elected, applies as well to a county surveyor of a county of the twenty-ninth class whose compensation consists of fees or salary per diem for work done as to those whose compensation consists of specified salaries.—*Sarter v. Siskiyou County*, 183 P. 852.

¶100(2) (Wash.) Commissioner of port district is a public officer within Const. art. 2, §

25, prohibiting increase or decrease in compensation of "public officer" during his term of office.—*State v. Wardall*, 183 P. 67.

Port district commissioner, elected and inducted into office under law providing that no compensation should be paid, but subsequent to enactment of law authorizing election to pay salary, and prior to the election whereby salary was voted, came within constitutional prohibitions against increase in compensation during term of office.—*Id.*

OIL.

See *Action*, ¶50; *Customs and Usages*, ¶18; *Evidence*, ¶457; *Joint Adventures*, ¶5; *Jury*, ¶14; *Limitation of Actions*, ¶65; *Lis Pendens*, ¶24, 26.

OPTIONS.

See *Corporations*, ¶116.

OPTOMETRY.

See *Constitutional Law*, ¶88, 328; *Physicians and Surgeons*, ¶2, 6.

OSTEOPATHY.

See *Constitutional Law*, ¶328; *Physicians and Surgeons*, ¶6.

PARENT AND CHILD.

See *Adoption*; *Bastards*, ¶37; *Deeds*, ¶56, 194, 208; *Divorce*, ¶182; *Guardian and Ward*; *Infants*.

¶2(2) (Utah) Divorced father of boy living with his maternal grandmother and his mother's second husband held entitled to the custody of the boy in order that he might be adopted by his father's sister and her husband, fit persons by character and means, and anxious to have the child, despite a strong affection between the boy and his stepfather and grandmother.—*Farmer v. Christensen*, 183 P. 328.

¶2(3) (Utah) Other things equal, the natural parent of a child is entitled to its care, custody, and control, but may by agreement or conduct deprive himself of his natural right to confer it upon others; the guiding principal always being the best interests of the child for the present and future.—*Farmer v. Christensen*, 183 P. 328.

¶3(1) (Cal.App.) A minor's right to support and maintenance by its father may not be limited or contracted away by the parents.—*Fernandez v. Aburrea*, 183 P. 366.

PARTIES.

See *Action*, ¶50.

For parties on appeal and review of rulings as to parties, see *Appeal and Error*.

For parties to particular proceedings or instruments, see also the various specific topics.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

¶76(1) (Cal.App.) The objection that an action is not brought by the proper party plaintiff is waived by failure to raise the point by demurrer or answer.—*Fernandez v. Aburrea*, 183 P. 366.

¶76(5) (Cal.App.) That the complaint in action by an administrator fails to show capacity to sue, is not ground for demurrer, but such defect can be taken advantage of only by answer.—*Bank of Commerce & Trust Co. v. Humphrey*, 183 P. 222.

¶92(4) (Cal.App.) Complaint is not subject to demurrer for misjoinder of defendants; it not appearing from the face of the complaint that any defendant is improperly joined.—*Cameron v. City of Richmond*, 183 P. 604.

¶95(5) (Cal.) Where the agent of the real defendant, a corporation, appearing specially, re-

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

ceived the summons and knew the contents of the complaint, there was proper service of process, despite a misnomer of defendant, which the court, having acquired jurisdiction of the person of defendant, as well as the subject-matter of the suit, possessed the power to correct.—Thompson v. Southern Pac. Co., 183 P. 153.

PARTITION.

See Attorney and Client, 6144; Limitation of Actions, 6179; Tenancy in Common, 628.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

677(2) (Cal.App.) Though the agreement between plaintiffs and defendant in partition, joint owners of land, provided a sale should only be made by all of the parties uniting in a joint transfer, under Code Civ. Proc. § 752, the court could order a sale for purposes of division of proceeds; it appearing that a partition could not be made without great prejudice to the joint owners.—Vollmer v. Wheeler, 183 P. 264.

95 (Cal.) The land set off to one party in a simple partition suit to sever the unity of title and segregate the possession is not "recovered" by such party, partition in such case merely transforming the right of common possession of the whole tract into a right to the exclusive possession of the same interest or share as represented by a parcel set off in severalty.—Bennett v. Potter, 183 P. 156.

114(6) (Cal.) Code Civ. Proc. § 796, contemplates that allowances for attorney's fees in a partition proceeding be made to the party, and not directly to the attorneys.—Bennett v. Potter, 183 P. 156.

PARTNERSHIP.

See Joint Ventures, 64.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(D) Actions for Dissolution and Accounting.

327(6) (Or.) In suit between partners for an accounting of commissions earned on a sale, which sale was not consummated by the buyer, but rescinded, and the property resold to the buyer's wife, to be available as a ground of recovery, fraud, collusive or otherwise, in that such second sale to the wife was a subterfuge to prevent plaintiff from receiving his share of the commission earned on the original sale, must be pleaded.—Runnells v. Leffel, 183 P. 756.

PATENTS.

See Evidence, 6434; Indians, 618; Municipal Corporations, 6330, 339.

X. TITLE, CONVEYANCES. AND CONTRACTS.

(C) Licenses and Contracts.

214 (Cal.App.) In view of circumstances, purchasers of territorial rights in a patent held not barred by laches from maintaining their suit to cancel the contract as induced by fraud, because they did not formally rescind until June 1st, the contract having been made March 23d, after efforts to obtain repayment of money received by the seller.—Bechtold v. Coney, 183 P. 841.

215 (Cal.App.) Purchasers of territorial rights in a patent were entitled to cancel the contract for either of two misrepresentations of the seller that he owned the patent, whereas he only owned an undivided sixth interest, and that he would furnish a machine as designated, together with specifications for manufacture, which he never intended to do; Civ. Code, § 1572, defining "actual fraud" to be a promise

made without intention to perform.—Bechtold v. Coney, 183 P. 841.

PAUPERS.

See Appeal and Error, 6684, 709.

PAYMENT.

See Account Stated, 61; Appeal and Error, 61050, 1107; Assumpsit, Action of, 68; Bankruptcy, 6186; Banks and Banking, 6107, 111, 112, 260; Bills and Notes, 6129, 155, 405, 430, 468, 527, 538; Boundaries, 646; Brokers, 663, 75; Certiorari, 643, 60; Constitutional Law, 670; Corporations, 6155, 240; Drains, 685; Evidence, 6441; Highways, 6128; Insurance, 690, 186, 198, 349, 362, 364, 646, 668; Interest, 643; Levees, 69; Limitation of Actions, 6155; Mandamus, 614; Mechanics' Liens, 6157, 264, 315; Money Received, 61; Municipal Corporations, 685, 1038; Officers, 6100; Principal and Agent, 6101, 105, 106, 160½; Principal and Surety, 6115; Replevin, 672; Sales, 632, 196, 202, 218½; Taxation, 6526; Tender; Tenancy in Common, 628; Trial, 6194, 243; Vendor and Purchaser, 615, 86, 93, 94, 95, 101, 148, 170, 187, 334, 336, 339, 342.

I. REQUISITES AND SUFFICIENCY.

4 (Ok.) It is not essential that payment should be made by the debtor himself; and, though it is made by one who is not a party to a contract and not in privity with the debtor, yet if accepted in satisfaction of the contract it will discharge the obligation.—Wallingford v. Alcorn, 183 P. 726.

36 (Ok.) Notwithstanding Rev. Laws 1910, § 4283, providing that a negotiable note is payable in money only and without any condition not certain of fulfillment, the parties may by agreement fix a price at which property delivered by debtor to creditor shall be valued, and when so received it is a payment and equivalent to a payment of so much money.—Wallingford v. Alcorn, 183 P. 726.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

63(1) (Ok.) In action on a joint note, all the parties being officers and stockholders of a company, evidence that after its execution plaintiff as manager sold property of company and converted proceeds to his own use, offered to prove the plea of payment, held inadmissible.—Wallingford v. Alcorn, 183 P. 726.

PENALTIES.

See Appeal and Error, 61107; Guaranty, 621; Vendor and Purchaser, 6180.

PERPETUITIES.

6(10) (Cal.App.) Tripartite agreement, whereby vendors conveyed land to third parties to secure payment of purchase price and whereby third parties agreed to sell separate tracts of land upon purchaser's demand and apply certain per cent. of proceeds to discharge of purchase-money indebtedness and convey interest in outstanding contracts and remaining portion of land to purchasers upon payment to vendors of purchase price, did not suspend power of alienation beyond period of lives in being under Civ. Code, § 715, since purchaser could at any time secure conveyance.—Withers v. Bousfield, 183 P. 855.

9(7) (Cal.) Provision in will that when grandson shall become 21 trustee shall segregate trust fund and any accumulations thereof and convey one part to the son, etc., though void by Civ. Code, § 723, as providing for further accumulation of income of other half, until grandson becomes 25 years of age, held not to

make invalid the gift of the income in view of section 733.—*In re Duffill's Estate*, 183 P. 337.

PHYSICAL EXAMINATION.

See Damages, ¶206.

PHYSICIANS AND SURGEONS.

See Constitutional Law, ¶88, 328; Damages, ¶206; Limitation of Actions, ¶31; Master and Servant, ¶405; Witnesses, ¶219.

¶2 (Cal.) St. 1913, p. 1097, prohibiting the practice of optometry without a license, is not invalid.—*Ex parte Rust*, 183 P. 548.

¶6(3) (Cal.) Optometry Act 1913, § 10, permitting "physicians and surgeons" to treat eyes, etc., is inapplicable to osteopaths, in view of Medical Act of 1913, providing that osteopaths be given different certificates from those issued to physicians and surgeons, and prior legislation in which osteopaths were placed on a different basis than physicians and surgeons.—*Ex parte Rust*, 183 P. 548.

¶6(5) (Cal.) A license to practice "osteopathy" does not authorize the practice of optometry, since the quoted word does not include the treatment of eyes, fitting of glasses, etc.—*Ex parte Rust*, 183 P. 548.

PLEADING.

See Action, ¶48; Courts, ¶99, 212; Equity, ¶65; Limitation of Actions, ¶177, 179, 183.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

¶34(1) (Cal.App.) Under Code Civ. Proc. § 452, a complaint should be liberally construed with a view to substantial justice, and the liberal spirit is carried into Const. art 6, § 4½; hence a complaint, though not a model pleading, is not open to special demurrer, where the facts pleaded disclosed the cause of action.—*Menefee v. Oxnem*, 183 P. 379.

¶34(7) (Or.) A complaint, in a suit to reform a deed by striking out a purported obligation of purchaser to pay a note and mortgage, and relieve him from liability to a deficiency judgment (L. O. L. § 426), although subject to demurrer for not giving a more specific explanation of plaintiff's own conduct to show that the mistake did not arise from his own gross negligence, held sufficient as against an objection thereto urged for the first time upon appeal, as every reasonable inference should be given in favor of the complaint that can be drawn therefrom.—*Welch v. Johnson*, 183 P. 776.

¶35 (Cal.App.) The complaint for personal injury from a leopard in a circus being predicated on the keeping of vicious and dangerous animal, known to defendant to be such, would have been sufficient without allegation of negligence, so that any averment thereof may be treated as surplusage.—*Opelt v. Al G. Barnes Co.*, 183 P. 241.

¶36(3) (Cal.App.) New matter in answer, constituting a defense, will be deemed to be controverted, and may not be regarded as evidence in favor of plaintiff.—*Globe Grain & Milling Co. v. Drenth*, 183 P. 285.

¶36(3) (Cal.App.) Defendant may not contend he should not have been sued as administrator, but individually; the complaint, which, after setting forth defendant's representative capacity of administrator, alleged he as such administrator obtained possession of money and property, and, after demand for delivery thereof to plaintiffs, refused and still refuses to so deliver them, not having been demurred to, but such allegations having been specifically admit-

ted by the answer.—*Green v. Hynes*, 183 P. 568.
 ¶36(3) (Wash.) In an action against a restaurant keeper for breach of his contract to furnish garbage for use by plaintiff in fattening hogs, where defendant in his answer alleged that plaintiff left silverware from the garbage in the hogpens, retained it for his own use, or gave it away, so that defendant warned him, defendant cannot contend he was unaware of plaintiff's business of feeding hogs, and its dependence on the garbage.—*Nelson v. Davenport*, 183 P. 132.
 ¶36(5) (Cal.App.) Failure of answer, in action for breach of contract of sale, to deny demand for delivery, alleged in complaint, not only excuses plaintiff from making the fact clear, but justifies the finding of such demand.—*Jacobson-Reimers Co. v. Tozai Co.*, 183 P. 466.
 ¶37 (Cal.App.) Omission of an allegation necessarily implied from other allegations is immaterial.—*Royal Indemnity Co. v. Midland Counties Public Service Corporation*, 183 P. 960.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

¶48 (Okla.) Under the Code provisions, it is not necessary that a pleading state facts to bring the cause under any particular form of action at common law, but a petition is sufficient under Rev. Laws 1910, § 4737, if it states facts in a plain and concise manner which entitle plaintiff to some legal or equitable relief.—*Turben v. Douglass*, 183 P. 881.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

¶93(1) (Or.) L. O. L. § 74, as amended by Laws 1911, p. 144, providing defendant may set forth by answer as many counterclaims as he has, including pleas in abatement, does not change the rule that defenses must be consistent, and that, where answer first denies a thing and then admits it, the latter controls; so a plea in abatement, on the ground that jurisdiction of the person had not been acquired, is overcome by a plea to the merits, in effect an allegation of general voluntary appearance.—*Duncan Lumber Co. v. Willapa Lumber Co.*, 183 P. 476.

(C) Traverses or Denials and Admissions.

¶122 (Cal.App.) In a personal injury action by an infant by a guardian ad litem, defendant's denial of the appointment of such guardian upon information and belief is insufficient to require plaintiff to submit proof thereon; the order and records affording defendant ready means of ascertaining the truth of the allegation.—*Saylor v. Taylor*, 183 P. 843, 845.

¶126 (Okla.) An answer which confines itself to denying, in the same words, an allegation of the petition, and does not attempt to deny its substance and spirit, admits the material averments of the petition, and only raises an immaterial issue.—*State v. Ross*, 183 P. 918.

¶129(1) (Cal.) Allegation of complaint is admitted by defendant's failure to deny it in the answer.—*House v. Piercy*, 183 P. 807.

(E) Set-Off, Counterclaim, and Cross-Complaint.

¶140 (Cal.) In action for breach of contract, refusing to receive a cross-complaint for a rescission of the contract after defendant had rested held not an abuse of discretion.—*Slankard v. Wagnon*, 183 P. 562.

¶148 (Nev.) If an averment of marriage and residence are necessary and indispensable facts to be stated in a complaint for support and maintenance, they are equally so in a cross-complaint in a divorce action, regardless of the fact that the plaintiff has alleged that there was a marriage and that the parties resided in the

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state.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

⇒166 (Or.) Where following the words, "This defendant admits and alleges," the answer makes affirmative statements which in form are new matter, but in substance amount merely to denials, a reply is unnecessary.—Welch v. Johnson, 183 P. 776.

V. DEMURRER OR EXCEPTION.

⇒192(2) (Cal.) A wife's complaint for separate maintenance is not subject to be stricken because uncertain in its allegations of cruelty, but the proper remedy is a demurrer, under Code Civ. Proc. § 430, upon ground that complaint is uncertain, etc.—Mattson v. Mattson, 183 P. 443.

⇒198 (Cal.App.) A joint demurrer by all the defendants must be overruled, if the complaint is good against any of them.—Cameron v. City of Richmond, 183 P. 604.

⇒204(2) (Okla.) A general demurrer to the petition as a whole should be overruled, if any paragraph of petition is good and states a cause of action.—Jackson v. Levy, 183 P. 506.

⇒204(2) (Okla.) Where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, the demurrer should be overruled.—Tucker v. Leonard, 183 P. 907.

⇒204(3) (Wash.) Where a pleader attempted to state two causes of action, but failed in his facts as to one of them, stating only one good cause of action, it is the duty of the court to overrule a demurrer and retain the case for trial upon the cause of action well stated, under Rem. Code 1915, § 259, subd. 5, and section 286.—Konick v. Champneys, 183 P. 75.

⇒205(1) (Okla.) Where a pleading states any facts upon which a pleader is entitled to any relief under the law, a general demurrer should be overruled.—Schreiner v. City Nat. Bank of McAlester, 183 P. 906.

⇒205(2) (Cal.App.) Where a complaint attempted to allege a cause of action for breach of contract to convey and a cause of action for the return of earnest money paid, and the only demurrer interposed was a general one, if the complaint states sufficient facts for recovery of the earnest money, disregarding the other allegations, it must be held sufficient.—Hay v. Hollingsworth, 183 P. 582.

⇒214(1) (Cal.App.) On appeal from order sustaining demurrer to complaint, facts alleged in complaint are binding upon both parties and court.—Lanktree v. Lanktree, 183 P. 954.

⇒214(1) (Utah) On demurrer to a complaint, its allegations must be taken as true.—Kennedy v. Burbidge, 183 P. 325.

VI. AMENDED PLEADINGS AND REPLEADER.

⇒236(4) (Cal.App.) In an action against a canal company for the cost of completing its canal brought by the surety for the contractor on an express contract, the trial court's refusal to allow a proposed amended complaint declaring on an implied contract was not an abuse of discretion, where the case was pending 10 months before trial, and the lower court's decision was not made for more than a year thereafter, and 5 months passed after remand of the case by the appellate court before plaintiff asked leave to amend.—Watterson v. Owens River Canal Co., 183 P. 816.

⇒236(6) (Wash.) If plaintiff had asked leave to amend complaint specifically alleging items of damages, so as to include another item of damages, it would have been the duty of the court to permit it, unless defendant would have been misled, taken by surprise, or injured thereby.—Anderson v. Rucker Bros., 183 P. 70.

⇒248(17) (Cal.App.) Amended complaint alleging plaintiff's ownership of corporate stock, delivery of the certificate to defendant under a pooling agreement, sale of the franchise and property of the company, with extinguishment of the trust and conversion by defendant of plaintiff's shares to his own use, held not to have introduced an entirely new and different cause of action, the original complaint having alleged delivery of the stock to defendant as trustee under the pooling agreement, sale of the company's property, and defendant's refusal to account to plaintiff for his proportionate share of the proceeds; the remedy only, not the cause of action, having been changed by the amendment.—Schaad v. Barceloux, 183 P. 716.

VII. SIGNATURE AND VERIFICATION.

⇒291(4) (Okla.) In action for foreclosure of mortgage securing a note, defendant by filing his unverified denial, admitted execution of mortgage.—Jackson v. Levy, 183 P. 505.

VIII. PROPERT, OYER, AND EXHIBITS.

⇒312 (Nev.) In an action by subcontractor against the surety on contractor's bond, the fact that the bond denominated the subcontractor as the electric works, while the complaint named it as the electrical works, is immaterial under Rev. Laws, §§ 5080, 5081, the variance probably being due to a mere clerical error.—U. S. Fidelity & Guaranty Co. v. Rene Electrical Works, 183 P. 386.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

⇒330 (Wash.) Rem. & Bal. Code, § 284, requiring service of a copy of items of an account upon adverse party upon demand therefor in order to introduce evidence thereof did not require land purchaser, pleading damages for vendor's failure to plow land and remove brush therefrom in compliance with contract, to serve vendor with an itemized statement of damages upon vendor's demand therefor, to entitle him to introduce evidence as to such damages; the words "items of account" not including items of damages for breach of land contract.—Kelly v. Hinkhouse, 183 P. 86.

XI. MOTIONS.

⇒343 (Wyo.) In an action to enjoin the foreclosure of a chattel mortgage by notice and sale, a motion for judgment on the pleadings on the ground that new matter constituting a complete defense was pleaded in the answer, to which no reply was filed, was properly denied, where the alleged new matter merely amounted to an allegation that a tender set out in the complaint was insufficient because attorney's fees were not tendered, where the notice of foreclosure as set out in the petition shows its publication three days after tender, and does not purport to be the act of an attorney.—H. E. Wright & Co. v. Douglas, 183 P. 786.

⇒354(1) (Cal.) A wife's complaint for separate maintenance is not subject to be stricken because uncertain in its allegations of cruelty, but the proper remedy is a demurrer under Code Civ. Proc. § 430, upon ground that complaint is uncertain, etc.—Mattson v. Mattson, 183 P. 443.

⇒366 (N.M.) Under Code 1915, § 4136, where parts of a complaint are stricken out, but enough remains to constitute a cause of action, plaintiff need not amend to prevent a default, but may except to the ruling striking out such parts, go to trial on what is left, and on appeal have a review of the ruling.—Bisetti v. Roberts, 183 P. 403.

XII. ISSUES, PROOF, AND VARIANCE.

⚡376 (Cal.App.) In action against constable for conversion of property sold under execution against third persons after claim made by plaintiff, allegations in constable's second and separate defense that a verified claim of ownership had been served upon him did not relieve plaintiff of necessity of proving service of such claim in order to establish its case under Code Civ. Proc. § 689, since such allegation, being new matter constituting a defense, was deemed controverted.—Globe Grain & Milling Co. v. Drenth, 183 P. 285.

⚡385 (Wash.) Where there is a bill of particulars, proof will be restricted to the matters therein set out.—Anderson v. Rucker Bros., 183 P. 70.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡403(3) (Or.) Where complaint correctly set forth note sued upon, except that it omitted one phrase, but answer set forth note correctly and reply admitted such portion of answer, *held*, that pleadings construed together referred to note introduced in evidence.—Nickell v. Bradshaw, 183 P. 12.

⚡406(5) (Cal.App.) In an action to foreclose a lien for improvement of a street intersection, objection to the complaint that the improvement ordinance was pleaded as to its passage, approval, and existence by recital, instead of directly, should have been made by special demurrer, and, not having been so made, was waived.—Hutton v. Newhouse, 183 P. 276.

⚡408 (Nev.) An objection that the complaint utterly fails to state a cause of action may be raised at any time.—Nielsen v. Rebard, 183 P. 984.

⚡433(6) (N.M.) Where a material fact omitted from a complaint is fully litigated without objection as if it had been put in issue by pleadings, it is duty of trial court to treat complaint as having been properly amended in aid of judgment.—Springer v. Wasson, 183 P. 398.

PLEDGES.

⚡55 (Cal.App.) A pledgee may bring an action at law and recover the amount of his debt from his debtor by independent suit for personal judgment without selling or foreclosing the pledge, and is entitled to the same relief where he has sought to procure a sale of the pledge by judicial process, but has failed because the pledge is commercial paper and not salable.—Traders' Bank of Los Angeles v. Wilcox, 183 P. 256.

⚡56(1) (Cal.App.) The provisions of Civ. Code, § 3006, as to a sale of securities by the pledgee, were designed for the benefit of the pledgor, and may be waived by him.—Traders' Bank of Los Angeles v. Wilcox, 183 P. 256.

The pledgee of commercial paper pledged as collateral is bound to collect, and, if necessary, to sue upon it as and when it falls due, and apply it on the debt secured; and, in the absence of compelling reasons, a court of equity will not decree the sale of such pledged collateral before its maturity; the right to collect the debt pledged when it falls due and to sue therefor, if necessary, being an adequate legal remedy.—Id.

Both under the common law and Civ. Code, §§ 3006, 3011, where personal evidences of indebtedness are pledged as collateral security, no right is created in the pledgee, in the absence of express agreement, to personally cause a sale of the security, and he is entitled to equitable relief, and an order for judicial sale only when there are special conditions shown not in the contemplation of the parties when the contract was made, and imposing additional hardship on the pledgee if required to rely on collection at maturity.—Id.

POLICE.

See False Imprisonment, ⚡3; Municipal Corporations, ⚡708.

POLICE POWER.

See Constitutional Law, ⚡81; Municipal Corporations, ⚡589-628.

POOL

See Corporations, ⚡116.

PORTS.

See Officers, ⚡100.

POST OFFICE.

See Bills and Notes, ⚡526; Evidence, ⚡71; Insurance, ⚡665; Sales, ⚡32.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRINCIPAL AND AGENT.

See Animals, ⚡82; Appeal and Error, ⚡171, 1051; Attorney and Client; Brokers; Insurance, ⚡76, 90, 186, 668; Parties, ⚡95; Sales, ⚡288; Vendor and Purchaser, ⚡15, 334, 339.

I. THE RELATION.**(A) Creation and Existence.**

⚡24 (Okl.) Agency, when made an issue, is a question of fact, to be determined, in proper cases, by the jury, from all the facts and circumstances in evidence.—Holmes v. Halstid, 183 P. 969.

(B) Termination.

⚡43(1) (Cal.App.) One's agency to deliver for the donor property to the donee is revoked by death of donor prior to delivery.—Green v. Hynes, 183 P. 568.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(A) Powers of Agent.**

⚡99 (Cal.) When authority is deduced from recognition of certain acts, it must be limited to the presumption of other acts of the same general kind, and cannot be extended to acts of a wholly different nature.—Post v. City and County Bank, 183 P. 802.

⚡99 (Wash.) A principal is bound, not only by an agent's acts within his actual authority, but also by acts within the agent's apparent authority.—Petersen v. Pacific American Fisheries, 183 P. 79.

⚡99 (Wash.) Architect is not, as such, a general agent, and persons dealing with him are bound by the general rules of agency.—Columbia Security Co. v. Aetna Accident & Liability Co., 183 P. 137.

⚡101 (1) (Wash.) In an action for breach of a contract to purchase scrap iron, in view of the whole record, *held* that the trial court properly instructed that plaintiff seller's agent had no authority to make any modified contract for plaintiff when defendant buyer refused to pay for a car of the shipment; plaintiff's agent merely having been sent on to make collection.—Bernstein v. Schwartz, 183 P. 105.

⚡101(4) (Wash.) Authority given architect to interpret plans and specifications and condemn material as unsound did not empower him to recast drawings and specifications upon a matter already perfectly clear and explicit,

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

thereby increasing the total building cost so as to threaten, if not defeat, owner's rights under bond indemnifying owner against cost exceeding amount mentioned in the contract.—*Columbia Security Co. v. Aetna Accident & Liability Co.*, 183 P. 137.

⇒105 (4) (Wash.) A purchaser is warranted in paying purchase price to seller's agent if the agent is in fact authorized to receive payment, or the seller has clothed him with indicia of authority to receive payment, as by intrusting him with possession of the goods.—*Petersen v. Pacific American Fisheries*, 183 P. 79.

Where a lease required the lessee to sell certain stock of the lessor, the lessor's action in assisting lessee to make the sale did not revoke the lessee's powers under the lease, or require a purchaser to pay the purchase price direct to the lessor.—*Id.*

⇒106 (Cal.) Where stockholder, upon request of president of corporation, gave bank note to secure loan to corporation, the president was not stockholder's ostensible agent to receive the collateral upon payment of note, though president had theretofore made partial payment on note and secured extension thereof, since bank should have assumed that president, in making such payment, acted for himself and corporation and not for stockholder, and since authority to make partial payment, even if it did exist, did not, under Civ. Code, §§ 2300, 2317, create ostensible authority to receive the collateral.—*Post v. City and County Bank*, 183 P. 802.

That one has been given authority to make payment on note does not, under Civ. Code, §§ 2300, 2317, make him the maker's ostensible agent to receive security deposited with payee.—*Id.*

Where stockholder's note, given bank to secure loan to corporation, provided that the collateral should be returned to stockholder, bank, in delivering collateral to president of the corporation upon president's payment of note without a written order from stockholder, or communicating with stockholder before so doing, failed to exercise ordinary care within Civ. Code, § 2334, making principal bound by acts of agent under ostensible authority where person without want of ordinary care has incurred a liability or parted with value upon faith thereof.—*Id.*

Where one who had previously made partial payment on note purported to be maker's agent, and in paying up note claimed to have authority to receive the collateral, payee, in reposing confidence in purported agent and in delivering collateral without ascertaining whether he in fact had authority, is liable for loss upon purported agent's conversion of collateral, under Civ. Code, § 3543.—*Id.*

⇒119 (1) (Wash.) Presumptively an agent employed to make contracts has no power to rescind them, his duty being to acquire interests, and not to give them away, while he has no implied power to waive or give up rights or interests of his principal.—*Bernstein v. Schwartz*, 183 P. 105.

⇒120 (8) (Wash.) In an action for damages for breach of a contract to purchase scrap iron, evidence was inadmissible to show a special agency in plaintiff's salesman to make contracts with a particular person or company other than defendant buyer.—*Bernstein v. Schwartz*, 183 P. 105.

(B) Undisclosed Agency.

⇒143(2) (Cal.App.) The benefits to be derived from a transaction may always be assigned, and they may likewise always be enforced by an undisclosed principal, where full consideration has been rendered by the agent.—*Hay v. Hollingsworth*, 183 P. 582.

⇒143 (2) (Wash.) Owner could bring action on contractor's bond, though its secretary and general manager was named as owner in bond.—*Columbia Security Co. v. Aetna Accident & Liability Co.*, 183 P. 137.

(C) Unauthorized and Wrongful Acts.

⇒160½ (Wash.) Payment to an authorized agent discharges the indebtedness, although the agent misappropriates the payment.—*Petersen v. Pacific American Fisheries*, 183 P. 79.

(D) Ratification.

⇒172 (N.M.) Principal must ratify whole of agent's unauthorized act, or not at all, and cannot accept its beneficial results, and at same time avoid its burdens.—*Lawrence Coal Co. v. Shanklin*, 183 P. 435.

(F) Actions.

⇒188 (Cal.App.) In suit by an undisclosed principal for breach of a contract to convey, it was not necessary that the agent of plaintiff be joined as a party because of some after interest which he was to have in the land, had it been secured.—*Hay v. Hollingsworth*, 183 P. 582.

PRINCIPAL AND SURETY.

See Appeal and Error, ⇒187, 1039; Canals, ⇒15; Contracts, ⇒84; Guaranty; Guardian and Ward, ⇒175, 182; Indemnity; Mechanics' Liens, ⇒284, 315; Pleading, ⇒312; Witnesses, ⇒300.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

⇒87 (Wash.) Actual breach of contractor's bond occurs when liens are filed and established by the judgment of the court.—*Columbia Security Co. v. Aetna Accident & Liability Co.*, 183 P. 137.

III. DISCHARGE OF SURETY.

⇒88 (Cal.App.) Acceptance by a landlord from his tenants of a reduced rent for several months, for which he gave receipts in full, in no way altered or extended the liability of the sureties on the tenants' bond in the penal sum of \$3,000 to work their discharge.—*Dodge v. Chapman*, 183 P. 966.

⇒99 (Cal.App.) Sureties on the bond of tenants were not released as for any alteration of the tenant's contract by the landlord's act in accepting for several months amounts of rent less than was due under the lease, for which he gave receipts in full.—*Dodge v. Chapman*, 183 P. 966.

⇒101(1) (Cal.App.) The doctrine that the agreement by which an existing contract is changed must be valid and binding in order to discharge the surety has no application to a case where the agreement is by way of alteration of the original instrument.—*Nissen v. Ehrenpfort*, 183 P. 956.

⇒115(1) (Cal.) In an action by a contractor upon a bond of a subcontractor guaranteeing performance of the contract, the effect of contractor's premature payment of subcontractor's defaults would not be to release the surety from the whole bond, but only from the amount so paid.—*Siegel v. Hechler*, 183 P. 664.

Where a subcontract provided that subcontractor should save contractor free and harmless from any liability that might accrue from the former's default, and subcontractor's bond bound the surety company to the performance of such covenant, upon breach by subcontractor, the contractor's immediate payment of parties performing work and furnishing material, who were entitled to a lien under Code Civ. Proc. §§ 1184, 1187, was not premature, and did not violate the contract or affect the bond's validity.—*Id.*

⇒128(1) (Wash.) Mere silence on the part of a surety when informed of a subsequent modification by the principal and creditor of an outstanding contract, theretofore signed by them and surety, does not imply assent on surety's part.—*Columbia Security Co. v. Aetna Accident & Liability Co.*, 183 P. 137.

§129 (2) (Wash.) Increase of more than 20 per cent. in cost of work without written consent of surety on contractor's bond, in violation of provision of bond, was not fatal to action on bond, where such increase resulted from unauthorized order of architect, and where surety had signed bond with knowledge that changes in plans and specifications made such increase necessary.—*Columbia Security Co. v. Aetna Accident & Liability Co.*, 183 P. 137.

Surety, having signed contractor's bond with knowledge of changes in plans and specifications, which changes were made prior to such signing, is estopped to assert invalidity of bond by reason of changes.—*Id.*

IV. REMEDIES OF CREDITORS.

§149 (Wash.) The reasonableness and enforceability of a provision of contractor's bond, limiting time within which action shall be commenced for a breach, depends not alone upon the words of the bond and the contract, but also upon the facts of the particular case.—*Columbia Security Co. v. Aetna Accident & Liability Co.*, 183 P. 137.

Provision of contractor's bond, requiring suit to be brought within six months after date fixed in contract for completion of work, did not preclude owner from bringing action on bond after expiration of such period, where surety had induced owner to delay commencement of suit.—*Id.*

PRISONS.

See Criminal Law, §1144.

PRIVATE STATUTE.

See States, §131.

PRIVILEGE.

See Constitutional Law, §206.

PROCESS.

See Appeal and Error, §916; Courts, §11; Dismissal and Nonsuit, §80; Drains, §90; Parties, §85.

II. SERVICE.

(D) Privileges and Exemptions.

§119 (Cal.) Where plaintiff in action pending in another state comes into this state to attend the taking of a deposition by his adversary he is subject to service of a summons.—*Hand v. Superior Court of Los Angeles County*, 183 P. 456.

PROFITS.

See Joint Adventures, §7.

PROHIBITION.

See Courts, §99, 212; Divorce, §182.

I. NATURE AND GROUNDS.

§3 (2) (Cal.App.) Where court set aside verdict for defendant and entered judgment for plaintiff, defendant's remedy is not by writ of prohibition, even though court acted without jurisdiction, he having had a plain, speedy, and adequate remedy by appeal from judgment rendered.—*Dickerson v. Superior Court in and for Imperial County*, 183 P. 235.

§3 (5) (Cal.App.) That petitioner for writ of prohibition is unable, by reason of his financial condition, to comply with the statute by giving undertaking giving him right to retain possession of property is immaterial, and does not affect the question of adequacy of remedy afforded by appeal.—*Dickerson v. Superior Court in and for Imperial County*, 183 P. 235.

§10 (2) (Cal.App.) If, upon the assumption that an action is one of law, the court submits the case to a jury, and thereafter, upon rendition of verdict, concludes that issues are of an equi-

table character and repudiates the verdict, such ruling, like the denial of the jury trial to one entitled thereto, is not in excess of jurisdiction.—*Dickerson v. Superior Court in and for Imperial County*, 183 P. 235.

§11 (Cal.App.) If, upon the assumption that an action is one of law, the court submits the case to a jury, and thereafter, upon rendition of verdict, concludes that issues are of an equitable character and repudiates the verdict, such ruling, like the denial of jury trial to one entitled thereto, is mere error committed in the course of trial, and not in excess of jurisdiction.—*Dickerson v. Superior Court in and for Imperial County*, 183 P. 235.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Animals, §2.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §269-530.

PUBLIC LANDS.

See Mandamus, §14; Mines and Minerals, §9-29.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(A) Surveys.

§26 (Or.) Evidence to show a mistake in a United States survey, which has been acted on and upheld by its Land Department and is presumed to be correct, held not of the clear and cogent character necessary to authorize the court to correct it, and overthrow the credit due it as established by the field notes.—*Robertson v. Martin*, 183 P. 651.

(B) Entries, Sales, and Possessory Rights.

§35 (5) (Wash.) The only vested right acquired by one who successfully contests homestead entry is the preference right for 30 days, under Act Cong. May 14, 1880, § 2 (U. S. Comp. St. § 4587), to enter upon the lands, no vested interest in the land itself having been acquired, and the government having the right between date of contest and contestant's entry upon land to change the rules relating to acquisition of the land.—*Brown v. Baker*, 183 P. 89.

Filing of application to purchase land creates no vested right in the land, and does not affect the right of the government to change the land rules or to entirely withdraw the land from sale.—*Id.*

§36 (Wash.) Timber and Stone Act, § 1 (U. S. Comp. St. § 4671), authorizing sale of surveyed public lands valuable chiefly for timber, "at the minimum price of \$2.50 per acre," did not preclude land office from fixing a greater price; the words "minimum price" meaning the lowest price, and not a fixed price.—*Brown v. Baker*, 183 P. 89.

(I) Proceedings in Land Office.

§106 (1) (Ok.) Decisions of officers of Land Department on controverted questions of fact, in the absence of fraud, imposition, or mistake, are final, except as they may be reversed on appeal to that department.—*Mortgage & Debenture Co. v. Rhodes*, 183 P. 481.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

§125 (Ok.) Courts of equity, in proper cases, may afford relief to a party, where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the Land Department.—*Mortgage & Debenture Co. v. Rhodes*, 183 P. 481.

§128 (Ok.) Evidence in action to have a resulting trust declared in land entered and proved

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

up by defendant under the homestead laws of the United States held to sustain a judgment denying relief.—Wheeler v. Widener, 183 P. 407.

—128 (Okl.) Where homestead entrymen, having right to have a patent issued, disposed of her homestead by will, and died before final proof, and on application of a daughter and devisee a patent was issued to heirs of entryman, and in a devisees' action to declare a resulting trust it appeared that patent was either issued erroneously with knowledge of will, or on final proof which intentionally or inadvertently failed to disclose that fact, a proper case for equitable relief was presented, in view of Rev. St. U. S. § 2291 (U. S. Comp. St. § 4532).—Mortgage & Debenture Co. v. Rhodes, 183 P. 481.

(M) Conveyances, Contracts, and Exemptions.

—135(2) (Okl.) Under Rev. St. U. S. § 2291 (U. S. Comp. St. § 4532), where a homestead entryman complies fully with the homestead laws of the United States, but dies before making final proof, he is entitled to dispose of his homestead by will.—Mortgage & Debenture Co. v. Rhodes, 183 P. 481.

—139 (Okl.) Contracts concerning the purchase and conveyance of public land, made prior to the entry and proving up of the homestead claim, violate the spirit of the laws of the United States, and are in fraud thereof, and cannot be enforced by a court of equity.—Wheeler v. Widener, 183 P. 407.

III. DISPOSAL OF LANDS OF THE STATES.

—187½ [New, vol. 8A Key-No. Series]. (Wyo.) The purchaser of school land from the state must, as provided by Comp. St. 1910, § 632, pay prior lessee thereof the appraised value of irrigation ditches made by him thereon and water rights acquired by him therefor, and not the state, as indicated by section 616; the provision of section 632 to that effect being the later enactment, and so controlling.—State v. Carey, 183 P. 785.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Electricity; Railroads.

QUANTUM MERUIT.

See Work and Labor.

QUIETING TITLE.

See Abatement and Revival, —41; Adverse Possession, —66; Appeal and Error, —1043; Boundaries, —35; Covenants, —81; Judgment, —682; Vendor and Purchaser, —49, 85.

I. RIGHT OF ACTION AND DEFENSES.

—2 (Cal.App.) A general demurrer to a complaint seeking a judgment determining that plaintiff was the sole owner of certain promissory notes secured by mortgages, should have been sustained because an action to quiet title to personal property does not lie.—Hale v. Kennedy, 183 P. 723.

—6 (Cal.App.) The holder of the legal title may maintain an action to quiet title against any one claiming an adverse interest.—Noyes v. Huffman, 183 P. 284.

—10(2) (Cal.App.) Under Code Civ. Proc. § 700, as to execution sale of real property, where land fraudulently conveyed was sold under execution in favor of a creditor and bid in by him, he acquired, by virtue of the sheriff's certificate and the sale, the legal title, and not merely an equitable interest in the land, and could therefore maintain action, by cross-complaint in partition suit, against debtor's vendee.—Wangenheim v. Garner, 183 P. 670.

183 P.—68

—15 (Cal.) In a suit to quiet title against building restrictions, a judgment, not merely denying plaintiff relief, but affirmatively holding plaintiff's land subject to such restrictions, cannot be upheld on the ground that plaintiff's seeking to escape from the restrictions is inequitable, where such restrictions do not in fact exist so far as defendants are concerned.—Werner v. Graham, 183 P. 945.

II. PROCEEDINGS AND RELIEF.

—35(1) (Cal.App.) An allegation in a suit to quiet title that the plaintiff, is the owner of the land in possession of it is sufficient, even though plaintiff's right of recovery depends upon whether or not there was an agreed boundary line.—Doyle v. Bradshaw, 183 P. 185.

—43 (Cal.App.) Where land fraudulently conveyed was sold under execution in favor of a creditor, and bid in by him, and in partition suit involving such land the creditor cross-complained against the vendee of the debtor, the creditor might, as against such vendee, introduce evidence to show that the vendee's deed was in fraud of creditors, although fraud was not pleaded in the cross-complaint; such fraud being matter in avoidance of the vendee's answer, setting up title based on such deed.—Wangenheim v. Garner, 183 P. 670.

—51 (Cal.App.) If a defendant in an action to quiet title shows an equitable right to have the legal title conveyed to him the court may, in the exercise of its chancery powers, grant the proper relief, under Code Civ. Proc. § 738, providing that all questions not exclusively of probate jurisdiction shall be finally determined in such actions.—Noyes v. Huffman, 183 P. 284.

QUITCLAIM.

See Deeds, —25; Vendor and Purchaser, —224.

QUO WARRANTO.

See Abatement and Revival, —41, 47; Divorce, —239.

RACE.

See Deeds, —149.

RAILROADS.

See Constitutional Law, —245; Mines and Minerals, —9; Waters and Water Courses, —179.

X. OPERATION.

(F) Accidents at Crossings.

—348(4) (Cal.App.) In action for death of an occupant of an automobile struck by a train, pushed around a curve without the warning signals required by Civ. Code, § 486, and without attaching the air brakes, evidence held to warrant a finding that railroad was negligent.—McClure v. Southern Pac. Co., 183 P. 248; Scherrer v. Same, Id. 250.

—350(7) (Wash.) Where there was no positive testimony that a whistle was sounded for the crossing at which plaintiff's automobile was struck by an interurban car, and the negative testimony, to the effect that the witnesses heard no approaching signal, but did hear a "little toot" when the motorman first saw the automobile, the question of negligence was for the jury.—Kent v. Walla Walla Valley Ry. Co., 183 P. 87.

—350(17) (Cal.App.) Where a railroad track was obscured because it was constructed in a narrow cut and was covered with dirt at the crossing, and the position of crossing sign was such that it could not be seen by the occupants of an automobile, who were strangers, unaware of railroad's existence, the question whether their failure to stop, look, and listen, constituted contributory negligence, was for the jury.—McClure v. Southern Pac. Co., 183 P. 248; Scherrer v. Same, Id. 250.

350(22) (Wash.) Whether the driver of an automobile struck at an interurban railway crossing, was guilty of contributory negligence in proceeding from behind a small service station to cross the track without stopping held for the jury.—Kent v. Walla Walla Valley Ry. Co., 183 P. 87.

RAPE.

See Criminal Law, 673, 1170.

RATIFICATION.

See Corporations, 426; Principal and Agent, 172.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer; Partition; Quieting Title.

RECEIVERS.

See Appeal and Error, 920, 1024, 1043, 1097; Divorce, 267, 286; Limitation of Actions, 69.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) Nature and Subjects of Remedy.

8 (Cal.App.) Equity has inherent power in aid of its jurisdiction to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor.—Davies v. Ramsdell, 183 P. 702.

RECORDS.

See Appeal and Error, 490-714, 744, 757, 766, 918, 1094, 1106; Certiorari, 60; Chattel Mortgages, 60, 85, 90; Criminal Law, 595, 1088-1124, 1144, 1178, 1184; Dedication, 19, 37, 41; Deeds, 60; Evidence, 178; Highways, 90; Judgment, 800; Mines and Minerals, 29; Vendor and Purchaser, 231.

17(2, 3) (N.M.) The district court, independently of statute, may restore its lost records, either before or after judgment.—Springer v. Wasson, 183 P. 398.

17(9) (N.M.) Restored lost records of court have the same force and effect and evidentiary value as the originals, if existing.—Springer v. Wasson, 183 P. 398.

In a collateral proceeding, the district court's order and judgment, restoring its lost records, cannot be successfully attacked on ground that a party to the suit was not served with notice of the motion therefor and given an opportunity to contest it, without evidence of such facts.—Id.

On collateral attack upon an order and judgment of the district court restoring its lost records, the presumption will be indulged that the order and judgment were entered with true regard to the proper practice and procedure.—Id.

REFERENCE.

See Attorney and Client, 54.

REFERENDUM.

See Statutes, 174, 175.

REFORMATION OF INSTRUMENTS.

See Appeal and Error, 1010; Contracts, 99; Equity, 39; Limitation of Actions, 179; Pleading, 34.

I. RIGHT OF ACTION AND DEFENSES.

25 (Or.) Where both plaintiff, seeking to reform a deed by striking out a clause assuming a mortgage made by his grantors to mortgagee, and his grantors, agree that the clause was inserted by mistake, and no element of estoppel being available to the mortgagee, who was not induced by the assumption provision to

change his position to his disadvantage, held, that purchaser was not guilty of such negligence in failing to read the deed prepared by his own stenographer, and executed and recorded by his grantors, as would prevent reformation of the deed.—Welch v. Johnson, 183 P. 776.

II. PROCEEDINGS AND RELIEF.

33 (Or.) In a suit to reform a deed by striking out the clause obligating purchaser to pay a note and mortgage, purchaser's grantors, as well as their mortgagee, should be made parties.—Welch v. Johnson, 183 P. 776.

44 (Cal.App.) In proceedings to revise a written instrument, evidence of the agreement's purpose and of negotiations leading to its execution held admissible.—Roush v. Kirkman, 183 P. 353.

47 (Cal.App.) Where sign painter contracted with real estate firm to purchase a lot owned one-half by the firm and one-half by undisclosed co-owners, and collaterally contracted that he might pay the purchase price installments by one-third of his monthly bills for sign painting, in his suit against the firm and undisclosed co-owners for reformation of the contract and for recovery of sums paid thereon, judgment for defendants, foreclosing plaintiff's interest in the lot unless balance of purchase price was paid, cannot be supported on theory that firm had no authority to bind the co-owners by the collateral agreement as well as the land sale, for in such case, the contracts being inseparable, there would be no contract at all binding plaintiff, and he should have had judgment for at least the portion of the purchase price paid.—McAuliff v. McFadden, 183 P. 870.

REHEARING.

See Appeal and Error, 833; Judgment, 328.

RELEASE.

See Attorney and Client, 101; Covenants, 72; Mortgages, 309; Principal and Surety, 115.

RELIEF STATUTE.

See States, 131.

REPLEVIN.

See Appeal and Error, 768.

I. RIGHT OF ACTION AND DEFENSES.

10 (Nev.) To enable a plaintiff to recover in replevin, the specific property must be in the possession of the defendant at the commencement of the action.—Nielsen v. Rebard, 183 P. 984.

IV. PLEADING AND EVIDENCE.

72 (Cal.App.) In a claim and delivery case, evidence that plaintiff paid defendant for certain number of mules, but that defendant delivered three less than stipulated number, held to sustain trial court's finding that plaintiff was entitled to possession of the three animals in question.—Harmon v. Keogh, 183 P. 201.

V. DAMAGES.

79 (Cal.) Parties whose property was taken under replevin process are not entitled to recover interest on the value of the property which was destroyed while in possession of the plaintiff in replevin, together with damages for the withholding of the property.—Nahhas v. Browning, 183 P. 442.

83 (Cal.) One whose property is taken in replevin suit is not confined to interest as on the value of the property as damages, if he can establish the fact that the value of the use of the property exceeds the interest.—Nahhas v. Browning, 183 P. 442.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⌚124(3) (Cal.) Plaintiff in replevin cannot, by dismissing his action after destruction of the property by fire, deprive defendants of the right given them, by Code Civ. Proc. § 667, to recover damages on the replevin bond for the taking and withholding of the property.—*Nahhas v. Brown-ing*, 183 P. 442.

Where, after plaintiffs in replevin obtained property by replevin process, it was destroyed by fire, the owners may recover, in suit on replevin bond, not only the value of the property, but damages for withholding, and they are not restricted to interest on the value of the property, upon the theory that taking was a conversion.—*Id.*

REPORTS.

See Attorney and Client, ⌚54; Highways, ⌚41.

REPURCHASE.

See Vendor and Purchaser, ⌚84.

RETROSPECTIVE LAWS.

See Statutes, ⌚263-270.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Certiorari.

RIOT.

See Criminal Law, ⌚1172.

⌚1 (Okla.Cr.App.) Rev. Laws 1910, § 2559, subds. 3 and 4, relating to punishment for riot, contain no definition of the crime of riot; that crime being defined by section 2558.—*Johnson v. State*, 183 P. 926.

RISKS.

See Master and Servant, ⌚204-217.

ROADS.

See Highways.

ROBBERY.

See Criminal Law, ⌚1184.

RODENTS.

See Counties, ⌚216.

SABOTAGE.

See Insurrection, ⌚2; Statutes, ⌚251.

SAFETY APPLIANCE ACT.

See Appeal and Error, ⌚930; Jury, ⌚32; Master and Servant, ⌚284, 291.

SALES.

See Assault and Battery, ⌚15; Bankruptcy, ⌚186; Brokers, ⌚88; Chattel Mortgages, ⌚225; Corporations, ⌚116, 121, 155; Customs and Usages, ⌚13; Evidence, ⌚117, 178, 498; Execution, ⌚242; Frauds, Statute of, ⌚89, 106, 109, 118, 158; Landlord and Tenant, ⌚51; Larceny, ⌚60; Master and Servant, ⌚318; Patents, ⌚214, 215; Pleading, ⌚36; Pledges, ⌚55, 56; Principal and Agent, ⌚101, 105, 120; Sales, ⌚367; Tenancy in Common, ⌚43; Trial, ⌚62; Trover and Conversion, ⌚30; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

⌚12 (Cal.App.) In view of Civ. Code, §§ 1039, 1721, defining sales and transfers, and section

1722, declaring what property may be subject to sale, and section 1730, providing that any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not, a future crop of beans, not yet planted, was subject to sale contract.—*Hamilton v. Klinke*, 183 P. 675.

⌚32 (Cal.App.) Letters and telegrams transmitted through brokers regarding proposed sale of glycerine held not to establish a completed contract between the parties, in view of the fact that their minds did not meet on terms of payment, and that both parties expected to reduce the understanding to a more formal writing.—*Marx & Rawolle v. Standard Soap Co.*, 183 P. 225.

II. CONSTRUCTION OF CONTRACT.

⌚71(5) (Cal.App.) Under Civ. Code, §§ 1448-1450, as to right of selection where an obligation requires performance of one of two acts in the alternative, defendant, who contracted to sell to plaintiffs turkeys "numbering from 200 head to 1,200," to be delivered "between now and Thanksgiving," having delivered none, and refused to deliver any, lost his right of determining the number, and was liable for damages on the basis of the maximum number.—*Jacobson-Reimers Co. v. Tozai Co.*, 183 P. 466.

⌚81(5) (Cal.App.) Where a contract of sale merely provided that deliveries were to be taken before September 1st, in the absence of statement as to when the orders for and specifications of the goods should be given, the law will presume they were intended to be given within a reasonable time before the date fixed for delivery, especially under Civ. Code, §§ 1655, 1657, providing stipulations necessary to make a contract reasonable or conformable to usage are implied, and that if no time is specified for performance of an act required, reasonable time is allowed.—*Charles Boldt Co. v. Julius Levin Co.*, 183 P. 200.

⌚87(2) (Cal.App.) In an action for goods sold and delivered, evidence of the usual time required and allowed for the filling of orders given plaintiff by defendant and of the previous dealings of the parties with respect to the time allowed for the filling of orders and of similar matters, held relevant on the issue of what was a reasonable time for the giving of orders and specifications before the time for delivery fixed by the contract.—*Charles Boldt Co. v. Julius Levin Co.*, 183 P. 200.

⌚88, (Cal.App.) In action to recover for goods sold and delivered to defendant, it was the duty of the trial court to find what was a reasonable time for defendant to give orders for and specifications of the goods before the date fixed by the contract for delivery; the contract having been silent as to when the orders should be given.—*Charles Boldt Co. v. Julius Levin Co.*, 183 P. 200.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

⌚90 (Nev.) In action for purchase price of hay destroyed by fire, evidence that a stick was placed in the hay to indicate the amount covered by the sales agreement, held immaterial on the question whether hay subject to agreement was ascertained so as to pass title, where a subsequent written agreement fixed exact amount of hay sold.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

⌚182(1) (Wash.) In an action for breach of a contract to purchase scrap iron, the matters of the quality or identity of the goods and of the account between the parties were questions of fact for the jury.—*Bernstein v. Schwartz*, 183 P. 105.

⇒182(3) (Cal.App.) While waiver of a sales contract breach is a mixed question of law and fact, yet, when but one inference can be drawn from the facts, it is not error for the court to charge that these facts constitute a waiver.—*Lompoc Produce & Real Estate Co. v. Browne*, 183 P. 166.

(D) Payment of Price.

⇒196 (Cal.App.) Any breach by plaintiff buyer of a contract provision requiring him to purchase seed for defendant seller was waived, as a matter of law, where defendant retained a partial payment and kept the contract open for his own benefit for six months, without complaint regarding the alleged breach.—*Lompoc Produce & Real Estate Co. v. Browne*, 183 P. 166.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

⇒197 (Cal.App.) A contract for sale of an unplanted crop of beans, providing that, until the bill of lading or warehouse receipt covering them was received by the vendee, the vendor agreed to assume "all risks of loss or damage to said beans," construed as passing title.—*Hamilton v. Klink*, 183 P. 675.

⇒199 (Cal.App.) In case of a cash sale, where delivery and payment are concurrent conditions, whether or not the seller has waived the condition of payment is a question of intention.—*People v. Mills Sing*, 183 P. 865.

⇒199 (Nev.) Uniform Sales Act, § 19, prescribing several rules for ascertaining the intent of the parties as to when title passes, merely creates presumptions which give way if a contrary intent appears.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

Under the direct provisions of Uniform Sales Act, §§ 8, 22, the seller must bear the loss of hay covered by a sales agreement, but to which title had not passed, when it burned without the fault of either party.—*Id.*

⇒200(2) (Nev.) A contract under which all hay in certain stacks was sold, excepting 30 tons to be retained by the seller, etc., *held* to make measurement of the hay a condition precedent to the passing of title despite the use of the word "bought" and "sold" in the contract.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

⇒201(1) (Cal.App.) Under Civ. Code, § 1721, defining a sale, as between the parties, a sale may be completed without delivery.—*Hamilton v. Klink*, 183 P. 675.

⇒201(5) (Nev.) Uniform Sales Act, § 19, rule 5, creating a presumption that title does not pass until the goods have been delivered, *held* inapplicable to an agreement under which certain hay was to be constructively delivered immediately after it had been measured.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

⇒202(1) (Cal.App.) Under Civ. Code, § 1721, defining a sale, as between the parties a sale may be completed, without either delivery or payment of consideration.—*Hamilton v. Klink*, 183 P. 675.

⇒202(1) (Cal.App.) Where a sale is a cash sale, delivery of the goods and payment of the price are concurrent acts.—*People v. Mills Sing*, 183 P. 865.

⇒209 (Nev.) Where all the hay in certain stacks was sold except 30 tons retained by the seller, the hay sold was "specific or ascertained goods" within Uniform Sales Act, § 18, providing that the property in such goods is transferred at time the parties intend.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

Uniform Sales Act, § 19, rule 1, creating a presumption that title is intended to pass where there is an unconditional contract to sell certain specific goods in a deliverable state, etc., *held* applicable to an agreement to sell all the hay in certain stacks except 30 tons to be retained by the seller.—*Id.*

⇒218½ (Cal.App.) An absolute delivery of property to the buyer without demand for the

price is presumptive evidence of a waiver of the condition of present payment and of a willingness to give credit, which presumption may be rebutted by the acts and declarations of the parties, or the circumstances.—*People v. Mills Sing*, 183 P. 865.

Whether delivery of goods on a cash sale without payment is absolute, so as to pass title, or conditional, so that title does not pass, depending, as it does, on the intention of the parties, the intent that the delivery before payment shall be conditional may be inferred from the acts of the parties and the circumstances, and is a question for the jury; an express declaration of intention to insist on immediate payment not being necessary.—*Id.*

⇒218½ (Nev.) In seller's action to recover purchase price of hay which defendant claimed had not been measured so as to pass title before it was accidentally burned, evidence that plaintiff's sons measured the hay after sales contract was executed, but before date agreed upon for measurement, *held* inadmissible to show compliance with contract.—*Cassinelli v. Humphrey Supply Co.*, 183 P. 523.

VI. WARRANTIES.

⇒261(4) (Cal.App.) Acceptance of order for "export cured" codfish amounted to a warranty that goods, when packed for shipment, should measure up, in regard to quality, to the full meaning of the term "export cured," although the word "warranty" was nowhere used.—*Barrios v. Pacific States Trading Co.*, 183 P. 236.

⇒267 (Cal.App.) Where a writing exists between the parties to a sale, the extent of a warranty made is limited to the language used.—*American Steel Pipe & Tank Co. v. Hubbard*, 183 P. 830.

Where a writing exists between the parties to a sale, the extent of a warranty made is limited to the language used, and parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies.—*Id.*

⇒280 (Cal.App.) In action for breach of warranty to ship "export cured codfish," it was not incumbent upon plaintiff in first instance to show that condition "Perishable, store away from boilers," stamped on the packages, had been complied with during the shipment; such condition forming no part of the contract between the parties, and being placed upon the outside of the packages by the packer without any knowledge on the part of the purchaser.—*Barrios v. Pacific States Trading Co.*, 183 P. 236.

⇒285(2) (Okla.) In a warranty provision that, if binder did not work properly on first day's use by buyer, he should give "immediate notice" in writing to dealer, specifying the defects, that term ordinarily means due diligence in a reasonably prompt time as nature and circumstances of particular case demand.—*Moline Plow Co. v. Adair*, 183 P. 499.

⇒287(1) (Cal.App.) Where plaintiff seller did not deliver the character of goods it had agreed to sell, defendant buyer was justified in rejecting them, and no obligation rested upon it to tender their return, etc.—*Pacific Western Commercial Co. v. Western Wholesale Drug Co.*, 183 P. 287.

⇒288(2) (Cal.App.) A buyer was entitled to rely upon the assurances of packer of codfish that goods ordered would be of the quality warranted by the terms of their written agreement, and mere fact that an agent of buyer saw goods in process of preparation and expressed a doubt as to their being sufficiently dried cannot be held to either constitute a waiver of the warranty that the codfish would be "export cured," nor to have required a further inspection of the goods after they had been sealed and packed and delivered on shipboard for the place of their destination.—*Barrios v. Pacific States Trading Co.*, 183 P. 236.

⇒288(2) (Cal.App.) Where plaintiff seller of oil orchard heaters, purchased by sample, de-

livered to defendant buyer heaters differing from the sample, but the buyer, with opportunity to inspect, nevertheless accepted and used the heaters, she must be deemed to have waived any objection on account of their being otherwise than as represented.—*American Steel Pipe & Tank Co. v. Hubbard*, 183 P. 830.

VII. REMEDIES OF SELLER.

(C) Recovery of Goods Delivered or Proceeds Thereof.

☞316(1) (Cal.App.) Where a sale is a cash sale, delivery of the goods and payment of the price are, concurrent acts, and the vendor, though he has delivered, supposing he would immediately receive the price, may reclaim the property, if the purchase money is not paid according to terms, provided he has not waived payment, or been guilty of laches or estopping conduct.—*People v. Mills Sing*, 183 P. 865.

(E) Actions for Price or Value.

☞347(2) (Cal.App.) Where fruit trees, expressly warranted to be merchantable, were, in fact, unmerchantable under Pol. Code, § 2322, as amended St. 1917, p. 627, and section 2322i, as added by St. 1917, p. 637, purchase-price notes were without consideration except as to amount received for a portion buyer was able to sell to other parties.—*Elmer Bros. v. Carpenter*, 183 P. 566.

(F) Actions for Damages.

☞377 (Wash.) In an action by the seller of wheat for damages because the buyer failed to perform its contract of purchase, complaint held sufficiently to allege a performance or tender of performance by the seller.—*Jones-Scott Co. v. Ellensburg Milling Co.*, 183 P. 113.

☞383 (Or.) In an action for breach of a contract to purchase and pay for cordwood cut by plaintiff, plaintiff's testimony as to the cost of the stumpage and of the cutting and hauling held to afford a basis for the computation of damages.—*Newman v. Multnomah Fuel Co.*, 183 P. 1.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

☞409 (Cal.App.) Where defendant seller refused to perform a contract for sale of a bean crop, plaintiff buyer had an immediate right of action, although time for delivering the crop had not arrived.—*Lompoc Produce & Real Estate Co. v. Browne*, 183 P. 166.

☞413 (Cal.App.) Where defendant seller claimed plaintiff buyer had breached a sales contract, plaintiff may show that defendant's own testimony established a waiver of the alleged breach, although waiver was not pleaded, since any variance could not have surprised defendant and might be cured by amending complaint to conform to proof.—*Lompoc Produce & Real Estate Co. v. Browne*, 183 P. 166.

☞416(2) (Wash.) In an action against a restaurant keeper for breach of his contract to furnish garbage to plaintiff for use in feeding hogs, plaintiff's testimony as to how long on an average during the last 6 months of the contract it took in feeding the material to make a marketable hog out of a stock or feeder hog, also evidence of the number of cans and the average weight per day of the garbage taken from defendant's place under the contract, held admissible.—*Nelson v. Davenport*, 183 P. 132.

☞418(2) (Cal.App.) In buyer's action for breach of contract for sale of a bean crop, the market value of the beans at time of breach is the proper measure of damages.—*Lompoc Produce & Real Estate Co. v. Browne*, 183 P. 166.

☞420 (Wash.) In an action for breach of contract to furnish garbage from defendant's hotel, wherewith plaintiff fattened hogs for market, case held for the jury under plaintiff's evidence, showing to a reasonable certainty a large and

substantial loss of profits.—*Nelson v. Davenport*, 183 P. 132.

(D) Actions and Counterclaims for Breach of Warranty.

☞426 (Ok.) Where parties to a sale stipulate course to be pursued by buyer if warranty fails, such stipulation must be followed by him in seeking to enforce the warranty.—*Moline Plow Co. v. Adair*, 183 P. 499.

☞437(1) (Cal.App.) In an action for the price of oil orchard heaters, where defendant buyer did not plead as a defense violation of an implied warranty, under Civ. Code, § 1770, she could not rely upon such violation either in support of a cause of action or as defense.—*American Steel Pipe & Tank Co. v. Hubbard*, 183 P. 830.

☞441(1) (Cal.App.) Correspondence held to establish that defendant buyer gave plaintiff seller prompt and definite notice that potassium carbonate was defective in not meeting the percentage of purity guaranteed by the seller's warranty.—*Pacific Western Commercial Co. v. Western Wholesale Drug Co.*, 183 P. 287.

Evidence regarding defendant buyer's attempts to resell certain goods and its offer to make an equitable adjustment of the situation held not to show that it waived plaintiff seller's breach of warranty in furnishing impure potassium carbonate.—*Id.*

☞441(3) (Cal.App.) In action for damages for breach of a warranty to ship "export cured" codfish, evidence held sufficient to sustain a finding that codfish shipped was not "export cured."—*Barrios v. Pacific States Trading Co.*, 183 P. 236.

☞441(3) (Cal.App.) In an action for the price of oil orchard heaters, evidence held insufficient to sustain the defense urged, under Civ. Code, § 1766, that the goods delivered differed from the sample exhibited to defendant buyer when she gave plaintiff seller's agent the order.—*American Steel Pipe & Tank Co. v. Hubbard*, 183 P. 830.

IX. CONDITIONAL SALES.

☞456 (Cal.) An agreement as to a piano, though in form a lease, providing for bill of sale on payment of certain sum, held a conditional sale.—*Silverstin v. Kohler & Chase*, 183 P. 451.

☞477(4) (Cal.) Seller in conditional sale by bringing action merely for the installments due, only part being due, does not confirm title in buyer; this not being inconsistent with continuance of the contract.—*Silverstin v. Kohler & Chase*, 183 P. 451.

☞479(2) (Cal.) Seller in conditional sale not having confirmed title in buyer by suing for installments, his retaking possession, as authorized by contract, on further default, even though forcible, does not amount to conversion.—*Silverstin v. Kohler & Chase*, 183 P. 451.

SAMPLE

See Sales, ☞268, 441.

SCHOOLS AND SCHOOL DISTRICTS.

See Attorney General, ☞6; Mandamus, ☞4, 14, 79, 102, 154, 164; Public Lands, ☞187½.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

☞36 (Ok.) Laws 1915, c. 202, § 2, imposing duties on county superintendent as to declaring a consolidated school district dissolved and the filling of vacancies in "revived school district," leaves no discretion to superintendent.—*Rasure v. Sparks*, 183 P. 495.

☞39 (Ok.) Laws 1913, c. 219, art. 4, § 2, permitting any person aggrieved by alteration or refusal to alter boundaries of any joint school district to appeal to state superintendent of

public instruction, gives no remedy to officers or school patrons of a consolidated school district, organization under article 7, where county superintendent refuses or neglects to perform his duties under article 7, § 2, relating to formation of consolidated districts.—*State v. Ross*, 183 P. 918.

§44 (Okla.) Laws 1915, c. 202, § 2, providing that if 60 per cent. of the voters of a consolidated school district shall vote to dissolve district, etc., requires only that 60 per cent. of votes cast shall be in favor of dissolution, and not that 60 per cent. of all voters of district shall vote therefor.—*Rasure v. Sparks*, 183 P. 495.

(B) District Debt, Securities, and Taxation.

§102 (Cal.App.) A city may levy a school tax upon lands lying without the municipal limits but within a city school district.—*Wible v. City of Bakersfield*, 183 P. 291.

An ordinance requiring a tax to be levied for school purposes on all taxable property within the city, etc., includes land within a city school district but outside the city limits, in view of Pol. Code, § 1576, providing that territory outside the city shall be deemed a part of the city for purpose of levying school taxes, etc.—*Id.*

SECRET PROFIT.

See Joint Adventures, §7.

SENTENCE.

See Criminal Law, §980-992.

SEPARATE PROPERTY.

See Husband and Wife, §119-133.

SEPARATION.

See Husband and Wife, §278-298½.

SET-OFF AND COUNTERCLAIM.

See Brokers, §82; Courts, §169.

SEWERS.

See Drains.

SHERIFFS AND CONSTABLES.

See Pleading, §376.

SIGHT.

See Evidence, §9.

SIGNATURES.

See Chattel Mortgages, §60; Evidence, §348; Infants, §105.

SLANDER.

See Libel and Slander.

SODOMY.

See Indictment and Information, §110.

SPECIAL LAWS.

See Statutes, §86.

SPECIFIC PERFORMANCE.

II. CONTRACTS ENFORCEABLE.

§28(1) (Cal.App.) A parol contract by an aunt to devise 1,000 acres of land to her niece in consideration of an agreement by the niece that she would live with the aunt until niece's marriage, held too uncertain and unfair to be specifically enforced, where niece was of marriageable age at time of contract, and married

3 years thereafter while aunt lived 15 years.—*Kurtz v. De Johnson*, 183 P. 588.

§70 (Nev.) Shares of corporate stock cannot be recovered in an action for specific performance, unless they possess peculiar and unusual value.—*Nilsen v. Rebard*, 183 P. 964.

§86 (Cal.App.) A contract to devise will be specifically enforced only where it is in all respects just, fair, and reasonable in its mutual compensations, and certain in its terms, and where the promise resulted in such changed conditions as to promisee that refusal to enforce promise will permit a fraud to be perpetrated against promisee.—*Kurtz v. De Johnson*, 183 P. 588.

A decedent's parol contract to devise will be strictly construed, closely scrutinized, and weighed with a careful balance, when specific performance is sought, and it must be such as, attended by all the attributes of frankness, fairness, and honesty, will appeal to the conscience of the chancellor.—*Id.*

SPEED.

See Highways—§177, 184; New Trial, §70.

STATES.

See Constitutional Law, §70, 206; False Imprisonment, §3.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

§131 (Wash.) Although by Constitution and an act in pursuance thereof the state has agreed it may be sued, nevertheless it has the power without litigation to provide for compensation on account of services rendered or material furnished for its benefit, by making an appropriation therefor.—*State v. Clausen*, 183 P. 115.

§131 (Wash.) The appropriation of \$5,000 from the general fund by the Laws 1919, p. 687, for the relief of Ernest Lister, was valid and enforceable, although the nature of services or value given to the state by Lister is not stated therein.—*State v. Clausen*, 183 P. 120.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§64(2) (Cal.) St. 1913, p. 793, providing for a permit for supplying water which must be the purest and most healthful obtainable, and that furnishing water without a permit is a public nuisance, being in part unconstitutional, the court could not grant an injunction against a city furnishing pure water without a permit by eliminating the unconstitutional part, requiring that the purest water be furnished.—*Frost v. City of Los Angeles*, 183 P. 342.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§86 (Cal.App.) Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, held not to involve special legislation, within the meaning and contemplation of Const. art. 4, § 25, subd. 2, applying as it does to all children under 14 years of age and to all of a class.—*People v. Camp*, 183 P. 845.

III. SUBJECTS AND TITLES OF ACTS.

§117(2) (Wash.) Laws 1917, p. 76, entitled "An act relating to the compensation * * *

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

of injured workmen," etc., and providing in section 19 that the liabilities and defenses prescribed by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) should apply to certain workmen injured in intrastate commerce, does not violate Const. art. 2, § 19, requiring bills to embrace only one subject to be expressed in the title.—*Archibald v. Northern Pac. R. Co.*, 183 P. 95.

☞118(6) (Cal.App.) Pen. Code, § 288, prohibiting any lewd or lascivious act upon a child under the age of 14, etc., entitled, as enacted by St. 1901, p. 630, "An act to amend the Penal Code by adding a new section thereto to be numbered," etc., "relating to crimes against children," *held* not in violation of Const. art. 4, § 24, requiring expression of the subject of an act in the title.—*People v. Camp*, 183 P. 845.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, etc., entitled, as enacted by St. 1901, p. 630, "An act to amend the Penal Code by adding a new section thereto to be numbered," etc., "relating to crimes against children," *held* not violative of Const. art. 4, § 24, as explicitly negating and contradicting the subject expressed in the title; it not being misleading or calculated to deceive.—*Id.*

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

☞167(2) (Cal.) St. 1867-68, p. 116, relating to homesteads, and providing that a party entitled, if in exclusive occupation, should have his right though the land was held in joint tenancy, tenancy in common, etc., was abrogated by the adoption of the Codes January 1, 1873.—*In re Carraghar's Estate*, 183 P. 161.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

☞174, 175 (Nev.) In construing the referendum as applied to legislation for counties, the usual rules of construction are applicable; the thing to be sought being the thought expressed.—*Pershing County v. Sixth Judicial Dist. Court*, 183 P. 314.

☞181(1) (Ok.) In the construction of statutes, the intention of the lawmakers, when ascertained, must govern.—*Hudson v. Hopkins*, 183 P. 507.

☞183 (Cal.App.) A cardinal rule of statutory construction is that, if giving a word or phrase its literal meaning would result absurdly, such meaning must be disregarded, and a meaning ascribed consistent with the context and evident object of the act, that would render it not only consistent, but reasonable in effect, and therefore, effectual.—*People v. Camp*, 183 P. 845.

☞184 (Nev.) In construing a statute the legislative intent controls, and in seeking the intent the evil sought to be remedied should be ascertained.—*Escalle v. Mark*, 183 P. 387.

☞207 (Ok.) Where general terms or expressions in one part of the statute are inconsistent with more particular provisions in another part, the latter provision will be given effect as a

clearer and more definite expression of the legislative will.—*Palmer v. King*, 183 P. 411.

☞220 (Wyo.) A legislative construction of Comp. St. 1910, §§ 2826, 2835, 2836, and Laws 1911, c. 13, § 1, relating to granting of liquor licenses, that no license fee shall be refunded to any licensee, as shown by Laws 1919, c. 100, § 1, relating to refunding of license fees after enacting statutory prohibition, is entitled to great weight.—*Peterson v. Incorporated Town of Guernsey, in Platte County*, 183 P. 645.

☞225 (Ok.) To ascertain the intent of a statute, all the various portions of the legislative enactment upon particular subject, including subsequent enactments, should be construed together and given effect as a whole.—*Hudson v. Hopkins*, 183 P. 507.

☞226 (Cal.App.) Compensation acts of this country being generally based upon the English Workmen's Compensation Act, the rulings of the commission and courts of England are persuasive, where the language of the statute is not materially dissimilar.—*Hartford Accident & Indemnity Co. v. Industrial Accident Commission, of California*, 183 P. 234.

☞228 (Ok.) The natural and appropriate office of a "proviso" being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter.—*Hudson v. Hopkins*, 183 P. 507.

A proviso to a section of the statute should be construed with the section of which it forms a part, and, if the context requires it, may be construed tantamount to an independent enactment.—*Id.*

(C) Time of Taking Effect.

☞251 (Cal.) Section 4 of Act April 30, 1919 (St. 1919, p. 282), as to criminal syndicalism and sabotage, *held* to be a sufficient compliance with Const. art. 4, § 1, requiring a statement in one section of the act of the facts making it necessary in the judgment of the Legislature that a law shall go into immediate effect.—*Ex parte McDermott*, 183 P. 437.

(D) Retroactive Operation.

☞263 (Or.) Unless there is a clear intent to the contrary, statutes should not be construed retrospectively, or so as to interfere with pending judicial proceedings.—*Rice v. Douglas County*, 183 P. 768.

☞270 (Cal.) The amendment of an unconstitutional statute, making it constitutional, does not have retroactive effect, so as to affect the validity of a judgment determining such statute unconstitutional, rendered before the amendment, and such a judgment will not be reversed on appeal by reason of such amendment.—*Frost v. City of Los Angeles*, 183 P. 342.

VII. PLEADING AND EVIDENCE.

☞285 (Cal.App.) The validity of a statute, which has been duly certified, enrolled and approved, and deposited in the office of the secretary of state, cannot be impeached by a resort to the journals of the Legislature, or by extrinsic evidence of any character.—*People v. Camp*, 183 P. 845.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. 14, .95, 470, 548,
737, 740
Amend. 14, § 1, 845

STATUTES AT LARGE.

1864, June 3, ch. 166, § 1,
18 Stat. 99, 34
1878, June 3, ch. 151, § 1,
20 Stat. 89, 89

1890, May 14, ch. 89, § 2,
21 Stat. 141, 89
1891, Feb. 28, ch. 383, §
5, 26 Stat. 795, 489
1893, March 2, ch. 196,
27 Stat. 531, 478
1896, April 1, ch. 87, 29
Stat. 85, 478
1898, July 1, ch. 541, §
47a(2), 30 Stat. 557,
Amended by Act 1910,
June 25, ch. 412, § 8,
36 Stat. 840, 308

1900, June 6, ch. 813, 31
Stat. 676, 489
1901, March 1, ch. 676, §
4, 31 Stat. 863, 907
1901, March 1, ch. 676, §
28, 31 Stat. 861, 413
1902, May 27, ch. 888, 32
Stat. 258, 413
1902, June 30, ch. 1323,
32 Stat. 500, 413
1902, June 30, ch. 1323, §
6, 32 Stat. 501, 413

1908, March 2, ch. 976,	
32 Stat. 943.....	478
1903, March 3, ch. 994,	
32 Stat. 1008.....	489
1906, June 28, ch. 3572,	
34 Stat. 539.....	507
1906, June 28, ch. 3572,	
§ 2, subsec. 4, 34 Stat.	
541.....	507
1908, April 22, ch. 149,	
35 Stat. 65.....	478
1908, May 27, ch. 199, 35	
Stat. 312.....	907
1910, April 14, ch. 160, 36	
Stat. 298.....	478
1910, June 25, ch. 412, §	
8, 36 Stat. 840.....	308
1912, April 18, ch. 83, § 7,	
37 Stat. 88.....	507
1917, Oct. 6, ch. 97, 40	
Stat. 395.....	123

REVISED STATUTES.

§ 2291	481
2318	657
2319	282, 657
§§ 2320, 2324.....	657

COMPILED STATUTES
1916 (or 1918).

4222	489
4532	481
4537	89
4613	657
4614	282, 657
4615, 4620.....	657
4651, 4671.....	89
§§ 8605-8615, 8617-8619,	
8621-8623.....	478
§§ 8657-8665	95, 478
9631	308
9661	34

COMPILED STATUTES
1918.

§§ 991(3), 1233.....	123
----------------------	-----

ARIZONA.

REVISED STATUTES 1913.

CIVIL CODE.

Para. 3153-3162.....	737, 740
----------------------	----------

CALIFORNIA.

CONSTITUTION.

Art. 1, § 1.....	548
Art. 1, § 6.....	845
Art. 1, § 11.....	548
Art. 1, § 13.....	874
Art. 1, § 18.....	366
Art. 1, § 21.....	548
Art. 4, § 1.....	437
Art. 4, § 24.....	845
Art. 4, § 25, subsec. 2...	845
Art. 4, § 25, subsecs. 19,	
33.....	548
Art. 6, § 2.....	552
Art. 6, § 4½.....	298, 379,
545, 843, 874	
Art. 11, § 6.....	243
Art. 11, § 9.....	604, 852
Art. 11, § 11.....	230
Art. 11, § 18.....	243
Art. 12, § 21.....	824

CIVIL CODE.

§ 14	552
111, subsec. 2.....	954
114	954
130	443
§§ 136, 140.....	862
158	301
164	723

194	552
196a	366
230	552
309	716
408	250
486	248
711	470
715	855
723, 733, 749.....	337
768, 801, 802.....	945
811, subsec. 4.....	532
847	855
857, Amended by Laws	
1913, p. 438.....	855
1039	675
1046	945
1056	453
1113	197
1158	833
1238	365
1262 et seq.....	365
1276	794
§§ 1324, 1325.....	574
1369	440
§§ 1426, 1426b.....	657
1448-1450.....	466
1468	945
§§ 1530, 1531.....	227
1566, 1567, 1572, 1574	
1589	298
1625	274
1638	156
1641, 1642.....	870
1647, 1654.....	156
1655, 1657.....	200
§§ 1661, 1698.....	156
1721, 1722, 1730.....	675
§§ 1766, 1770.....	830
1774	833
1999	190
2224, 2231, 2235.....	301
2300, 2317, 2334.....	802
2611	174
§§ 2819, 2820.....	956
2948	351
§§ 3006, 3011.....	256
3288	843
§§ 3300, 3306.....	807
3408	379
§§ 3431, 3439, 3442.....	308
3543	802

CODE OF CIVIL PROCEDURE.

4	598
325	692
337	261
337, subsec. 1.....	289
338, subsec. 4.....	264
340, subsec. 3.....	668
344	261
§§ 342, 345.....	455
355	273
395	250, 368
409	598
430	443
452	379
472	716
473.....	185, 208, 606, 954
§§ 581a, 583.....	592
625	373
647	576
648	169
659	218
667	442
671	862
674	267
680	285
700	670
§§ 714, 715.....	206
738	284
752	264
796	156
836	824
941b	247
953a	247, 278, 951

§ 953c	254, 284, 307,
352, 451, 716	
§ 963	447
963, Amended by Laws	
1915, p. 209.....	843
1045	259
1183	347
1184	864
1187	347, 664, 957
1192	957
1203	347
1298	214
1464	146
§§ 1493, 1494.....	214
1502	832
1510	214
1760	267
1847	836
1856	274
1870, subsecs. 1, 4, 15..	552
1879	552
1880	576
1881	141
1958	198
1962, subsec. 2.....	855
1963, subsec. 7.....	789
2061	364, 874
2077	809

PENAL CODE.

7	679
18	845
190	585, 952
245	829
§§ 272, 273, 273g.....	845
286	686
288	845
484	679
492	458
§§ 650½, 671.....	845
786	865
956	679
1192	585
1237	712
1387	829

POLITICAL CODE.

1160	809
1543	820
1576	291
1700	820
2322, Amended by	
Laws 1917, p. 627.....	566
§ 2322½ added by Laws	
1917, p. 637.....	566
§§ 2745-2773.....	800
§§ 3463, 3466, 3493½...	598
§§ 3819, 4039.....	809
4041, subsec. 3.....	809
4044	852
4258, subsec. 12.....	852
4290	852

DEERING'S GENERAL
LAWS 1915.

Page 1121	189
-----------------	-----

CITY CHARTERS.

San Francisco. Laws	
1913, p. 1611.....	542
San Francisco, art. 2, ch.	
1, § 1.....	303
San Francisco, art. 2, ch.	
1, § 9.....	706
San Francisco, art. 2, ch.	
2, § 1, subsec. 2.....	706
San Francisco, art. 2, ch.	
2, § 1, subsec. 5.....	303
San Francisco, art. 2, ch.	
2, § 9.....	706
San Francisco, art. 2, ch.	
2, § 9, subsec. 2.....	706
San Francisco, art. 3, ch.	
1, §§ 1-5.....	243
San Francisco, art. 6, ch.	
1, §§ 3, 9.....	706

San Francisco, art. 6, ch. 1, § 9, subsec. 5.....	303
San Francisco, art. 6, ch. 1, § 22.....	706
San Francisco, art. 6, ch. 2.....	706
San Francisco, art. 6, ch. 2, §§ 1, 2, 8, 9, 23, 26, 31.....	706
San Francisco, art. 9, ch. 6, § 1.....	303

LAWS.

1867-68, p. 116.....	161
1883, p. 268, § 858.....	189
1901, p. 630.....	845
1901, p. 794.....	243
1905, p. 528.....	820
1911, p. 730.....	447
1911, pp. 738, 743, 747, §§ 18, 19, 21, 30.....	447
1911, p. 796.....	467
1913, p. 279.....	960
1913, p. 289, § 17b, Amended by Laws 1915, p. 1087.....	234
1913, p. 438.....	855
1913, p. 577, Amended by Laws 1915, p. 311; Laws 1917, p. 30.....	822
1913, p. 639.....	356
1913, pp. 645, 646, §§ 13, 19.....	178
1913, p. 646, § 20.....	963
1913, p. 648, § 20j.....	356
1913, p. 722.....	548
1913, p. 793.....	342, 347
1913, p. 868.....	455
1913, p. 1097.....	548
1913, p. 1101, § 10.....	548
1913, p. 1303, § 28.....	845
1913, p. 1611.....	542
1915, p. 209.....	843
1915, p. 311.....	822
1915, p. 406, § 20.....	358
1915, p. 407, § 20g.....	463
1915, p. 408, § 22.....	358
1915, p. 746.....	820
1915, p. 1087, § 6.....	234
1917, p. 30.....	822
1917, pp. 627, 637.....	566
1917, p. 857, § 29.....	538
1919, p. 281.....	437
1919, p. 281, § 2, subsec. 3.....	437
1919, p. 282, § 4.....	437

IDAHO.

COMPILED LAWS.

§ 3998, subsec. 1.....	990
§ 4807.....	960

NEVADA.

CONSTITUTION.

Art. 10, § 1.....	642
-------------------	-----

REVISED LAWS.

§ 3909.....	387
§ 5015.....	391
§ 5015, subsec. 1.....	391
§ 5080, 5081.....	386
§ 5683.....	317
§ 5686, 5687.....	312

LAWS.

1907, ch. 102.....	387
1913, ch. 97.....	317
1913, ch. 97, § 7.....	317
1915, ch. 159, §§ 8, 18, 19.....	523
1915, ch. 159, § 19, rules 1, 5.....	523
1915, ch. 159, § 22.....	523

NEW MEXICO.

CODE 1915.

§ 4138.....	403
-------------	-----

LAWS.

1917, ch. 43, §§ 15, 17.....	749
1917, ch. 43, § 37.....	402

OKLAHOMA.

CONSTITUTION.

Art. 2, § 6.....	979
Art. 2, § 20.....	430, 626, 932
Art. 7, § 2.....	918
Art. 7, § 13.....	907
Art. 13, § 1.....	918
Art. 23, § 7.....	980

WILSON'S REVISED & ANNOTATED STATUTES 1903.

§§ 849, 1193-1219.....	731
------------------------	-----

REVISED LAWS 1910.

§§ 153, 154.....	923
§ 821.....	889
§ 942.....	477
§§ 1140-1188.....	422
§ 1161.....	907
§ 1166.....	483
§§ 1798, 1802.....	626
§ 1816, Amended by Laws 1917, ch. 119.....	499
§ 2319.....	613
§ 2558.....	926
§ 2559, subsecs. 3, 4.....	926
§ 2875.....	886
§ 3331.....	907
§ 3605.....	430
§§ 3690, 3692, 3701.....	626
§ 3772.....	898
§§ 3983, 3984.....	49
§ 4036.....	56
§ 4238.....	726
§§ 4644, 4645.....	923
4695.....	409
4714.....	499
4737.....	881
4745.....	918
4759.....	975
4971.....	55
4993.....	505, 881, 880, 969
5229.....	726
5267.....	416
5268.....	610
5281.....	980
5547.....	932
5738.....	430
5739.....	430, 620
5780.....	626
5828.....	926
§ 5843, 6003.....	613
6005, 49, 427, 505, 613, 6149.....	734
6210, 6211.....	986
6383, 6384, 6386, 6489, 6522, 6523, 6530, 6532, 6553, 6554.....	42
6564.....	907
6563.....	427
6645.....	907
7437.....	923
8059.....	626
8341.....	495

LAWS.

1909, ch. 24.....	905
1913, ch. 135.....	923
1913, ch. 219, art. 4, § 2.....	918
1913, ch. 219, art. 7, § 2.....	918
1915, ch. 202.....	495
1915, ch. 202, § 2.....	495
1915, ch. 246, art. 2, § 10.....	880
1917, ch. 119.....	499

OREGON.

LORD'S OREGON LAWS.

72.....	476
74, Amended by Laws 1911, p. 144.....	476
§§ 213-258.....	987
241, subsec. 2, Amended by Laws 1917, p. 64.....	655
415.....	937
426.....	776
803, subsec. 5.....	1
937.....	780
3682, Amended by Laws 1913, p. 334, § 20.....	23
§§ 5884, 5837, 5904, 5905, 5920, 5937.....	12
§§ 6284-6286.....	768
§ 7175.....	773

LAWS.

1903, p. 264, § 11.....	768
1911, p. 144.....	476
1913, p. 334, § 20, Amended by Laws 1915, p. 184, § 1.....	23
1915, p. 150.....	780
1915, pp. 162, 163, §§ 24, 25.....	780
1915, p. 184, § 1.....	23
1915, p. 298.....	23
1917, p. 64.....	655
1917, p. 403, § 2.....	653
1917, p. 588.....	768

UTAH.

COMPILED LAWS 1917.

§ 4881.....	323
§§ 5869, 6094.....	334

WASHINGTON.

CONSTITUTION.

Art. 2, § 19.....	95
Art. 2, § 25.....	67
Art. 3, § 25.....	67
Art. 4, § 13.....	67
Art. 7, § 9.....	65
Art. 11, § 8.....	67
Art. 11, § 12.....	65

REMINGTON & BALLINGER'S CODE.

§ 284.....	86
§§ 1341, 1699.....	93

REMINGTON'S CODE 1915.

§ 259, subsec. 5.....	75
§§ 286, 296.....	75
§§ 299, 301.....	123
§§ 339, 393.....	91
§§ 680, 681, 693, 695.....	74
827.....	91
1722.....	74
1730-8.....	91
2601, subsec. 3.....	127
3909.....	121
§§ 4091-4136-5.....	134
6604-5b, Amended by Laws 1917, p. 78.....	84
6604-5d.....	82
§§ 6611, 6612, 6616, 6688.....	111
§§ 7892-22, 7892-23.....	107
§ 8165-1 et seq.....	67
§§ 9212, 9213.....	65

LAWS.

1911, p. 412.....	67
1911, p. 412, § 5, Amended by Laws 1917, p. 502, § 2.....	67

1915, p. 9, § 13.....	130
1917, p. 76.....	95
1917, p. 78.....	84
1917, p. 96, § 19.....	95
1917, p. 502, § 2.....	67
1919, p. 299.....	115
1919, p. 687.....	120

WYOMING.	
COMPILED STATUTES	
1910.	
§§ 616, 632.....	785
§§ 2826, 2835, 2836.....	645

LAWS.	
1911, ch. 13, § 1.....	645
1917, ch. 32, §§ 4, 5.....	37
1917, ch. 32, § 6. Amend- ed by Laws 1919, ch. 15	37
1919, ch. 15.....	37
1919, ch. 100, § 1.....	645

STIPULATIONS.

See Appeal and Error, ⚡519, 714; Attorney and Client, ⚡86; Venue, ⚡61.

STREET RAILROADS.

See Carriers, ⚡815, 322, 347.

SUBROGATION.

See Electricity, ⚡19; Master and Servant, ⚡405.

SUPERSEDEAS.

See Appeal and Error, ⚡461, 465, 468, 470, 487; Criminal Law, ⚡1144; Divorce, ⚡182.

SUPPORT.

See Adoption, ⚡20; Bastards, ⚡37; Parent and Child, ⚡3.

SURETYSHIP.

See Principal and Surety.

SYNDICALISM.

See Insurrection, ⚡2; Statutes, ⚡251.

TAXATION.

See Adverse Possession, ⚡94; Appeal and Error, ⚡1106, 1107; Boundaries, ⚡46; Constitutional Law, ⚡283; Counties, ⚡190, 196; Drains, ⚡85, 90; Highways, ⚡90, 121-123; Judgment, ⚡518, 682, 746; Municipal Corporations, ⚡124, 358, 365, 530, 889; Schools and School Districts, ⚡102; Vendor and Purchaser, ⚡334.

III. LIABILITY OF PERSONS AND PROPERTY.

(B) Corporations and Corporate Stock and Property.

⚡128 (Utah) Comp. Laws 1917, § 5869, relating to assessment of bank shares, is not complied with by deducting assessed value of bank's realty from total value of shares, but amount to be deducted is a sum bearing same relation to total value of shares as assessed value of realty bears to book value of capital stock, surplus, and undivided profits.—Pingree Nat. Bank of Ogden v. Weber County, 183 P. 334.

(C) Public Property and Institutions.

⚡181 (Okl.) Act Cong. April 18, 1912, § 7, second proviso, must be construed tantamount to an independent enactment, and removes the exemption from taxation made by Osage Allotment Act of June 28, 1906, § 2, subd. 4, as to homestead allotment of an Osage Indian at death of allottee.—Hudson v. Hopkins, 183 P. 507.

Purchasers of land by virtue of Act Cong. April 18, 1912, took subject to section 7, second proviso, nothing therein should exempt any of property from taxation, and could not claim benefits of exemption from taxation granted to allottees in Osage Allotment Act of June 28, 1906.—Id.

V. LEVY AND ASSESSMENT.

(G) Review, Correction, or Setting Aside of Assessment.

⚡453 (Cal.App.) A landowner who failed to make complaint to the board of equalization regarding a tax assessment cannot attack the

tax lien in court.—Wible v. City of Bakersfield, 183 P. 291.

⚡454 (Utah) The valuation of bank shares by an assessor and board of equalization, in determining tax the shares should bear, is conclusive in absence of fraud.—Pingree Nat. Bank of Ogden v. Weber County, 183 P. 334.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

⚡526 (Or.) It was within the power of the Legislature to pass L. O. L. § 3682, as amended by Laws 1913, p. 384, § 20, requiring taxpayers to pay their taxes on April 1st, but permitting them to pay one-half of the sum due and allow the remainder to run until September 1st, by paying a sum equivalent to 1 per cent. a month on the unpaid balance.—Spexarth v. Sherman, 183 P. 23.

⚡537 (Utah) An assessment of bank shares for taxation by a county assessor and board of equalization is not conclusive where they misapplied the statutory method of calculating taxes, but is subject to judicial revision in action to recover taxes under Comp. Laws 1917, § 6094.—Pingree Nat. Bank of Ogden v. Weber County, 183 P. 334.

⚡543(6) (Utah) A complaint alleging that excessive valuation of bank shares resulted in an exorbitant and unlawful tax, etc., authorizes admission of evidence that a deduction of real estate values from the total value of the shares was not made in manner required by Comp. Laws 1917, § 5869.—Pingree Nat. Bank of Ogden v. Weber County, 183 P. 334.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(C) Remedies for Wrongful Enforcement.

⚡511(6) (Cal.App.) Evidence that assessed value of plaintiff's property was increased 60 per cent. for purpose of school taxation, that such increased assessed value did not exceed the property's real value, and that assessor considered the valuation fair, etc., held not to establish a fraudulent assessment.—Wible v. City of Bakersfield, 183 P. 291.

TELEGRAPHS AND TELEPHONES.

See Explosives, ⚡7; Sales, ⚡32.

TENANCY IN COMMON.

See Appeal and Error, ⚡1173; Homestead, ⚡3, 84; Joint Tenancy; Partition, ⚡77; Statutes, ⚡167.

I. CREATION AND EXISTENCE.

⚡3 (Or.) Where a mother died seized of land with her son as tenant in common, the other children, the will devising to the son a life estate in the mother's share of the tract, subject to payment of certain charges, became tenants in common with the son; joint tenancy having been abolished by L. O. L. § 7175.—Le Vee v. Le Vee, 183 P. 773.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

⚡11 (Or.) Tenants in common hold their interest in the realty independently of each other, and neither one can do an act respecting the title which will bind the others.—Le Vee v. Le Vee, 183 P. 773.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⚡28(1) (Cal.App.) Where defendant in partition by conveyance from the parties' predecessor was the owner of a quarter interest in the property, subject only to payment to plaintiffs of \$10,200 derived from the proceeds of the sale of the whole property, in the absence of any provisions transferring his right, defendant was entitled to his proportionate share of rents and profits derived from the property up to sale thereof.—Vollmer v. Wheeler, 183 P. 264.

⚡38(13) (Cal.App.) Though a joint tenant or tenant in common may maintain an action of forcible entry and detainer against a cotenant who has ejected him, his right to restitution is restricted to his right of reinstatement to the common possession only.—Noble v. Manatt, 183 P. 823.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

⚡43 (Cal.App.) Where defendant sold plaintiff beans, to be grown on a certain piece of land, and the evidence showed that certain beans were grown on the land by defendant as a cotenant with defendant's wife, and were subject to a lien as a mortgage on the interest of both, in adjusting the rights of the parties, it must be held that plaintiff succeeded to the interest of the defendant.—Hamilton v. Klinkle, 183 P. 675.

⚡43 (Or.) The grantee of a tenant in common becomes merely a new tenant in common with the remainder of the original holders.—Le Vee v. Le Vee, 183 P. 773.

⚡55(1) (Or.) As against a stranger, one tenant in common may recover possession of the whole of the land held by himself and his cotenants.—Le Vee v. Le Vee, 183 P. 773.

TENDER.

See Appeal and Error, ⚡1107; Chattel Mortgages, ⚡115; Insurance, ⚡198; Pleading, ⚡343; Sales, ⚡377; Vendor and Purchaser, ⚡148, 170, 336, 342.

⚡15(6) (Wyo.) Where tender of payment of notes is refused for reasons other than that it does not constitute an offer of lawful money, or is not the kind of money or property in which payment is to be made by the terms of the contract, the creditor waives that objection.—H. E. Wright & Co. v. Douglas, 183 P. 786.

THEATERS AND SHOWS.

See Animals, ⚡69, 71, 74; Pleading, ⚡35.

THREATS.

See Injunction, ⚡63; Master and Servant, ⚡339.

TIMBER.

See Evidence, ⚡10.

TIME.

See Appeal and Error, ⚡339, 428, 479, 612, 624, 744, 801, 833, 873; Bankruptcy, ⚡152, 185, 186, 303; Bills and Notes, ⚡129, 155, 405, 468, 498, 526, 527; Carriers, ⚡215, 228; Corporations, ⚡116, 121; Courts, ⚡212; Criminal Law, ⚡1099; Dismissal and Nonsuit, ⚡60; Divorce, ⚡181; Exceptions, Bill of, ⚡43, 56; Executors and Administrators, ⚡202; Injunction, ⚡57; Insurance, ⚡349, 364, 508½, 668; Interest, ⚡43; Joint Ventures, ⚡7; Limitation of Actions, ⚡53, 130, 179, 183, 197; Mechanics' Liens, ⚡132, 157; Mines and Minerals, ⚡9; Municipal Corporations, ⚡373, 530; Pleading, ⚡408; Public Lands, ⚡35; Sales, ⚡81, 87, 88, 196, 285, 409; Taxation, ⚡526; Vendor and Purchaser, ⚡86, 93, 101, 187, 334, 336; Venue, ⚡66, 61; Waters and Water Courses, ⚡151; Wills, ⚡481.

⚡10(1) (Or.) It being impossible to file on June 5th, the day of the general primary election, and a public holiday by proclamation of the Governor, the report of viewers and county surveyor directed to locate a proposed county road, a filing on the next day was sufficient, and the court did not lose jurisdiction because the report was not filed on the holiday, as prescribed in the order.—Rice v. Douglas County, 183 P. 768.

TIPS.

See Master and Servant, ⚡385.

TORTS.

See Assault and Battery, ⚡15-40; Brokers, ⚡100; False Imprisonment, ⚡3-7; Forcible Entry and Detainer, ⚡29; Libel and Slander, ⚡9-121; Malicious Prosecution, ⚡16-49; Municipal Corporations, ⚡865; Negligence, ⚡32-142; Nuisance, ⚡72; Trover and Conversion.

TRADE UNIONS.

See Injunction, ⚡118; Master and Servant, ⚡339.

TRESPASS.

See Animals, ⚡100; Appeal and Error, ⚡981; Landlord and Tenant, ⚡51; New Trial, ⚡76; Waters and Water Courses, ⚡171.

TRIAL.

See Costs; Criminal Law, ⚡641-829; Evidence, ⚡71; Jury; New Trial; Prohibition, ⚡10, 11; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

IV. RECEPTION OF EVIDENCE.

(B) Order of Proof, Rebuttal, and Reopening Case.

⚡59(2) (Cal.) In action involving the legitimacy of a child, admitting declarations by the mother's paramour that he was the child's father, before it was shown that the mother's husband could not have been its father, involves merely the order of proof and is almost entirely within the trial court's discretion.—In re McNamara's Estate, 183 P. 552.

⚡62(3) (Cal.App.) Where defendant seller's own testimony showed he had waived an alleged breach of the sales contract by plaintiff buyer, the court did not abuse its discretion in refusing defendant permission to rebut claim of waiver, when permission was sought after defendant had rested and plaintiff's motion to withdraw issue regarding its breach of contract from jury had been granted.—Lompoc Produce & Real Estate Co. v. Browne, 183 P. 166.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

⚡108½ (Cal.App.) Counsel may ask prospective jurors whether they are interested in any insurance company but persistent inquiries as to whether they would be prejudiced by knowledge that a casualty company had insured defendant, and directly implying that such insurance had been effected, constitute reversible error in an evenly balanced case.—Arnold v. California Portland Cement Co., 183 P. 171.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⚡139(1) (Cal. App.) Nonsuit may be granted only when there is no evidence of sufficient substantiality to support a verdict for plaintiff, indulging in every legitimate inference from plaintiff's evidence, and disregarding conflict-

ing evidence.—*Lemmermann v. Pope & Talbot*, 183 P. 467.

⚡139(1) (Wash.) Credibility of evidence was for jury.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

(C) Dismissal or Nonsuit.

⚡163 (Cal.) A motion for nonsuit at close of plaintiff's case will not be granted unless specific grounds on which motion is made are stated.—*Mattson v. Mattson*, 183 P. 443.

⚡163 (Cal.App.) A motion for nonsuit should specify the ground upon which it is made.—*Williamson v. Williamson*, 183 P. 301.

(D) Direction of Verdict.

⚡170 (Ok.) Where the court properly excludes the evidence offered by defendant, and the evidence offered by plaintiff is sufficient to entitle him to judgment, it is not error to direct a verdict for plaintiff.—*Shaw v. Hutton*, 183 P. 477.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⚡187(1) (Cal.App.) In an automobile accident case, an instruction that presumption the car was being used for owner's benefit is not destroyed by testimony that the car had been loaned to the driver unless such testimony is believed by the jury, etc., *held* not to erroneously assume the testimony mentioned was false.—*Randolph v. Hunt*, 183 P. 358.

⚡194(12) (Cal.) In a payee bank's action on a note, defended on ground of payment by a corporation in which defendant maker was a stockholder, by check to plaintiff's cashier, an instruction that the drawing of such check was not in the ordinary course of business between defendant company and the bank was erroneous, as being an instruction on a question of fact, and particularly where this was the only note paid by the defendant, although the company had drawn checks payable to the bank.—*National Bank of San Mateo v. Whitney*, 183 P. 789.

(C) Form, Requisites, and Sufficiency.

⚡243 (Cal.) In payee bank's action against maker of a note, defended on ground of payment by check to order of plaintiff's cashier, drawn by a corporation in which defendant was a stockholder, and made upon the cashier's false representation that it was required by the bank examiner, an instruction that cashier's requirement of making check payable to him was notice putting defendant on inquiry *held* erroneous, as conflicting with another instruction that defendant was entitled to rely upon the cashier's integrity.—*National Bank of San Mateo v. Whitney*, 183 P. 789.

⚡244(1) (Cal.) Where defendant's counsel in an assault case improperly argued to the jury that plaintiff's provoking words mitigated the damages, after question of punitive damages had been withdrawn from jury, the court might properly emphasize that portion of his instruction which showed the fallacy and impropriety of counsel's argument.—*Benjamin v. Walton*, 183 P. 529.

(D) Applicability to Pleadings and Evidence.

⚡250 (Ok.) Instruction on questions of law, not applicable to the issues or evidence, is error, though abstractly correct.—*Holmes v. Halstid*, 183 P. 969.

⚡252(11) (Ok.) Where there was no evidence to sustain the defense of contributory negligence, it was not error to refuse to submit that issue.—*Okmulgee Window Glass Co. v. Bright*, 183 P. 898.

(E) Requests or Prayers.

⚡256(12) (Cal.App.) An instruction that an automobile driver, desiring to change his course, must first see that there is sufficient space, etc., in substantially the language of Motor Vehicle Act, § 20, subd. (j), *held* not error, in absence of a request to interpret the statutory language.—*Pemberton v. Arny*, 183 P. 358.

⚡260(1) (Ok.) It is not error to refuse special requested instructions when the questions covered thereby are included in the general instruction.—*Whitehead Coal Mining Co. v. Schneider*, 183 P. 49.

⚡260(1) (Ok.) Where court fairly covered the issue involved in its general instructions, its refusal to submit defendants' special requested instructions was not error.—*St. Louis & S. F. Ry. Co. v. Fraser*, 183 P. 478.

⚡260(1) (Ok.) The refusal of requested instructions tendered by defendant was not error, where those to which he was entitled were covered by the instructions given.—*Rennie v. Gibson*, 183 P. 483.

⚡260(1) (Ok.) Refusal of a requested instruction is not error, where same proposition is covered by the instructions given, and which as a whole fairly submit the law applicable to case.—*Holmes v. Halstid*, 183 P. 969.

⚡267(1) (Wash.) Court may give requested instruction in its own language, however appropriate may be the language in which request was framed.—*Lund v. Griffiths & Sprague Stevedoring Co.*, 183 P. 123.

(G) Construction and Operation.

⚡295(6) (Cal.App.) In an automobile accident case an instruction that plaintiff could not recover unless the automobile driver had been employed by defendant automobile owner, *held* not reversible error, when charge was considered as a whole, because conflicting with other instructions allowing recovery if defendant did not attempt to restrain the reckless driving.—*Randolph v. Hunt*, 183 P. 358.

⚡296(1) (Or.) It was not prejudicial error to give an incorrect instruction, where, in view of the other instructions given and the testimony in the case, the jury could not have been misled.—*Hinkson v. Kansas City Life Ins. Co.*, 183 P. 24.

⚡296(3) (Cal.App.) In an automobile accident case an instruction that defendant automobile owner's failure to control the machine's operation, if he had a right to do so, did not relieve him from liability, *held* not erroneous, in view of other instructions and evidence that defendant did not exercise control although he had the opportunity of doing so.—*Randolph v. Hunt*, 183 P. 358.

IX. VERDICT.

(A) General Verdict.

⚡340(5) (Ok.) Where verdict does not allow interest to which prevailing party is clearly entitled, and dates between which interest is allowable is ascertainable from the verdict or uncontroverted facts, and rate is fixed in the note sued on trial, judge should correct the verdict.—*Wallingford v. Alcorn*, 183 P. 726.

(B) Special Interrogatories and Findings.

⚡349(2) (Cal.App.) Since the court may refuse to submit questions for a special verdict, under Code Civ. Proc. § 625, error cannot be predicated on its refusal to submit certain requested interrogatories.—*McEwen v. New York Life Ins. Co.*, 183 P. 373.

⚡360 (Cal.App.) In seller's action on purchase-price notes, where buyer set up, and court found, breach of express warranty, and where there was no attack on sufficiency of evidence to sustain findings, the force and validity of the findings *held* not affected by statement in conclusion of law that there was an implied warranty; such statement being mere surplusage.—*Elmer Bros v. Carpenter*, 183 P. 568.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

⚡382 (N.M.) In case tried to court, defendant's motion for judgment at close of plaintiff's testimony for want of sufficient evidence to "prove the allegations of the complaint" calls for a declaration of law, and admits all the facts proven by, and all reasonable inferences from, the evidence.—Union Bank v. Mandeville, 183 P. 394.

In case tried to court, defendant's motion for judgment at close of plaintiff's testimony for want of sufficient evidence to "prove the allegations of the complaint" is in the nature of a demurrer to the evidence, governed by same rules as a like motion for an instructed verdict in a jury trial.—Id.

Defendant's motion for judgment at close of plaintiff's testimony for want of sufficient evidence to "prove the allegations of the complaint" does not authorize court which case is tried to weigh the evidence, or regard case as submitted on facts proven by plaintiff, and should be overruled, if, assuming truth of all facts proven and all reasonable inferences from the evidence, plaintiff makes out a prima facie case.—Id.

⚡384 (Cal.) In a case tried without a jury, if the evidence is insufficient to support a judgment for complainant, nonsuit is properly granted.—Hensley v. Hensley, 183 P. 445.

(B) Findings of Fact and Conclusions of Law.

⚡395(1) (Cal.) A finding that defendants executed and agreed to all terms of a written contract held a sufficient finding on defendant's allegations that contract did not express real intent of parties.—Berger v. Bright, 183 P. 541.

⚡395(2) (Cal.) In action for breaching a contract which compromised defendant's failure to convey certain land, a finding, setting forth the original contract for conveyance between the parties and defendant's failure to comply with it, held not uncertain or argumentative.—Slankard v. Wagnon, 183 P. 562.

⚡397(2) (Cal.App.) In action by a hotel lessee against the lessor for failure to provide proper heating facilities, court's conclusion that appellant lessee was entitled only to nominal damages rendered unnecessary an express finding regarding the adequacy of the heating plant.—Weichers v. Dehail, 183 P. 187.

⚡404(1) (Cal.App.) Where contractors, suing owner for balance due, denied allegation of an account stated, but admitted one of the plaintiffs was indebted to owner upon note, finding that such plaintiff was indebted on note in amount alleged due from all contractors cannot be construed as a finding that there was an account stated growing out of construction of the building.—Fatta v. Catalano, 183 P. 224.

⚡404(4) (Cal.App.) Findings are to be read as a whole, and, if possible, are to be interpreted so as to uphold the general judgment, and, unless there is an irreconcilable conflict between the general and special findings, the general ones will govern.—Todd v. Orcutt, 183 P. 963.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

⚡412 (Cal.App.) Where, after, adverse rulings on objections to evidence, motion to strike, and for a nonsuit, defendants proceed with the case and introduce evidence which supplies the defects in plaintiff's proof, the erroneous rulings of the trial court are cured.—Western California Land Co. v. Welch, 183 P. 169.

⚡414 (Cal.App.) Where, after adverse rulings on objections to evidence, motion to strike, and for a nonsuit, defendants proceed with the case and introduce evidence which supplies the defects in plaintiff's proof, the erroneous rulings of the trial court are cured.—Western California Land Co. v. Welch, 183 P. 169.

⚡419 (Cal.App.) Where, after adverse rulings on objections to evidence motion to strike

and for a nonsuit, defendants proceed with the case and introduce evidence which supplies the defects in plaintiff's proof, the erroneous rulings of the trial court are cured.—Western California Land Co. v. Welch, 183 P. 169.

⚡419 (Cal.App.) Where, though plaintiff did not make out a prima facie case, defendant introduced evidence, oral and documentary, on the merits, which was followed by further evidence introduced by plaintiff, the order denying defendant's motion for nonsuit, at the close of plaintiff's evidence, will not be disturbed, defendant not having attacked general verdict or special findings for plaintiff, thus conceding the evidence had supplied any deficiency existing when motion for nonsuit was made.—Schaad v. Barceloux, 183 P. 716.

TROVER AND CONVERSION.

See Appeal and Error, ⚡1050; Evidence, ⚡121; Pleading, ⚡376; Sales, ⚡479.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

⚡! (Ok.) "Conversion" is any distinct act or dominion wrongfully exerted over another's personal property, in denial of or inconsistent with his rights therein.—Probst v. Bearman, 183 P. 886.

II. ACTIONS.

(A) Right of Action and Defenses.

⚡13 (Nev.) Trover is an action, not to recover the specific thing, but to recover the value of the property wrongfully converted.—Nielsen v. Rebard, 183 P. 984.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

⚡30 (Ok.) Where one who converts property sells it to another, who has knowledge of the conversion, the buyer and seller may be sued jointly for the conversion.—Probst v. Bearman, 183 P. 886.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Descent and Distribution, ⚡69; Perpetuities, ⚡6, 9; Public Lands, ⚡128; Wills, ⚡656.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

⚡11(1) (Cal.) Assignment of mortgage to a trustee in consideration of the beneficiary's agreement to continue to care for, nurse, and support assignor during the remainder of his life, created a valid trust.—Musgrave v. Renkin, 183 P. 145.

⚡11(2) (Cal.App.) Even if a trust to convey was invalid under Civ. Code, § 857, a later contract, re-executing the original transaction subsequent to the taking effect of the amendment of 1913 (St. 1913, p. 438) to such statute, authorizing trusts to convey, was valid and enforceable.—Withers v. Bousfield, 183 P. 855.

(B) Resulting Trusts.

⚡79 (Cal.) Persons contributing toward purchase price of real estate held entitled to a resulting trust in property in proportion that their contribution bore to total purchase price.—Gaume v. Sheets, 183 P. 535.

II. CONSTRUCTION AND OPERATION.

(B) Estate or Interest of Trustee and of Centui Que Trust.

⚡136 (Cal.App.) Tripartite agreement, whereby vendors conveyed land to third parties to secure payment of purchase price and whereby

third parties agreed to sell separate tracts of land on purchaser's demand and apply certain per cent. of proceeds to payment of purchase money, and interest in outstanding contracts and remaining portion of land to purchasers when vendor shall have received payment in full of purchase price *held* not a dry and passive trust.—*Withers v. Bousfield*, 183 P. 855.

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

—272(3) (Cal.) Stock dividends paid out of earnings accumulating after the death of a stockholder, who has created a trust estate by will, are income belonging to the life beneficiary of the trust, and not principal belonging to the corpus of the estate.—*In re Duffill's Estate*, 183 P. 337.

UNDERTAKINGS.

See Prohibition, —3.

UNIFORM SALES ACT.

See Sales, —199, 201, 209.

USURY.

See Building and Loan Associations, —46.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

—98 (Okla.) Under Wilson's Rev. & Ann. St. 1903, § 849, interest could not be collected upon a contract entered into in Oklahoma territory which was tainted with usury.—*Midland Savings & Loan Co. v. Nicoll*, 183 P. 731.

VENDOR AND PURCHASER.

See Brokers, —63, 75, 85; Covenants, —96; Escrows; Equity, —39; Evidence, —422; Exchange of Property, —8, 11, 13; Execution, —242; Guaranty, —21, 70; Guardian and Ward, —95, 96; Interest, —43; Joint Adventures, —7; Judgment, —682; Limitation of Actions, —65; Lis Pendens, —24, 26; Mortgages, —1, 27, 82, 253, 275, 559; Municipal Corporations, —85, 89; Partition, —77; Perpetuities, —6; Pleading, —205, 380; Principal and Agent, —183; Public Lands, —35, 38, 187½; Reformation of Instruments, —47; Sales; Tenancy in Common, —28, 43; Trusts, —79, 136.

I. REQUISITES AND VALIDITY OF CONTRACT.

—3(1) (Cal.) Contract whereby one party agreed to advance to other party who was owner of interest in land certain sum of money where-with to buy other interests and discharge incumbrances, and second party agreed to repay advancement after selling property and divide remainder with first party, was not one for the conveyance of an estate in real property to which the special measure of damages for breach prescribed by Civ. Code, § 3306, would be applicable; but section 3300, as to damages from breach of contract, would apply.—*Ilouise v. Piercy*, 183 P. 807.

—15 (Cal.App.) One who exchanged land for corporate stock cannot maintain that there was no consideration in that the stock was worthless, where the defendant paid \$1,500 in cash and assumed a certain indebtedness on the land conveyed, although the cash was paid to the former's agent and was retained by him as his commission in negotiating the exchange.—*Arendt v. McConnell*, 183 P. 202.

—35 (Cal.App.) A vendor's representations that tax deed affidavits upon which the validity of his title depended were correct according to advice he had received, etc., *held* not a misrepresentation of fact authorizing rescission of the sales contract.—*Melicharek v. Colkins*, 183 P. 457.

—44 (Or.) Evidence *held* to sustain finding that there was no fraudulent representation in the trade of a farm.—*Robertson v. Martin*, 183 P. 651.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

—49 (Cal.) Vendee's agreement to pay expenses incurred by the vendor in clearing title, to property refers only to expenses in perfecting title to be tendered vendee, and does not include attorney's fees incurred in an action to quiet title by vendor against vendee.—*Gaume v. Sheets*, 183 P. 535.

—50 (Cal.App.) Where vendors executed grant, bargain, and sale deed to third parties and entered into a tripartite agreement with purchaser and third parties, whereby third parties agreed to sell or execute contract for sale of small tracts of the land conveyed upon purchaser's demand, and deposit certain per cent. of proceeds in a bank to vendors' credit, the deed and tripartite agreement should be considered as parts of one contract.—*Withers v. Bousfield*, 183 P. 855.

—50 (Cal.App.) Where a written contract for the sale of a lot upon installment payments and a contemporaneous written contract, expressly referring thereto and reciting that it was made in consideration thereof, providing that vendors should not look to purchaser for payments of amounts beyond a certain portion of what purchaser earned painting signs for vendors, the two instruments evidence but a single contract, under Civ. Code, § 1642, and must be so construed as to give effect to each under section 1641.—*McAuliff v. McFadden*, 183 P. 870.

—58 (Or.) A vendor's agreement to clear the lots, grade street, and lay a water main *held* an independent covenant not authorizing the purchaser to rescind contract upon its breach.—*McCracken v. Bay City Land Co.*, 183 P. 9.

—65(2) (Or.) Trade, for a house and \$2,000, of a farm represented in the conveyance as 24.75 acres, according to government survey, "be the same more or less," *held* in gross, and not by the acre.—*Robertson v. Martin*, 183 P. 651.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

—84 (Cal.App.) On sale of land, the vendor and purchaser may legally enter into an agreement whereby the purchaser may require the vendor to repurchase within a specified time.—*Hale v. Pendergrast*, 183 P. 833.

—85 (Cal.) A vendor's notice, declaring contract void for nonpayment of a purchase price installment and that he would commence an action to quiet title within 60 days, unless vendee surrendered possession, *held* a repudiation of the contract, which justified vendee in surrendering property and treating contract as rescinded.—*Gaume v. Sheets*, 183 P. 535.

—86 (Cal.) Under a contract of sale of land, wherein the payment of a certain part of the purchase price within a specified time and the delivery of the deed were dependent and concurrent conditions, the vendee after the expiration of the time within which he was to make such payment could consider the contract abandoned, where the vendor after such time and without tendering a deed gave notice of termination of the contract and forfeiture on the theory that the vendee was in default.—*Lemle v. Barry*, 183 P. 148.

—86 (Cal.App.) Willful refusal by a vendee of land to perform his agreement amounts to an abandonment of the contract by him.—*Andrews v. Karl*, 183 P. 838.

(B) Rescission by Vendor.

—93 (Cal.App.) Where time is made of the essence of a contract for the sale of land, tar-

minating it on failure to comply strictly and punctually with conditions, the effect is to entail a forfeiture on the mere default of the purchaser by his failure to make payments when and as he obligated himself to do, if the vendor has not waived the default or forfeiture, as is within his right by express agreement or unequivocal acts or demeanor.—*Andrews v. Karl*, 183 P. 838.

§95(2) (Cal.App.) Where contract provided for forfeiture of purchaser's rights thereunder upon failure to make payments when due, vendor's acceptance of payments while purchaser was in arrears created a temporary suspension of right of forfeiture.—*La Chance v. Brown*, 183 P. 216.

§95(2) (Cal.App.) Right of forfeiture for failure to make payment when due may be waived by vendor's express agreement or unequivocal acts or demeanor.—*Andrews v. Karl*, 183 P. 838.

Where the conduct of the vendor of land, or the entire course of business between him and the purchaser, amounts to a waiver of the clause in the contract making time of the essence, the waiver creates a temporary suspension of the right of forfeiture in the vendor for delay in payment by the purchaser.—*Id.*

Where the vendor of land on maturity of the first annual installment stated that he did not need the money, but that instead the purchasers could continue to improve the property, increasing its value, and endeavor to resell it, the vendor thereby waived any forfeiture incurred by the purchasers through failure to make payment promptly on time.—*Id.*

§101 (Cal.App.) Where contract provided for forfeiture of purchaser's rights thereunder upon failure to make payments when due, vendors' acceptance of payments while purchaser was in arrears created a temporary suspension of right of forfeiture, which could be restored only by a definite and specific notice of an intention to enforce it.—*La Chance v. Brown*, 183 P. 216.

Vendors, after waiving right of forfeiture for purchaser's failure to make payments when due, could revive right only by giving purchaser reasonable time within which to make payments in compliance with contract.—*Id.*

Where contract provided for forfeiture of payments upon purchaser's failure to pay installments when due, and required vendor to make repairs in case of fire, vendor, after having waived right of forfeiture by acceptance of overdue payments, and after having undertaken to repair building after partial destruction by fire, could not revive right of forfeiture by notice demanding payment before completion of repairs.—*Id.*

§101 (Cal.App.) Where the conduct of the vendor of land, or the entire course of business between him and the purchaser, amounts to a waiver of the clause in the contract making time of the essence, the waiver creates a temporary suspension of the right of forfeiture in the vendor for delay in payment by the purchaser, which can be revived only by giving definite and specific notice of the vendor's intention.—*Andrews v. Karl*, 183 P. 838.

Where the vendor of land on maturity of the first annual installment stated that he did not need the money, but that instead the purchasers could continue to improve the property, increasing its value, and endeavor to resell it, the vendor thereby waived any forfeiture incurred by the purchasers through failure to make payment promptly on time, and the vendor never having given notice of intention to restore the right, it was not revived.—*Id.*

§102 (Cal.App.) Sale of premises by vendor to persons other than purchaser without purchaser's knowledge or consent does not constitute an attempt to rescind contract, since vendor may sell property subject to purchaser's rights under the contract.—*La Chance v. Brown*, 183 P. 216.

(C) Rescission by Purchaser.

§109 (Cal.App.) Where there exists an executory contract for the sale and conveyance of real property, and improvements which constitute a material part of the consideration had been destroyed, the loss falls upon the vendor, and purchaser has the right to rescind the contract.—*La Chance v. Brown*, 183 P. 216.

§116 (Cal.App.) Where purchaser failed to tender a reconveyance of lots or of money received by purchaser for them, he had no cause of action for rescission of the purchase contract.—*Melicharek v. Colkins*, 183 P. 457.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§144(2) (Cal.) Where there has been no fraudulent misrepresentation as to the vendor's title, the fact that he has an imperfect title or no title at all at time of execution of a contract of sale does not invalidate the contract of sale; it being sufficient if vendor has good title at time he is called upon to perform.—*Lemle v. Barry*, 183 P. 148.

(B) Conveyance.

§148 (Cal.) Where, under a contract of sale of land, the making of the deed and the payment of a certain part of the purchase price were dependent and concurrent conditions, and time was of the essence of the contract, vendor could not put the vendee in default until he tendered his deed.—*Lemle v. Barry*, 183 P. 148.

(D) Payment of Purchase Money.

§170 (Cal.) In order to put in default the vendor in a contract of sale of land, under which payment of a certain part of the purchase price and delivery of the deed were dependent and concurrent conditions, and in which time was of the essence of the contract, the vendee must tender the purchase money.—*Lemle v. Barry*, 183 P. 150.

§170 (Or.) Plaintiff's letter inquiring what balance remained to be paid on a land contract and expressing a desire to secure a deed as soon as possible held insufficient to show a tender of amount due under the contract.—*McCracken v. Bay City Land Co.*, 183 P. 9.

§180 (Cal.App.) Note from purchaser to vendors, deposited with third parties to whom vendors had conveyed the land to secure payment of purchase money, held, in view of tripartite agreement and the deed, and in view of Code Civ. Proc. § 1962, subd. 2, a note for the purchase price, and not merely a penalty deposited with third parties as trustees.—*Withers v. Bougfield*, 183 P. 855.

§187 (Cal.App.) Vendors' acceptance of payments while purchaser was in arrears held to constitute waiver of time as an essential condition for the payment of installments due under the contract.—*La Chance v. Brown*, 183 P. 216.

§187 (Cal.App.) Failure to make payment when due may be waived by vendor's express agreement or unequivocal acts or demeanor.—*Andrews v. Karl*, 183 P. 838.

V. RIGHTS AND LIABILITIES OF PARTIES.

(A) As to Each Other.

§191 (Cal.App.) Willful refusal by a vendee to perform his agreement amounts to an abandonment of the contract by him, and the repudiated contract is no protection to the vendee in possession against the legal title.—*Andrews v. Karl*, 183 P. 838.

§203 (Cal.App.) Where there exists an executory contract for the sale and conveyance of real property, and improvements which constitute a material part of the consideration have been destroyed, the loss falls upon the vendor.—*La Chance v. Brown*, 183 P. 216.

(B) As to Third Persons in General.

⚡214(6) (Cal.App.) Instrument by which purchasers transferred their interest in a land sale contract and assignee agreed to accept same did not impose a personal liability upon assignee to pay purchase-price installments, despite Civ. Code, § 1589, providing that a voluntary acceptance of benefits involves an assumption of all obligations.—Beazley v. Embree, 183 P. 298.

⚡219 (Cal.App.) Evidence that plaintiff vendor had transferred a right of way across his property held insufficient to show that he would not be able to deliver such title as he had contracted to furnish.—Beazley v. Embree, 183 P. 298.

(C) Bona Fide Purchasers.

⚡224 (Okla.) One can be a bona fide purchaser under a quitclaim deed, executed in compliance with Rev. Laws 1910, § 1161, as well as if a grantee under a warranty deed.—Tucker v. Leonard, 183 P. 907.

⚡229(6, 7) (Cal.App.) One purchasing land after a judgment validating a reclamation district assessment thereon is charged with notice of the lien imparted by such judgment.—Reclamation Dist. 785 v. Lovdal Bros. Co., 183 P. 598.

⚡231(13) (Cal.App.) An instrument not entitled to go upon record is not constructive notice, although recorded.—Hale v. Pendergrast, 183 P. 833.

⚡231(15) (Cal.App.) An agreement to repurchase land on demand by the purchaser within a certain specified time is not entitled to be recorded unless it is acknowledged.—Hale v. Pendergrast, 183 P. 833.

An unacknowledged agreement to repurchase land, although physically attached to and by reference made a part of a purported notice signed and acknowledged by the purchaser of the land to the effect that the agreement was given in consideration of the sale of land, was not an "instrument" which could be recorded under Civ. Code, § 1158.—Id.

⚡242 (Okla.) Purchasers of land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed.—Tucker v. Leonard, 183 P. 907.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

⚡296 (Cal.App.) Willful refusal by a vendee of land to perform his agreement amounts to an abandonment of the contract by him, and the repudiated contract is no protection to the vendee in possession against the legal title, but the vendor may recover possession in an action of ejectment.—Andrews v. Karl, 183 P. 838.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

⚡334(1) (Cal.) Under a contract of sale of land, wherein the payment of a certain part of the purchase price within a specified time and the delivery of the deed were dependent and concurrent conditions, the vendee after the expiration of the time within which he was to make such payment could consider the contract abandoned, where the vendor after such time and without tendering a deed gave notice of termination of the contract and forfeiture on the theory that the vendee was in default, and the vendee was entitled to a return of installments of the purchase price theretofore paid.—Lemle v. Barry, 183 P. 148.

⚡334(3) (Cal.) Where a land sale contract is mutually rescinded, the vendees may recover purchase price installments paid by them.—Gaume v. Sheets, 183 P. 535.

⚡334(3) (Cal.App.) Where the mutual abandonment or rescission of a real estate sale con-

tract is unconnected with a new agreement, the purchaser may recover installments paid on the contract.—Hieatt v. Gassen, 183 P. 227.

Where the parties agreed to cancel a real estate sales contract, and plaintiff purchaser was given an option to purchase part of the premises covered by the old contract, there was in effect a "novation" as defined by Civ. Code, §§ 1530 and 1531, and plaintiff cannot recover partial payments made under the old contract.—Id.

⚡334(5) (Cal.App.) Where lots bought by plaintiff from a tax sale purchaser were redeemed by the owner upon payment of accrued taxes, interest, etc., there was not a total failure of consideration, authorizing the plaintiff to recover from his vendor in an action for money had and received.—Melicharek v. Colkins, 183 P. 457.

⚡334(6) (Cal.App.) Where defendants, owner's agents, did not act in bad faith in failing to complete the contract contemplated by the earnest money receipt they issued to plaintiff's agent such receipt making the deal subject to the approval of the owner, and the owner's approval not being given, plaintiff's only right was to recover the earnest money deposit.—Hay v. Hollingsworth, 183 P. 582.

⚡336 (Cal.) Where, under a contract of sale of land, payment of a certain part of the purchase price and delivery of the deed were dependent and concurrent conditions, and vendor, after termination of the time within which vendee should make such payment, gave notice of forfeiture of installments theretofore paid without tendering the deed, thus giving vendee the right to treat the contract as abandoned, a demand of the vendee for reimbursement as to installments theretofore paid, although long delayed, had the legal effect of an immediate demand, where the vendor requested delay, but made no effort to correct a defective title or tender a deed.—Lemle v. Barry, 183 P. 148.

⚡339 (Cal.App.) Where purchaser obtained a receipt from the vendor estate's agent for earnest money paid, which provided for sale of land upon the estate's approval, and for the payment of additional money by purchaser at a fixed date, purchaser was entitled to an approval of the sale before making the additional payment, and where approval was refused could recover the first payment, without having tendered the additional payment.—Hay v. Hollingsworth, 183 P. 582.

(B) Actions for Breach of Contract.

⚡342 (Cal.) Where a vendor has failed to tender a deed under a contract of sale and to correct a defective title, the vendee may sue for damages for breach of the contract, or may sue to recover installments previously made, but cannot have both remedies, the former being based on the contract, and the latter on an abandonment of the contract.—Lemle v. Barry, 183 P. 150.

⚡344 (Cal.) In action for breaching a contract which compromised defendant's failure to convey certain land, the fact that plaintiff did not offer to reconvey land outside the agreed boundaries which had been conveyed to him by defendant held immaterial.—Slankard v. Wagnon, 183 P. 562.

⚡345 (Cal.) In an action for breaching a contract which compromised defendant's failure to convey certain land, it is no defense that plaintiff accepted a deed from defendant from which the deficiency in the land conveyed might have been discovered.—Slankard v. Wagnon, 183 P. 562.

VENUE.

See Appeal and Error, ⚡339, 965; Corporations, ⚡666; Criminal Law, ⚡112-144, 564, 1033; Husband and Wife, ⚡289; Larceny, ⚡28.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

II. DOMICILE OR RESIDENCE OF PARTIES.

⚡22(1) (Cal.App.) Under Code Civ. Proc. § 395, providing that a personal action must be tried in the county in which the defendant or some one defendant resides, where there are several defendants residing in different counties, plaintiff has his election.—*Mitchell v. Kim*, 183 P. 368.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

⚡41 (Cal.App.) Where a personal action was brought in county where two material defendants resided, the trial court was justified in refusing to change place of trial to residence of third defendant.—*Beasley v. Embree*, 183 P. 298.

⚡42 (Nev.) Rev. Laws, § 5015, relating to change of venue, is mandatory, and proper application for a change must be granted.—*Salsberry v. Connolly*, 183 P. 391.

⚡52(1) (Cal.App.) In a woman's action for personal injuries against two mining companies and an individual, denial of the motion of one mining company for change of venue on account of convenience of witnesses and the ends of justice held not an abuse of the discretion of the trial court.—*Ryan v. Inyo Cerro Gordo Mining & Power Co.*, 183 P. 251.

⚡56 (Nev.) Rev. Laws, § 5015, subd. 1, authorizing court on motion to change place of trial in certain cases, does not authorize court to change the venue at any time before trial, in a case where defendant has filed no seasonable written application.—*Salsberry v. Connolly*, 183 P. 391.

⚡61 (Nev.) Under Rev. Laws, § 5015, providing for change of venue upon application made before the time for answering has expired, a stipulation made by attorneys, pursuant to district court rule No. 27, extending defendants' time to answer, did not extend the time to apply for a change of venue.—*Salsberry v. Connolly*, 183 P. 391.

A stipulation extending defendants' time to appear, demur, answer, or "move" did not extend the time to move for a change of venue as a matter of right.—*Id.*

⚡72 (Cal.App.) On motion for change of place of trial, the court will not go into the merits.—*Mitchell v. Kim*, 183 P. 368.

VERDICT.

See Trial, ⚡340-360.

VERMIN.

See Counties, ⚡216.

VESTED RIGHTS.

See Constitutional Law, ⚡92.

WAIVER.

See Damages, ⚡206.

WATERS AND WATER COURSES.

See Canals; Damages, ⚡159; Drains; Evidence, ⚡353; Injunction, ⚡9, 24; Public Lands, ⚡187½; Statutes, ⚡64.

VI. APPROPRIATION AND PRESCRIPTION.

⚡151 (Cal.) Under Civ. Code, § 811, subd. 4, relating to extinguishment of servitudes, a prescriptive right to the use of a ditch and water right is lost by failure to exercise the right for five years.—*Garbarino v. Noce*, 183 P. 532.

⚡152(5) (Cal.) Allegations that defendant owned a third interest in a ditch and water

right may be supported by proof of ownership acquired by deed, prescription, or other lawful manner.—*Garbarino v. Noce*, 183 P. 532.

⚡152(8) (Cal.) Plaintiff's testimony that defendant used water from a ditch by his permission and deeds indicating that ditch had been considered appurtenant to plaintiff's and not defendant's property, etc., held to sustain a finding that ditch and water right belonged solely to plaintiff, although the parties had alternated in using the water for many years.—*Garbarino v. Noce*, 183 P. 532.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

⚡171(2) (Cal.) Where defendants, to prevent injury to their land from seasonal waters from a canyon, erected a wooden barrier which turned the waters onto plaintiff's land, they were liable to plaintiff as for a trespass; the rule as to waters which are a common enemy having application only to "flood waters," waters escaping because of their height from confinement in a stream and running over the adjacent country.—*Thomson v. La Fetra*, 183 P. 152.

⚡172 (Wash.) One who by means of a dam impounds the water of a stream is required to exercise such reasonable care as a reasonably careful and prudent man, acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rain falls, and other conditions likely to cause freshets, would exercise under like circumstances, but is not required to provide against unprecedented floods or freshets or act of God.—*Anderson v. Rucker Bros.*, 183 P. 70.

Such freshets or floods as from climate and geographical condition may reasonably be expected, whether of frequent or infrequent occurrence, must be considered in estimating hazards attending obstructions of water course.—*Id.*

⚡179(4) (Cal.App.) In an action for damages to land abutting on a stream by reason of defendant railroad's wrongful acts in constructing its trestle bridge and a rock bulkhead across and within the stream, so as to obstruct the same causing overflow in time of flood, evidence that the construction did not conform to good engineering practice held to support verdict for plaintiff.—*Klein v. San Pedro, L. A. & S. L. R. Co.*, 183 P. 672.

⚡179(5) (Wash.) In action for damages caused by overflow from dam, alleged to have been negligently maintained by defendant, instructions as to care required of defendant in maintaining and constructing dam held not misleading.—*Anderson v. Rucker Bros.*, 183 P. 70.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

⚡182 (Cal.) St. 1913, p. 793, providing that every person, private corporation, or municipality engaged in furnishing water for human consumption, and having over 250 surface connections, shall be guilty of maintaining a nuisance, unless the water being supplied is the purest and most healthful securable, under all circumstances and conditions, is unreasonable and unconstitutional, amounting to an absolute prohibition of a lawful business.—*Frost v. City of Los Angeles*, 183 P. 342.

WEAPONS.

See Homicide, ⚡300.

WEIGHTS AND MEASURES.

See Sales, ⚡200, 218½.

WHISKY.

See Larceny, ⚡5.

WILD ANIMALS.

See Animals, ¶60, 71, 74; Pleading, ¶35.

WILLS.

See Descent and Distribution; Executors and Administrators; Husband and Wife, ¶278; Perpetuities, ¶9; Public Lands, ¶128, 135; Specific Performance, ¶28; Tenancy in Common, ¶3; Trusts, ¶272.

II. TESTAMENTARY CAPACITY.

¶52(1) (Cal.) It will be presumed that deceased was of sound mind when her will was executed.—In re Dow's Estate, 183 P. 794.

IV. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

¶99 (Cal.App.) Codicil, not specifically referring to any will, must be taken to refer to the last executed will.—In re Graham's Estate, 183 P. 952.

A codicil to an unrevoked will need not definitely refer to or be physically attached to such will.—Id.

A provision in a codicil, not specifically referring to any will, revoking a bequest revoked by the last executed will, will be disregarded as meaningless, having nothing upon which to operate; but such provision does not invalidate the remainder of the codicil.—Id.

(C) Execution.

¶123(5) (Cal.) Under Civ. Code, § 1276, requiring two attesting witnesses to sign at testator's request and in his presence, it is unnecessary that the witnesses sign in the presence of each other.—In re Dow's Estate, 183 P. 794.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) Probate and Revocation in General.

¶215 (Okl.) In a proceeding to probate a will under Rev. Laws 1910, §§ 6210, 6211, the only issue is the factum of the will, and the court has no jurisdiction to construe the will or try the validity of any devise therein.—Hill v. Buckholts, 183 P. 42.

(H) Evidence.

¶289 (Cal.) The presumption that deceased was of sound mind when her will was executed justifies the conclusion, in absence of testimony to the contrary, that she was neither unconscious nor asleep when will was witnessed.—In re Dow's Estate, 183 P. 794.

¶302(1) (Cal.) Conflicting evidence, and the presumption that testatrix was of sound mind, held to sustain finding that she was neither unconscious nor asleep when the will was witnessed.—In re Dow's Estate, 183 P. 794.

The written declaration of subscribing witnesses in attestation clause of a will that they signed at testatrix's request, the direct testimony of one witness that they signed at such request, which was later modified or retracted, testimony that other witness had been requested by testatrix's brother to sign, etc., held to sustain a finding that will was witnessed at testatrix's request.—Id.

VI. CONSTRUCTION.

(A) General Rules.

¶440 (Cal.App.) Testator's intention must be extracted from the express terms of his will.—In re McKay's Estate, 183 P. 574.

¶481 (Cal.) Wills generally speak as of the death of their makers.—In re Duffill's Estate, 183 P. 337.

(B) Designation of Devisees, and Legatees and Their Respective Shares.

¶525 (Cal.App.) A will devising all of testator's estate as follows: "To my wife one-

fifth part thereof, and to each of my children, H. and E., the undivided four-fifths part thereof," when construed in accordance with Civ. Code, §§ 1324, 1325, gives to each child an equal undivided portion of the four-fifths remainder; the use of the word "each" not rendering the devise void for uncertainty and impossibility of consummation.—In re McKay's Estate, 183 P. 574.

(G) Conditions and Restrictions.

¶656 (Cal.) Provision in testatrix's will that in case her son shall marry "A." that trustee shall pay to him thereafter annually a sum less than the amount theretofore named operated upon the trustee only; and, where son was divorced from his then wife, and thereafter married "A." before the death of testatrix, the contingency upon which the inhibition was to become effective was removed, in view of Civ. Code, § 749, providing that condition in will shall take effect at testator's death.—In re Duffill's Estate, 183 P. 337.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

¶734(1) (Cal.) The matter of interest on legacies is controlled by statute, in absence of provisions in the will.—In re Ballou's Estate, 183 P. 440.

¶734(6) (Cal.) A legacy to testator's adopted daughter, who had received substantial support from him for nearly 10 years preceding the making of the will and was in receipt of such support at the time of his death, held to be a "legacy for maintenance," within Civ. Code, § 1369, providing that such legacies bear interest from testator's death.—In re Ballou's Estate, 183 P. 440.

¶734(11) (Cal.) An adopted child's right to interest on a maintenance legacy, under Civ. Code, § 1369, is not destroyed because child demanded and received statutory family allowance pending administration, etc., where there was nothing in will which required child to elect between rights under will and statute.—In re Ballou's Estate, 183 P. 440.

(D) Election.

¶792(4) (Cal.App.) The fact that an administratrix offered an alleged will for probate, as she was required to do by Code Civ. Proc. § 1298, did not constitute an estoppel or election precluding her from claiming the instrument gave her contractual rights against deceased's estate.—Norton v. Norton's Estate, 183 P. 214.

WITNESSES.

See Appeal and Error, ¶203, 905; Chattel Mortgages, ¶60, 85, 90; Criminal Law, ¶508, 603, 1159, 1170½; Divorce, ¶130; Evidence; Venue, ¶52; Wills, ¶123, 302.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

¶40(2) (Cal.App.) Under Code Civ. Proc. § 1890, the competency of a child under the age of 10 years to testify is a matter left largely to the discretion of the court.—Exposito v. United Railroads of San Francisco, 183 P. 576.

(D) Confidential Relations and Privileged Communications.

¶219(4) (Cal.) The privilege of a patient, under Code Civ. Proc. § 1831, of preventing physicians from testifying as to communications made by patient, is personal to the patient and may be waived by him.—Hirschberg v. Southern Pac. Co., 183 P. 141.

¶219(5) (Cal.) Plaintiff in a personal injury action, by testifying fully and allowing a physician to testify fully as to her condition after an alleged assault, did not waive her right, giv-

en by Code Civ. Proc. § 1881, to object to the introduction in evidence of information acquired by another physician while acting as her physician several years prior to the injury complained of.—*Hirschberg v. Southern Pac. Co.*, 183 P. 141.

III. EXAMINATION.

(B) Cross-Examination and Re-Examination.

⚡274(2) (Wash.) In a prosecution for arson, where defendant put witnesses on the stand to testify that his general reputation was good, it was error to permit the state's attorney on cross-examination to ask the witnesses if they had heard about the defendant having a fire which destroyed the house in which he lived, and also whether they had heard that the house in which the defendant and his father lived had been destroyed by fire; the fact that such houses had burned not tending to discredit the witnesses nor to show that defendant's reputation was bad.—*State v. Presta*, 183 P. 112.

⚡287(3) (N.M.) In trial for murder, where sheriff, cross-examined by defendant's counsel as to whether he had filed a complaint against a third party for alleged acts of violence, answered in negative, it was proper for state on redirect to ask him why he had not filed such complaint, and to give him opportunity to explain reported circumstances as to such acts.—*State v. Parks*, 183 P. 433.

(C) Privilege of Witness.

⚡305(1) (Wash.) A witness may waive his privilege of refusing to testify on the ground that his testimony might incriminate him, and when he does so he cannot thereafter claim it.—*State v. Whalen*, 183 P. 130.

⚡306 (Wash.) Where a witness, in a prosecution for being in unlawful possession of intoxicating liquors, made no claim of privilege upon the ground that his testimony might incriminate him, sureties on his bail bond, he having been arrested by reason of having given testimony that incriminated him, cannot claim the privilege for him in a proceeding to forfeit bail, although Laws 1915, p. 9, § 13, provide that no person shall be prosecuted as to matter concerning which he is compelled to testify in such a prosecution.—*State v. Whalen*, 183 P. 130.

⚡307 (Wash.) A witness, in a prosecution for having in possession intoxicating liquors, who made no claim of privilege upon the ground that his testimony might incriminate him or upon any other ground, was not "compelled" to testify within the meaning of Laws 1915, p. 9, § 13, providing that no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify in such a prosecution.—*State v. Whalen*, 183 P. 130.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(B) Character and Conduct of Witness.

⚡349 (Okl. Cr. App.) On trial for homicide, exclusion of cross-examination of deceased's wife, a witness for the state, as to character of place at which she had registered under assumed name and as to whether she had occupied room there with a named man the night before the trial, offered to show her unchastity, was not an abuse of court's discretion.—*Boyer v. State*, 183 P. 620.

⚡349 (Wash.) In a prosecution for arson, where defendant put witnesses on the stand to testify that his general reputation was good, it was error to permit the state's attorney on cross-examination to ask the witnesses if they had heard about the defendant having a fire which destroyed the house in which he lived, and also whether they had heard that the house

in which the defendant and his father lived had been destroyed by fire, the fact that such houses had burned not tending to discredit the witnesses.—*State v. Presta*, 183 P. 112.

⚡350 (N.M.) In trial for murder, cross-examination of a defendant as to other crimes and specific acts of violence alleged to have been committed by him was proper, under rule that overt acts of wrongdoing by witness are relevant and impeaching evidence, but cannot be shown outside of his examination, the extent of which rests largely in court's discretion.—*State v. Parks*, 183 P. 433.

(C) Interest and Bias of Witness.

⚡372(2) (Okl. Cr. App.) On trial for murder, question on cross-examination of deceased's wife, a witness for the state, as to whether she had executed a power of attorney of her interest in the prosecution, and as to whether she had endeavored to settle it for a money consideration, and failed, was improperly excluded, as it bore on the weight and bias of her testimony and as to her feeling against defendant.—*Boyer v. State*, 183 P. 620.

(D) Contradiction and Corroboration of Witness.

⚡404 (Okl. Cr. App.) Statements of one accused of murder in giving an account of himself, or of the homicide, which tend to explain incriminating circumstances, may be proven false by prosecution after it has proved that accused made them.—*Wilson v. State*, 183 P. 613.

WOODEN BUILDINGS.

See Constitutional Law, ⚡320; Estoppel, ⚡62; Municipal Corporations, ⚡120.

WORDS AND PHRASES.

"Accomplice."—*Cole v. State* (Okl. Cr. App.) 183 P. 734.

"Account stated."—*Bennett v. Potter* (Cal.) 183 P. 156.

"Action."—*Hejduk v. Snyder* (Okl.) 183 P. 923.

"Action for recovery of money."—*Holmes v. Halstid* (Okl.) 183 P. 969.

"Actual fraud."—*Bechtold v. Coney* (Cal. App.) 183 P. 841.

"Allow."—*Luckie v. Diamond Coal Co.* (Cal. App.) 183 P. 178; *Cook v. Reid* (Cal. App.) 183 P. 820.

"Assigns."—*Werner v. Graham* (Cal.) 183 P. 945.

"Bill."—*State Board of Health of California v. Alameda County* (Cal. App.) 183 P. 455.

"Center of a road."—*Rice v. Douglas County* (Or.) 183 P. 768.

"Chronic disease."—*Coffey v. Northwestern Hospital Ass'n* (Or.) 183 P. 762.

"Claim."—*State Board of Health of California v. Alameda County* (Cal. App.) 183 P. 455.

"Compel."—*State v. Whalen* (Wash.) 183 P. 130.

"Confession."—*Wilson v. State* (Okl. Cr. App.) 183 P. 613.

"Conversion."—*Probst v. Bearman* (Okl.) 183 P. 886.

"De facto corporation."—*Coe v. City of Los Angeles* (Cal. App.) 183 P. 822.

"Demand."—*State Board of Health of California v. Alameda County* (Cal. App.) 183 P. 455.

"Dissolution."—*Subsidiary High Court of Ancient Order of Foresters v. Pestarino* (Cal. App.) 183 P. 297.

"Dividend."—*Rossi v. Rex Consol. Mining Co.* (Wash.) 183 P. 120.

"East."—*Anaheim Sugar Co. v. Orange County* (Cal.) 183 P. 809.

"Either."—*Lankford v. First Nat. Bank* (Okl.) 183 P. 56.

"Equal."—*Bissett v. Roberts* (N. M.) 183 P. 403.

"Equitable easement."—*Werner v. Graham* (Cal.) 183 P. 945.

"Escrow."—McPherson v. Barbour (Or.) 183 P. 752.
 "Excess."—McEwen v. New York Life Ins. Co. (Cal. App.) 183 P. 373.
 "Executory contract."—Bennett v. Potter (Cal.) 183 P. 156.
 "False pretenses."—People v. Rose (Cal. App.) 183 P. 874.
 "Family."—In re McNamara's Estate (Cal.) 183 P. 552.
 "Filing."—W. J. White Co. v. Winton (Cal. App.) 183 P. 277.
 "Flood water."—Thomson v. La Fetra (Cal.) 183 P. 152.
 "General agent."—Hinkson v. Kansas City Life Ins. Co. (Or.) 183 P. 24.
 "Good right to convey."—Rennie v. Gibson (Okl.) 183 P. 483.
 "Immediate notice."—Moline Plow Co. v. Adair (Okl.) 183 P. 499.
 "Income."—In re Duffill's Estate (Cal.) 183 P. 337.
 "Incumbrance."—Boothe v. Wyatt (Utah) 183 P. 323.
 "Independent contractor."—Swansea Lease, Inc. v. Molloy (Ariz.) 183 P. 740.
 "Inference."—Maupin v. Solomon (Cal. App.) 183 P. 198.
 "Instrument."—Hale v. Pendergrast (Cal. App.) 183 P. 833.
 "Items of account."—Kelly v. Hinkhouse (Wash.) 183 P. 80.
 "Jurisdiction."—Ralston v. Bennett (Or.) 183 P. 706.
 "Jurisdiction of the subject-matter."—Duncan Lumber Co. v. Willapa Lumber Co. (Or.) 183 P. 476.
 "Liable."—Saylor v. Taylor (Cal. App.) 183 P. 843.
 "Like."—Bissetti v. Roberts (N. M.) 183 P. 403.
 "Lot."—Earl v. Dutour (Cal.) 183 P. 438.
 "Maintenance."—In re Ballou's Estate (Cal.) 183 P. 440.
 "Minimum price."—Brown v. Baker (Wash.) 183 P. 80.
 "Months."—In re McNamara's Estate (Cal.) 183 P. 552.
 "Move."—Salsberry v. Connolly (Nev.) 183 P. 301.
 "Novation."—Hieatt v. Gassen (Cal. App.) 183 P. 227.
 "Order."—Warren Bros. Co. v. Boyle (Cal. App.) 183 P. 706.
 "Osteopathy."—Ex parte Rust (Cal.) 183 P. 548.
 "Other advantages."—Hartford Accident & Indemnity Co. v. Industrial Accident Commission of California (Cal. App.) 183 P. 234.
 "Persons in authority."—State v. Foster (N. M.) 183 P. 397.
 "Principal."—In re Duffill's Estate (Cal.) 183 P. 337.

"Proviso."—Hudson v. Hopkins (Okl.) 183 P. 507.
 "Public officer."—State v. Wardall (Wash.) 183 P. 67.
 "Record."—Howe v. Tiger (Okl.) 183 P. 983; Kendrick v. Healey (Wyo.) Id. 37.
 "Recover."—Bennett v. Potter (Cal.) 183 P. 156.
 "Residence."—Ryan v. Inyo Cerro Gordo Mining & Power Co. (Cal. App.) 183 P. 250.
 "Reversal of judgment on appeal."—Anderson v. National Ice & Cold Storage Co. (Cal. App.) 183 P. 273.
 "Riot."—Johnson v. State (Okl. Cr. App.) 183 P. 926.
 "Sale price."—Evans v. Rublee (Wash.) 183 P. 83.
 "Same transaction."—Konick v. Champneys (Wash.) 183 P. 75.
 "Satisfactory to owner."—Bruner v. Hegyi (Cal. App.) 183 P. 369.
 "Seisin."—Rennie v. Gibson (Okl.) 183 P. 483.
 "Self-defense."—Waldon v. State (Okl. Cr. App.) 183 P. 637.
 "Signed and validated."—Lankford v. First Nat. Bank (Okl.) 183 P. 56.
 "Special proceeding."—Hejduk v. Snyder (Okl.) 183 P. 923.
 "Specific or ascertained goods."—Cassinelli v. Humphrey Supply Co. (Nev.) 183 P. 523.
 "Suffered."—Crist v. Fife (Cal. App.) 183 P. 197.
 "Total disability."—Federal Life Ins. Co. v. Lewis (Okl.) 183 P. 975.
 "Trover."—Nielsen v. Reberd (Nev.) 183 P. 984.
 "Void."—Escalle v. Mark (Nev.) 183 P. 387.
 "West."—Anaheim Sugar Co. v. Orange County (Cal.) 183 P. 809.

WORK AND LABOR.

See Executors and Administrators, **221**.

14(1) (Cal.App.) Where owner repudiated building contract, the contractors were entitled to sue for the reasonable value of their services.—Fatta v. Catalano, 183 P. 224.

WORKMEN'S COMPENSATION ACTS.

See Admiralty, **20**; Electricity, **19**; Limitation of Actions, **130**; Master and Servant, **349-418**; Statutes, **226**.

WRIT OF ERROR.

See Appeal and Error.

WRITS.

See Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Process; Prohibition; Replevin.

TABLES OF PACIFIC CASES

IN

STATE REPORTS

VOL. 36, CALIFORNIA APPELLATE REPORTS

Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	
1	171	321	123	171	812	248	171	982	372	172	168	486	172	624	587	172
4	171	115	124	171	833	253	171	964	375	172	183	488	172	763	589	172
10	171	987	127	171	816	258	171	972	384	172	175	500	172	613	601	172
16	171	436	129	171	819	265	171	1098	389	172	166	503	172	620	602	173
20	171	439	133	171	834	275	171	1076	391	172	165	508	172	622	604	173
23	171	441	141	171	837	278	171	1087	394	172	178	511	173	617	608	173
25	171	440	143	172	406	280	171	1088	398	172	173	512	172	615	617	173
29	171	437	152	171	817	284	171	1084	402	179	422	514	172	769	627	172
33	171	841	153	171	814	288	171	1079	406	172	177	529	172	623	630	173
40	171	696	156	171	821	289	171	1078	410	172	169	531	173	615	641	173
41	171	699	159	171	823	292	171	1091	413	172	163	533	173	759	644	173
44	171	803	171	171	821	308	171	1086	416	172	412	536	172	760	646	173
48	171	906	173	171	815	311	171	1085	425	172	396	540	172	768	650	172
63	171	442	175	171	812	313	171	1082	430	172	398	543	172	775	653	173
68	171	698	179	171	827	316	171	1077	431	172	404	547	172	1128	660	173
69	171	701	181	171	846	319	171	1074	433	172	398	553	172	762	669	173
80	171	710	199	171	811	323	172	158	441	172	401	556	178	150	672	173
88	171	696	201	179	403	335	171	1089	447	172	405	567	172	1130	687	173
90	171	698	208	171	817	338	171	1080	454	172	393	568	177	171	690	178
93	171	715	212	171	976	342	178	145	460	172	892	573	172	1127	692	178
94	171	705	216	171	978	351	171	1079	463	172	611	574	172	1114	699	178
103	171	837	225	171	967	352	172	166	467	172	415	579	172	1126	703	178
114	171	697	229	171	976	356	172	170	469	172	616	582	172	1114	707	173
116	171	971	233	171	968	362	172	180	472	172	625	584	172	1122	714	173
119	171	805	240	171	984	370	172	163	479	172	618	585	172	1113	717	173
120	171	804														

VOL. 36, CALIFORNIA APPELLATE REPORTS

	Page		Page
A. B. Field & Co. v. Haven (173 P. 108).....	669	Brown v. Lemon Cove Ditch Co. (171 P. 705)	94
Alison v. Chapman (173 P. 389).....	759	California Trojan Powder Co. v. Garnsey (171 P. 1078).....	289
Amok Gold Mining Co. v. Canton Ins. Office, Limited (171 P. 1098).....	265	Calistoga, Town of, v. Adams (172 P. 624).....	486
Amundson v. Shafer (172 P. 173).....	398	Callett v. Central California Traction Co. (171 P. 984).....	240
Anderson v. Recorder's Court (171 P. 812).....	123	Carrera, Ex parte (172 P. 979).....	817
Anderson v. Wilcox (172 P. 398).....	430	Christin v. Clark (173 P. 109).....	714
A. P. Hotaling & Co. v. Hamilton (172 P. 393)	454	City of Napa v. Maxwell (171 P. 837)....	103
Armour & Co. v. R. Rosenberg & Sons Co. (173 P. 404).....	773	City of Redding v. Shasta County (171 P. 806)	48
Armstrong v. Industrial Accident Commission (171 P. 321).....	1	City of Venice v. Superior Court of Los Angeles County (173 P. 392).....	757
Barker Bros. v. Joos (171 P. 1085).....	311	City of Watts v. Superior Court of Los Angeles County (173 P. 183)	692
Bashore v. Lamberson (171 P. 968).....	233	Cole v. Mugridge (171 P. 827).....	179
Batt v. Stedman (173 P. 99).....	608	Correa, In re (172 P. 615).....	512
Bay Shore Laundry Co. v. Industrial Accident Commission (172 P. 1128).....	547	Craig v. Lee (171 P. 1089).....	335
Beem v. Reichman (171 P. 972).....	258	Crittenden v. Murphy (173 P. 595).....	803
Benton v. Hunt (172 P. 177).....	406	Cudahy Packing Co. v. R. Rosenberg & Sons Co. (173 P. 406).....	818
Biaggi, In re (172 P. 1130).....	650	Cuneo v. Davis (171 P. 1079).....	351
Birkel Co. v. Curtet (172 P. 165).....	391	Curran v. Wilson (171 P. 817).....	208
Bissig v. Johnston Organ & Piano Mfg. Co. (171 P. 816).....	127	Dodge v. Avery (172 P. 759).....	533
Bliss v. Southern Pac. Co. (172 P. 760)....	536	Dowell, In re (172 P. 1121).....	587
Blochman Commercial & Savings Bank v. Ketcham (171 P. 1084)	284	Downey v. Cavasso (171 P. 1077).....	316
Borba v. De Mello (172 P. 1113).....	601	Drouillard v. Southern Pac. Co. (172 P. 405)	447
Bradley v. McDonald (169 P. 427).....	807	Duncan v. Tom Poste, Inc. (172 P. 163)...	370
Brandes v. Superior Court of Santa Barbara County (172 P. 1130).....	567		

183 P.

(1093)

36 CAL. APP.—Continued.		Page		Page
Employers' Liability Assur. Corporation, Limited, of London, England, v. Industrial Accident Commission (177 P. 171).....		568	Machado v. Machado (172 P. 1124).....	646
Farrell v. City of Ontario (173 P. 392)....		754	McNeely v. Superior Court of Los Angeles County (173 P. 102).....	602
Fergus v. Venice Inv. Co. (172 P. 396)....		425	MacPhee v. Board of Police Com'rs of City and County of San Francisco (171 P. 1086).....	308
Fickes v. Baker (171 P. 819).....		129	Marconi Wireless Telegraph Co. of America v. North Pacific S. S. Co. (173 P. 103)....	653
Field & Co. v. Haven (173 P. 108).....		669	Massie v. Eldorado Gold Star Mining Co. (171 P. 814).....	153
Fitzgerald v. Southern Pac. Co. (173 P. 91).....		660	Mayer v. Anderson (173 P. 174).....	740
Fontaine v. Lacassie (171 P. 812).....		175	Moore & Scott Iron Works v. Industrial Accident Commission (172 P. 1114).....	582
Foreman v. Hunter Lumber Co. (173 P. 408).....		763	Morris v. Judkins (172 P. 163).....	413
Foster v. Los Angeles Trust & Savings Bank (172 P. 392).....		460	Morton v. Angst (173 P. 90).....	644
Franck v. Moran (171 P. 841).....		32	Munn v. Earl C. Anthony, Inc. (171 P. 1082).....	312
Gabbert v. Perry (173 P. 412).....		690	Napa, City of, v. Maxwell (171 P. 837)....	103
Gentry v. Citron (171 P. 1079).....		288	Nathan v. Porter (172 P. 170).....	356
George J. Birkel Co. v. Curtet (172 P. 165).....		391	Neal v. Industrial Accident Commission (171 P. 696).....	40
Globe Grain & Milling Co. v. Drenth (171 P. 821).....		156	Nelson v. Colton (171 P. 701).....	69
Globe Indemnity Co. v. Industrial Accident Commission (171 P. 1088).....		280	Nelson v. Thomas (172 P. 398).....	433
Gordon v. Perkins (171 P. 698).....		90	New England Equitable Ins. Co. v. Chicago Bonding & Surety Co. (172 P. 1122)...	584
Gravelly Ford Canal Co. v. Pope & Talbot Land Co. (178 P. 150).....		556	Norris v. Wright (171 P. 1087).....	278
Gravelly Ford Canal Co. v. Pope & Talbot Land Co. (178 P. 155).....		717	Oberholzer v. Hubbell (171 P. 436).....	16
Gravelly Ford Canal Co. v. Pope & Talbot Land Co. (178 P. 164).....		817	Ott Hardware Co. v. Holmberg (179 P. 422).....	402
Graves v. Union Oil Co. of California (173 P. 618).....		766	Overell Furniture Co. v. Superior Court of Los Angeles County (173 P. 176).....	745
Greene v. Locke-Paddon Co. (172 P. 168)...		372	Panter v. National Surety Co. (171 P. 803).....	44
Hackett v. Lewis (173 P. 111).....		687	Parkinson v. Langdon (171 P. 710).....	80
Haight v. Stewart (172 P. 769).....		514	Partridge v. City of Richmond (172 P. 166).....	389
Hallawell v. Union Oil Co. of California (173 P. 177).....		672	People v. Barkdoll (171 P. 440).....	25
Halsted v. Central Sav. Bank (172 P. 613).....		500	People v. Clark (173 P. 102).....	739
Halsted v. Central Sav. Bank (172 P. 614).....		816	People v. Donaldson (171 P. 442).....	63
Halsted v. First Sav. Bank (172 P. 613)....		500	People v. Elgar (171 P. 697).....	114
Halsted v. Oakland Bank of Savings (172 P. 614).....		816	People v. Escalera (171 P. 975).....	212
Hammond Lumber Co. v. Kearsley (172 P. 404).....		431	People v. Franklin (171 P. 441).....	23
Harding v. Dam (173 P. 604).....		748	People v. Fraysier (172 P. 1126).....	579
Harding v. Dam (173 P. 603).....		751	People v. Gonzales (173 P. 407).....	782
Hart, In re (172 P. 610).....		627	People v. Hill (172 P. 1114).....	574
Hickman v. Johnson (178 P. 145).....		342	People v. Jacobs (171 P. 715).....	93
Holmes v. Snow Mountain Water & Power Co. (172 P. 178).....		394	People v. Lee (172 P. 158).....	323
Hopkins v. Fresno County Abstract Co. (173 P. 106).....		699	People v. Lima (172 P. 762).....	553
Hotelling & Co. v. Hamilton (172 P. 393).....		454	People v. Lyons (173 P. 107).....	744
Hough v. Ferguson (171 P. 804).....		120	People v. Pera (171 P. 1091).....	292
Howard v. Cunningham (171 P. 976).....		229	People v. Shaw (172 P. 401).....	441
Huntington v. Vavra (172 P. 166).....		352	People v. Smith (171 P. 696).....	88
Ilardi v. Central California Traction Co. (172 P. 763).....		488	People v. Tanner (171 P. 459).....	20
Ingle Mfg. Co. v. Scales (172 P. 169).....		410	People v. Taylor (173 P. 391).....	762
Jesus Maria Rancho v. Southern Pac. Co. (172 P. 183).....		375	People v. Vogel (171 P. 978).....	216
J. M. Overell Furniture Co. v. Superior Court of Los Angeles County (173 P. 176).....		745	People v. Wagner (171 P. 699).....	41
John A. Roebling's Sons Co. v. Industrial Accident Commission (171 P. 987).....		10	People v. Webster (172 P. 768).....	540
Johnson, In re (171 P. 1074).....		319	People v. Wilson (172 P. 1116).....	589
Johnston v. Murphy (172 P. 616).....		469	Perkins v. Edinburg (171 P. 971).....	116
Jolly v. McCoy (172 P. 618).....		479	Piluso v. Spencer (172 P. 412).....	416
Kalish v. White (173 P. 494).....		604	Porter v. Anglo & London Paris Nat. Bank of San Francisco (171 P. 845).....	191
Karales v. Los Angeles Creamery Co. (171 P. 821).....		171	Prophet v. Katzenberger (172 P. 775).....	543
Keiper v. Pacific Gas & Electric Co. (172 P. 180).....		362	Rattray v. Wickersheim Implement Co. (171 P. 964).....	253
Lanterman v. Anderson (172 P. 625).....		472	Redding, City of, v. Shasta County (171 P. 806).....	48
Lefurgey v. Prentice (171 P. 1080).....		338	Reynolds v. E. Clemens Horst Co. (172 P. 623).....	529
Lobbett & Dean v. Oakland, A. & E. Ry. (172 P. 1123).....		641	Roebling's Sons Co. v. Industrial Accident Commission (171 P. 987).....	10
Long v. John Breuner Co. (172 P. 1132)....		630	San Joaquin Valley Bank v. Gate City Oil Co. (173 P. 781).....	791
Lynch v. Smith (San Joaquin Valley Bank v. Gate City Oil Co., 173 P. 781).....		701	Santina v. Tomlinson (171 P. 437).....	29
			Scattergood v. Superior Court of Los Angeles County (173 P. 110).....	703
			Schwitalla, In re (172 P. 617).....	511
			S. C. Smith Estate v. J. M. Dunn Auto Co. (172 P. 415).....	467
			Shell Co. of California v. Industrial Accident Commission (172 P. 611).....	463
			Sherwood & Sherwood v. Gill & Lutz (173 P. 171).....	707

36 CAL. APP.—Continued.

	Page		Page
Skinkle v. American Nat. Bank of San Francisco (171 P. 967).....	225	Treloar v. Keil & Hannon (171 P. 823)....	159
Smith v. McCallum (172 P. 408).....	143	Turner v. Watkins (172 P. 620).....	503
Smith v. Meade (171 P. 815).....	173	Union Mach. Co. v. Chicago Bonding & Surety Co. (172 P. 1113).....	585
Smith Estate v. J. M. Dunn Auto Co. (172 P. 415).....	467	Unwin v. Barstow-San Antonio Oil Co. (172 P. 622).....	508
Solomon v. Justices' Court of Los Angeles Tp. (171 P. 817).....	152	Van Loben Sels v. Producers' Fruit Co. (179 P. 403).....	201
Southern California Iron & Steel Co. v. Maier (172 P. 615).....	531	Venice, City of, v. Superior Court of Los Angeles County (173 P. 392).....	757
Souza v. First Nat. Bank of Hanford (172 P. 175).....	384	Verdier v. Stoll (172 P. 1127).....	573
Spier v. Peck (171 P. 115).....	4	Walker v. Kingsbury (173 P. 95).....	617
Stansbury v. Industrial Accident Commission (171 P. 698).....	68	Walsh v. Flatland (173 P. 596).....	819
Stephens v. Anderson (171 P. 811).....	199	Ward v. Otzen Packing Co. (171 P. 833)....	124
Stinnett v. Superior Court in and for Merced County (171 P. 1076).....	275	Watson v. Anderson (173 P. 394).....	778
Taylor v. Board of Police Com'rs of City and County of San Francisco (171 P. 1087).....	815	Watts, City of, v. Superior Court of Los Angeles County (173 P. 183).....	692
Thompson v. Newman (171 P. 982).....	248	Wells, In re (172 P. 93).....	785
Town of Calistoga v. Adams (172 P. 624)..	486	Williams v. City of Vallejo (171 P. 834)....	133
		Williams v. City of Vallejo (171 P. 837)....	141
		Winkler v. Sierra Park Co. (171 P. 805)....	119

VOL. 104, KANSAS REPORTS

Kan. Rep.	Pac. Rep.	Kan. Rep.	Pac. Rep.	Kan. Rep.	Pac. Rep.	Kan. Rep.	Pac. Rep.	Kan. Rep.	Pac. Rep.	Kan. Rep.	Pac. Rep.	Kan. Rep.	Pac. Rep.	Kan. Rep.	Pac. Rep.	
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	
1	177	521	111	178	401	215	178	605	320	179	356	445	179	365	587	180
3	177	544	116	177	536	221	178	612	324	179	378	453	179	550	591	180
7	178	239	120	178	255	224	178	618	330	179	380	460	179	328	594	180
10	177	526	124	178	393	230	178	432	335	179	378	465	179	332	594	180
11	177	536	129	179	314	233	178	433	339	179	353	467	179	359	604	180
16	177	519	136	178	399	236	178	614	344	179	326	469	179	304	612	180
18	178	241	141	177	360	237	178	607	348	179	301	475	179	361	619	180
23	178	395	145	178	243	241	178	408	351	179	308	478	179	335	622	180
32	178	245	148	177	628	245	178	411	353	179	553	481	179	347	624	180
44	177	532	153	177	523	250	178	416	362	179	342	485	182	544	629	180
47	177	538	157	178	423	254	178	609	366	179	307	487	179	972	632	180
57	177	538	159	178	427	257	178	435	368	179	314	489	180	187	635	180
59	177	523	166	178	614	264	178	420	370	179	321	497	180	449	642	180
65	177	540	168	178	445	268	178	407	373	179	319	501	180	209	646	180
72	177	534	170	178	617	269	178	421	377	179	303	505	180	211	653	180
77	178	590	171	178	415	276	178	445	380	179	318	509	180	193	657	180
80	177	528	174	178	623	277	178	447	383	179	330	512	180	280	660	180
81	177	525	178	178	405	278	178	413	388	179	362	516	180	261	664	180
84	181	945	181	178	409	281	178	621	394	179	323	521	180	263	668	180
88	177	520	184	178	447	282	178	418	400	179	353	524	180	267	671	180
90	177	522	187	178	424	286	68	74	403	179	309	526	180	268	677	180
92	178	252	191	178	430	287	178	426	404	179	348	530	180	278	679	180
94	178	254	196	178	444	289	178	441	408	179	371	534	180	198	684	180
96	177	539	198	178	747	294	178	438	410	179	360	540	179	974	689	180
100	178	250	204	178	621	301	179	309	412	179	348	543	180	220	693	180
102	177	527	206	178	615	311	178	611	422	179	300	551	180	453	702	180
104	177	530	207	178	750	311	178	991	425	179	343	571	179	969	708	181
107	178	253	210	178	621	316	178	616	432	179	372	578	180	242	712	181
109	178	251	211	178	751	316	179	973	440	179	333	578	182	643	716	180

VOL. 104, KANSAS REPORTS

	Page		Page
Advance-Rumely Thresher Co. v. Judd (180 P. 763).....	757	Board of Com'rs of Osborne County v. City of Osborne (180 P. 233).....	671
Advance-Rumely Thresher Co. v. Pfannenstiel (180 P. 763).....	757	Brewer v. Fairmont Creamery Co. (178 P. 250).....	100
Alison v. Harper (180 P. 449).....	497	Brown v. Atchison, T. & S. F. R. Co. (180 P. 211).....	505
Allen v. Atchison, T. & S. F. R. Co. (178 P. 395).....	23	Brown v. Lyons (180 P. 802).....	702
Allen v. Bush (178 P. 395).....	23	Brush v. Boyer (178 P. 445).....	168
Allen v. Chicago, R. I. & P. R. Co. (178 P. 395).....	23	Bunning v. Board of Com'rs of Shawnee County (179 P. 335).....	478
Allen v. Dickinson (178 P. 395).....	23	Bunning v. Rogers (179 P. 335).....	478
Allen v. Lusk (178 P. 395).....	23	Burton v. Dickson (180 P. 216, 775).....	594
Allen v. Missouri Pac. R. Co. (178 P. 395).....	23	Burton v. Kansas State Grange of Patrons of Husbandry (180 P. 216, 775).....	594
Allen v. Patee (179 P. 333).....	440		
Allen v. St. Louis & S. F. R. Co. (178 P. 395).....	23	Campbell v. City of Marion (178 P. 611, 991).....	311
American Nat. Bank of Ft. Smith v. Eby (178 P. 405).....	178	Campbell v. Herrick (180 P. 237).....	657
Anderson v. Denison Clay Co. (180 P. 797).....	766	Campbell v. Herrick-Moore Music Co. (180 P. 237).....	657
Anthony Booster Club v. City of Anthony (180 P. 762).....	821	Campbell v. Moore (180 P. 237).....	657
Anthony Booster Club v. Jennings (180 P. 762).....	821	Canaday v. Board of Com'rs of Scott County (181 P. 121).....	785
Atchison Sav. Bank v. Potter (179 P. 319).....	373	Canaday v. Hull (181 P. 121).....	785
Atchison, T. & S. F. R. Co. v. Board of Com'rs of Cloud County (179 P. 376).....	324	Carlisle v. Farmers' Elevator & Business Ass'n (180 P. 280).....	512
Atchison, T. & S. F. R. Co. v. Boyle Commission Co. (178 P. 614).....	166	Carlisle v. Farmers' Union Co-Op. Shipping & Business Ass'n (180 P. 280).....	512
Atchison, T. & S. F. R. Co. v. Hardesty (179 P. 376).....	324	Carter v. Kansas City Rys. Co. (177 P. 533).....	59
		Carter v. McPherson (177 P. 533).....	59
Balmer v. Long (179 P. 371).....	408	Carver v. Greason (177 P. 539).....	96
Balmer v. Osborn (179 P. 371).....	408	Cates v. Knapp (178 P. 447).....	184
Baskin v. Strang Land Co. (179 P. 356).....	320	Chelsea Oil & Gas Co. v. Chelsea Oil & Gas Co. (Gorrill v. Greenlees, 180 P. 798).....	693
Beck's Estate v. Kaw Boiler Works Co. (180 P. 250).....	591	Chelsea Oil & Gas Co. v. Greenlees (180 P. 798).....	693
Bellport v. Harkins (180 P. 220).....	543	Chelsea Oil & Gas Co. v. Welsh (Gorrill v. Greenlees, 180 P. 798).....	693
Bellport v. Kansas Casualty & Surety Co. (180 P. 220).....	543	Chicago, R. I. & P. R. Co. v. Board of Com'rs of Cloud County (179 P. 376).....	324
Benson v. Bush (178 P. 747).....	198	Chicago, R. I. & P. R. Co. v. Hardesty (Atchison, T. & S. F. R. Co. v. Board of Com'rs of Cloud County, 179 P. 376).....	324
Benson v. Missouri Pac. R. Co. (178 P. 747).....	198	City of Parsons v. Parsons Water Supply & Power Co. (178 P. 438).....	294
Bird v. Sternberg (180 P. 774).....	799	Clugman v. Hill (178 P. 243).....	145
Bird v. Wilcox (180 P. 774).....	799		
Bishop v. Roberts (178 P. 409).....	181		
Bissey v. City of Marion (178 P. 611, 991).....	311		

104 KAN.—Continued.		Page			Page
Coberly v. United Water, Gas & Electric Co. (178 P. 393).....	124		Fisher Mach. Works Co. v. Singletary (179 P. 328).....	460	
Collins v. Hayden (179 P. 308).....	351		Foot v. Bank of Pleasanton (178 P. 430).....	191	
Collins v. Miami County Gas Co. (180 P. 769).....	735		Foot v. Wilson (178 P. 430).....	191	
Collins v. Morris (178 P. 980).....	77		Foot v. Wilson Mercantile Co. (178 P. 430).....	191	
Colony State Bank v. Bankers' Deposit Guaranty & Surety Co. (177 P. 544).....	3		Frankovitch v. Weigant (181 P. 945).....	84	
Colony State Bank v. Watson (177 P. 544).....	8		Frederick v. City of Bonner Springs (178 P. 435).....	257	
Corpstein v. Salina Northern R. Co. (180 P. 736).....	811		Furst v. Buss (178 P. 411).....	245	
Coughlin v. Layton (180 P. 805).....	752		Furst v. McNitt (178 P. 411).....	245	
Courtney v. American Zinc, Lead & Smelting Co. (179 P. 342).....	362		Furst v. Phillips (178 P. 411).....	245	
Cox v. Denton (180 P. 261).....	516		Gadberry v. Hutchinson Egg Case Filler Co. (177 P. 834).....	72	
Crow v. Rogers (178 P. 621).....	204		Gale Mfg. Co. v. King & Dickey (178 P. 621).....	210	
Custer v. Royse (179 P. 353).....	339		Garber v. Beachy (179 P. 365).....	445	
Dabney v. Connecticut Fire Ins. Co. (180 P. 784).....	790		Garber v. State Bank of Esbon (Mitchell v. Beachy, 179 P. 365).....	445	
Davis v. Atchison, T. & S. F. R. Co. (180 P. 195).....	604		Gile v. Vanek (180 P. 240).....	624	
Deere Plow Co. v. Losey (179 P. 358).....	400		Gile v. Varnick (Vanek v. Vanek, 180 P. 240).....	624	
Dickinson v. Board of Com'rs of Cloud County (179 P. 376).....	324		Gilliland v. Ash Grove Lime & Portland Cement Co. (180 P. 793).....	771	
Dickinson v. Hardesty (Atchison, T. & S. F. R. Co. v. Board of Com'rs of Cloud County, 179 P. 376).....	324		Goehenour v. Brown (180 P. 776).....	808	
Dillon v. Bryant (179 P. 318).....	350		Goehenour v. Brown Bros. Const. Co. (180 P. 776).....	808	
Dixon v. Missouri Pac. R. Co. (179 P. 548).....	404		Goeken v. Bank of Palmer (179 P. 821).....	370	
Dixon v. Missouri Pac. R. Co. (180 P. 733).....	787		Goodwin v. Cudahy Packing Co. (180 P. 809).....	747	
Doner v. Deal (180 P. 766).....	793		Gorrill v. Chelsea Oil & Gas Co. (180 P. 798).....	693	
Doornbos v. Warwick (177 P. 527).....	102		Gorrill v. Greenlees (180 P. 798).....	693	
Drainage Dist. No. 3 of Sedgwick County v. Riverside Drainage Dist. of Sedgwick County (178 P. 433).....	233		Gorrill v. Welsh (180 P. 798).....	693	
Dunkerton, In re (179 P. 347).....	481		Greenlees v. Alluwe Oil Co. (179 P. 972).....	487	
Eames v. Clark (177 P. 540).....	65		Greenlees v. Kansas-Oklahoma Oil & Refinery Co. (179 P. 972).....	487	
Easter v. City of El Dorado (177 P. 538).....	57		Grimes v. Board of Com'rs of Stanton County (178 P. 251).....	109	
Eby's Estate v. Eby (178 P. 405).....	178		Grimes v. Raney (178 P. 251).....	109	
Economy Hog & Cattle Powder Co. v. Bilby (180 P. 735).....	769		Grisham v. Union Traction Co. (181 P. 119).....	712	
E. D. Fisher Lumber & Coal Co. v. Robbins (180 P. 264).....	619		Gulick v. Golder (178 P. 617).....	170	
Edwards v. Dana (178 P. 407).....	206		Hahn v. Arnold Automobile Co. (180 P. 204).....	660	
Edwards v. Kansas City (180 P. 271).....	684		Hahn v. Steinecke (180 P. 204).....	660	
Edwards v. Southwestern Bell Tel. Co. (180 P. 271).....	684		Hall v. Briggs (178 P. 447).....	277	
Elmo State Bank v. Hildebrand (177 P. 526).....	10		Hamblin v. Marchant (180 P. 811).....	689	
Emerick v. Jones (178 P. 399).....	136		Hayes v. Foster (178 P. 432).....	230	
Emerick v. Jones Motor Car Co. (178 P. 399).....	136		Hayes v. Mutual Ben. Life Ins. Co. (178 P. 432).....	230	
Emery v. Emery (180 P. 451).....	679		Henderson v. Magnolia Petroleum Co. (180 P. 228).....	653	
Epley v. Citizens' State Bank of Mullinville (180 P. 187).....	489		Hess v. Atchison, T. & S. F. R. Co. (179 P. 314).....	129	
Erickson, In re (180 P. 263).....	521		Hess v. Atchison, T. & S. F. R. Co. (179 P. 314).....	363	
Etchen v. Dennis & Son Garage (178 P. 408).....	241		Hess v. Atchison, T. & S. F. R. Co. (181 P. 117).....	708	
Etchen Automobile Co. v. Dennis & Son Garage (178 P. 408).....	241		Hess v. Hess (178 P. 750).....	207	
Ezell v. Butcher (179 P. 332).....	465		Hicks v. Olden (180 P. 780).....	723	
Farmers' & Merchants' Nat. Bank v. Hutchinson Wholesale Grocery Co. (179 P. 301).....	348		Hicks v. Saffell (180 P. 780).....	723	
Farmers' & Merchants' Nat. Bank v. Sprout (179 P. 301).....	348		Hicks v. Saffell's Estate (180 P. 780).....	723	
Farmers' & Merchants' State Bank v. Quasebarth (179 P. 300).....	422		Hicks v. Sage (180 P. 780).....	723	
First Nat. Bank of Elk City v. Springfield Fire & Marine Ins. Co. (178 P. 413).....	278		Hilliard v. Eby (178 P. 405).....	178	
First Nat. Bank of Elk City v. Tynar (178 P. 413).....	278		Hockman v. Sifers Candy Co. (178 P. 254).....	94	
First Nat. Bank of Garden City v. Stroup (177 P. 836).....	11		Hodgson v. John Deere Plow Co. (178 P. 607).....	237	
Fisher Lumber & Coal Co. v. Robbins (180 P. 264).....	619		Hoover v. Hoover's Estate (180 P. 275).....	635	
Fisher Mach. Works Co. v. Lambricht (179 P. 328).....	460		Hoover's Estate, In re (180 P. 275).....	635	
			Howard v. Jennings (180 P. 762).....	821	
			Hudson v. Riley (180 P. 198).....	534	
			Hudson v. Taintor (180 P. 198).....	534	
			Jaques v. Order of United Commercial Travelers of America (180 P. 200).....	612	
			Jarecki Mfg. Co. v. Merriam (180 P. 224).....	646	
			John Deere Plow Co. v. Losey (179 P. 358).....	400	
			Jones v. Hacker (178 P. 424).....	187	
			Kennedy v. Atchison, T. & S. F. R. Co. (179 P. 314).....	129	
			Kennedy v. Atchison, T. & S. F. R. Co. (179 P. 314).....	368	

104 KAN.—Continued.		Page		Page
Kennedy v. Atchison, T. & S. F. R. Co. (181 P. 117).....	708		Paulich v. Nipple (180 P. 771).....	801
Kenney v. St. Paul Fire & Marine Ins. Co. (180 P. 227).....	622		Pazer v. Davis (179 P. 309).....	403
Kirkland v. Atchison, T. & S. F. R. Co. (179 P. 362).....	388		Pazer v. Young (179 P. 309).....	403
Kozel v. Kozel (180 P. 278).....	530		Perkins v. Berry (177 P. 530).....	104
Kozel v. Morrow Lumber Co. (180 P. 278).....	530		Pessemier v. Genn (178 P. 426).....	287
			Peyton v. Waters (177 P. 525).....	81
Ladies Specialty Shop v. Butcher (179 P. 332).....	465		Pickens v. Campbell (179 P. 343).....	425
Lewis v. Lewis (178 P. 421).....	269		Putnam v. Putnam (177 P. 838).....	47
Lindsay v. Halstead Milling & Elevator Co. (179 P. 360).....	410		Reynolds v. National Bank of Commerce of Wichita (178 P. 605).....	215
Love v. Diplomat Mining Co. (178 P. 615).....	206		Richards v. Fleming Coal Co. (179 P. 380).....	330
Lowell-Woodward Hardware Co. v. Semke (180 P. 734).....	729		Rickel v. Atchison, T. & S. F. R. Co. (179 P. 550).....	453
Lowell-Woodward Hardware Co. v. Superior Leasing Co. (180 P. 734).....	729		Robinson v. Campbell (180 P. 193).....	509
Lowell-Woodward Hardware Co. v. Woods (180 P. 734).....	729		Root v. City of Topeka (180 P. 229).....	668
Lutz v. Lewis (178 P. 421).....	269		Rose v. Demy (179 P. 348).....	412
McCarter v. Rogers (178 P. 621).....	204		Rose v. Gypsum City (179 P. 348).....	412
McCoy v. Central States Life Ins. Co. (179 P. 969).....	571		Rose v. Kuhn (179 P. 348).....	412
McGill v. Riley (180 P. 198).....	534		Ruf v. Grimes (179 P. 378).....	335
McGill v. Taintor (Hudson v. Riley, 180 P. 198).....	534		Ruf v. Smith (179 P. 378).....	335
McMichael v. Crawford (180 P. 777).....	778		Safford v. Augusta Stone Co. (178 P. 618).....	224
McMichael v. Santa Fe Land Co. (180 P. 777).....	778		Safford v. Haines (178 P. 618).....	224
Marshall v. Beeler (178 P. 245).....	32		Safford v. Middleton (178 P. 618).....	224
Marshall v. Chilcott (179 P. 303).....	377		Safford v. Tibbetts (178 P. 618).....	224
Marshall v. City of Osborne (179 P. 303).....	377		Salina Iron & Metal Co. v. Davis (179 P. 309).....	403
Mathews v. Kansas City Rys. Co. (178 P. 252).....	92		Salina Iron & Metal Co. v. Young (Pazer v. Davis, 179 P. 309).....	403
Mathews v. Union Cent. Life Ins. Co. (178 P. 609).....	254		Sallee v. Gilliland (180 P. 763).....	722
Mathews v. Union Cent. Life Ins. Co. (179 P. 974).....	540		Schaefer v. Arkansas Valley Interurban R. Co. (179 P. 323).....	394
Mergen v. Salina Northern R. Co. (180 P. 736).....	811		Schaefer v. Arkansas Valley Interurban R. Co. (181 P. 118).....	740
Miles v. Golder (178 P. 617).....	170		Schmidt, Inc., v. Benedict (178 P. 444).....	196
Miller v. McGinnis (180 P. 267).....	524		School Dist. No. 29 in Finney County v. Wilson (177 P. 523).....	153
Missouri Pac. R. Co. v. Board of Com'rs of Greenwood County (180 P. 785).....	818		Schutt v. Campbell (179 P. 343).....	425
Mitchell v. Beachy (179 P. 365).....	445		Scudder v. Board of Com'rs of Shawnee County (Bunning v. Rodgers, 179 P. 335).....	478
Mitchell v. State Bank of Esbon (179 P. 365).....	445		Scudder v. Rogers (179 P. 335).....	478
Moler v. Healey (177 P. 526).....	80		Security State Bank of Wichita v. Seauhier (178 P. 239).....	7
Morgan v. Germania Fire Ins. Co. (179 P. 330).....	383		Sedbrook v. McCue (180 P. 787).....	813
Morgan v. Northwestern Nat. Ins. Co. (179 P. 330).....	383		Shaw v. Hacker (178 P. 424).....	187
Muckenthaler v. Noller (180 P. 453).....	551		Sinclair Refining Co. v. Hutchinson Oil Co. (180 P. 807).....	719
Needles v. Nuttle (180 P. 768).....	716		Sinclair Refining Co. v. Rosier (180 P. 807).....	719
Needles v. Wichita Park Amusement Co. (180 P. 768).....	716		Skinner v. Davis (179 P. 359).....	467
Omaha Crockery Co. v. Cleaver (180 P. 273).....	642		Smith v. Eby (178 P. 406).....	178
Omaha Crockery Co. v. Hodgson (180 P. 273).....	642		Smith v. Hutchinson Box Board & Paper Co. (180 P. 983).....	732
Oscar Schmidt, Inc., v. Benedict (178 P. 444).....	106		Smith v. Kaw Boiler Works Co. (180 P. 259).....	591
Oswald v. St. Joseph & G. I. R. Co. (178 P. 621).....	281		Smith v. Kibbe (178 P. 427).....	159
Otis v. Otis (177 P. 520).....	88		Smith v. Smith (180 P. 231).....	629
Outcault Advertising Co. v. Kraus (177 P. 532).....	44		Southern v. Magnolia Petroleum Co. (180 P. 228).....	653
Outcault Advertising Co. v. Wa-Keeney Hardware Co. (177 P. 532).....	44		Spencer v. McClenney (178 P. 253).....	107
Pantel v. Bower (178 P. 241).....	18		Spire v. J. I. Case Threshing Mach. Co. (180 P. 209).....	501
Parocca v. Missouri, K. & T. R. Co. (180 P. 270).....	677		Spire v. Spire (180 P. 209).....	501
Parsons v. Chilcott (Marshall v. City of Osborne, 179 P. 303).....	377		State v. Cook (State v. Williford, 178 P. 612).....	221
Parsons v. City of Osborne (179 P. 303).....	377		State v. Cortright (State v. Williford, 178 P. 612).....	221
Parsons v. Parsons Water Supply & Power Co. (178 P. 438).....	294		State v. Crawford (177 P. 360).....	141
Parsons v. Rea (177 P. 528).....	148		State v. Eckles (179 P. 361).....	475
			State v. Green (177 P. 519).....	16
			State v. Luft (179 P. 553).....	353
			State v. McCarty (179 P. 309).....	301
			State v. Macek (180 P. 985).....	742
			State v. Northup (179 P. 361).....	475
			State v. People's Amusement Co. (177 P. 360).....	141
			State v. Stanley (179 P. 361).....	475
			State v. Williford (178 P. 612).....	221
			State Bank of Downs v. Abbott (179 P. 326).....	344
			State ex rel. v. Carlson (182 P. 544).....	485
			State ex rel. v. Lyons (180 P. 802).....	702
			State ex rel. v. Rea (177 P. 528).....	148
			Steele v. Stevenson (179 P. 304).....	469
			Stern v. Board of Com'rs of Scott County (Canaday v. Hull, 181 P. 121).....	785

(183 P.)

104 KAN.—Continued.		Page	Page
Stern v. Hull (181 P. 121).....	785	Union Pac. R. Co. v. Board of Com'rs of Cloud County (179 P. 376).....	324
Strahm v. Patee (179 P. 333).....	440	Union Pac. R. Co. v. Hardesty (Atchison, T. & S. F. R. Co. v. Board of Com'rs of Cloud County, 179 P. 376).....	324
Sutherland v. Board of Com'rs of Shawnee County (Bunning v. Rogers, 179 P. 335).....	478	Union Pac. R. Co. v. Theden (178 P. 441).....	289
Sutherland v. Rogers (179 P. 335).....	478	Unrine v. Brent (178 P. 614).....	236
Sutton v. Missouri, K. & T. R. Co. (178 P. 418).....	282	Unrine v. Goebel (178 P. 614).....	236
Sutton v. Schaff (178 P. 418).....	282	Unrine v. Salina Northern R. Co. (178 P. 614).....	236
Swalp v. Swalp (178 P. 415).....	171		
		Vanek v. Vanek (180 P. 240).....	624
Tate v. Cook (68 P. 74).....	286	Vanek v. Varnick (180 P. 240).....	624
Tate v. Crooks (68 P. 74).....	286	Vassar v. Otis (177 P. 520).....	88
Taylor v. Holyfield (180 P. 208).....	587	Vaught v. Jonathan L. Pettyjohn & Co. (178 P. 623).....	174
Taylor v. Rogers (180 P. 208).....	587	Vilm Milling Co. v. Kansas Casualty & Surety Co. (180 P. 782).....	790
Thomas v. Buss (178 P. 411).....	245		
Thomas v. McNitt (Furst v. Buss, 178 P. 411).....	245	Wagler v. Gibbons (178 P. 751).....	211
Thomas v. Neloms (179 P. 307).....	366	Wagler v. Tobin (178 P. 751).....	211
Thomas v. Phillips (Furst v. Buss, 178 P. 411).....	245	Washington Nat. Bank v. Myers (180 P. 268).....	526
Thomas v. Proctor & Gamble Mfg. Co. (179 P. 372).....	432	Watson v. Watson (180 P. 242; 182 P. 643).....	578
Thompson v. Atchison, T. & S. F. R. Co. (177 P. 536).....	116	West v. Springfield Fire & Marine Ins. Co. (178 P. 423).....	157
Thorn v. Dinsmoor (178 P. 445).....	275	White v. Atchison, T. & S. F. R. Co. (178 P. 255).....	120
Toadvine v. Sinnett (178 P. 401).....	111	White v. Kansas City Stock Yards Co. (177 P. 522).....	90
Topeka Orphans' Home Ass'n v. Mills (178 P. 616; 179 P. 973).....	316	Willys-Overland Co. v. Evans (180 P. 235).....	632
Topeka Orphans' Home Ass'n v. Williams (178 P. 616; 179 P. 973).....	316	Willys-Overland Co. v. Evans Auto Mach. Works (180 P. 235).....	632
Traylor v. Rogers (178 P. 416).....	250	Wilson v. Carlson (182 P. 544).....	485
Trego County State Bank v. Bauer (178 P. 420).....	264	Winans v. Chapman (180 P. 266).....	664
Trego County State Bank v. Hillman (178 P. 420).....	264	Winkler v. Anderson (177 P. 521).....	1
Tryon v. Cook (Tate v. Crooks, 68 P. 74).....	286	Winkler Oil Co. v. Anderson (177 P. 521).....	1
Tryon v. Crooks (68 P. 74).....	286	Wolverton v. El Dorado-Harper-Emporia Oil & Gas Co. (180 P. 792).....	764

VOL. 91, OREGON REPORTS

Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	178	212	100	178	592	262	178	793	352	179	241	428	179
6	178	214	114	177	37	268	178	799	362	179	248	442	178
11	178	221	179	177	631	272	178	926	375	178	350	450	178
33	178	186	187	179	265	279	176	805	384	178	986	455	179
61	178	353	206	178	597	302	178	233	388	178	353	462	179
63	178	356	211	178	784	306	178	215	388	179	238	471	179
59	174	1161	232	178	791	316	178	218	395	179	239	483	179
69	178	358	240	177	956	324	178	932	402	179	253	483	179
87	178	377	240	178	796	333	178	535	407	179	254	506	178
92	178	879	247	178	230	343	178	942	417	179	245	514	179
98	178	388	256	177	629							557	619

VOL. 91, OREGON REPORTS

Berridge v. Nickell (178 P. 353).....	51	Feenaughty v. Beall (178 P. 600).....	654
Bligh v. Lafer (178 P. 353; 179 P. 238).....	388	Ford v. Henderson (178 P. 381; 179 P. 558).....	701
Board of Directors of North Unit Irr. Dist., In re (178 P. 186).....	38	Fritz v. Riggs (178 P. 799).....	268
Boulevard Drainage System v. Gordon (177 P. 956; 178 P. 796).....	240		
Brice v. Mt. Scott Park Cemetery Corporation (178 P. 935).....	333	Gard v. Peck (178 P. 186).....	33
Bridges v. Hurlburt (178 P. 793).....	262	Giesy v. Marion County (178 P. 598).....	450
Brown v. Almasie (178 P. 928).....	668	Gilbert v. Globe & Rutgers Fire Ins. Co. (174 P. 1161; 178 P. 358).....	59
Brown & Co. v. Duda (179 P. 253).....	402	Godfrey v. Howes (178 P. 388).....	98
Bryant v. Panter (178 P. 989).....	686		
Burdick v. Tum-A-Lum Lumber Co. (179 P. 245).....	417	Hanson v. Thornton (179 P. 494).....	585
		Hart v. Oregon Laundry Co. (178 P. 932).....	324
Carnahan Mfg. Co. v. Beebe-Bowles Co. (178 P. 233).....	302	Hawkins v. Rodgers (179 P. 563, 906).....	483
Catching v. Ruby (178 P. 796).....	506	Haworth v. Jackson (178 P. 926).....	272
Chapler v. Allen (179 P. 484).....	556	Hodson-Feenaughty Co. v. Coast Culvert & Flume Co. (178 P. 382; 179 P. 560).....	630
Chapman v. Hood River County (178 P. 379).....	92	Home, The, v. Selling (179 P. 261).....	428
Clark v. Jones (179 P. 272).....	455	Hunt v. Security State Bank (179 P. 248).....	362
Duniway v. Hadley (178 P. 942).....	343	Irelan v. City of Portland (179 P. 286).....	471
		Irwin v. McElroy (178 P. 791).....	232

91 OR.—Continued.		Page		Page
Johnson v. Meyers (177 P. 631).....	179		Samchuck v. Insurance Co. of North Amer-	
Johnston v. Fitzhugh (178 P. 230).....	247		ica (179 P. 257).....	692
Keeler Bros. v. School Dist. No. 108 (178			Sanborn-Cutting Co. v. Butler (178 P. 228;	
P. 218).....	316		179 P. 573).....	619
Klamath Water Users' Ass'n v. Martin			Sherman, Clay & Co. v. Bufum & Pendle-	
(178 P. 356).....	53		ton (179 P. 241).....	352
Lawrence v. Portland Ry., Light & Power			Shields v. W. R. Grace & Co. (179 P. 265)	187
Co. (179 P. 485).....	559		Siuslaw Timber Co. v. Russell (178 P. 214)	6
Lee v. Albro (178 P. 784).....	211		Smith v. Howell (176 P. 805).....	279
Lee v. Murphy (178 P. 784).....	211		Southern Oregon Co. v. Port of Bandon	
McGinnis v. Condron (179 P. 254).....	407		(178 P. 215).....	308
McGinnis' Estate, In re (179 P. 254).....	407		Springer v. Steiner (178 P. 592).....	100
Mack v. Mack (179 P. 557).....	514		State v. Chin Borkey (176 P. 195).....	606
Mackenzie v. Douglas County (178 P. 350)	375		State v. Ching Lem (176 P. 590).....	611
Matlock v. Alm (179 P. 570).....	709		State v. Chin Ping (176 P. 188).....	593
Merchant v. Smith-Powers Logging Co.			State v. Cox (179 P. 575).....	518
(178 P. 939).....	442		State v. Warner (178 P. 221).....	11
Miller v. Payette Valley Land Co. (178 P.			Stevens v. Myers (177 P. 37).....	114
987).....	680		Suey v. Benson Hotel Co. (179 P. 239)....	395
Nunn v. Nunn (178 P. 986).....	384		Sykes v. Sperow (179 P. 488).....	568
O'Donnell v. Lebb (178 P. 212).....	1		Turner v. Cyrus (179 P. 279).....	462
Pubols v. Jacobsen (177 P. 629).....	256		Ulbrand v. Smith (178 P. 597).....	206
			Wheelock v. Richardson (178 P. 377).....	87
			Wm. Brown & Co. v. Duda (179 P. 253)..	402

VOL. 104, WASHINGTON REPORTS

Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.
Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.	Pg. Vol. Pg.
1 175 289	137 176 14	231 176 26	354 176 343	444 177 323	545 177 334	643 177 667							
12 175 300	142 176 17	245 176 1	354 181 932	452 177 330	550 177 340	648 177 655							
15 175 304	160 176 11	246 176 2	357 176 333	460 177 347	562 177 810	652 177 696							
21 175 314	166 176 1	248 176 347	361 176 330	472 177 315	571 177 339	659 177 635							
21 181 857	170 176 2	257 176 349	363 176 553	476 177 333	575 177 650	663 177 646							
29 175 571	171 176 34	265 176 339	374 176 337	476 180 873	581 177 351	668 177 643							
32 175 572	182 176 8	268 176 352	382 176 673	481 177 312	589 177 682	676 177 658							
50 175 565	194 176 24	276 176 332	388 176 550	485 177 344	594 177 651	679 177 701							
62 175 559	196 175 956	278 176 556	396 176 547	493 177 326	603 177 354	685 177 648							
79 175 568	202 175 957	299 176 343	405 176 539	501 177 316	608 177 638	691 176 2							
84 175 578	204 176 15	309 176 359	414 176 544	507 177 320	610 177 665	693 176 331							
99 175 569	209 176 31	315 176 334	418 176 545	512 177 319	613 177 710	693 176 346							
105 176 4	219 176 149	315 181 874	422 176 675	515 177 328	619 177 640	694 176 331							
107 176 13	221 176 5	328 176 340	426 176 670	520 177 355	623 177 660	694 176 343							
110 176 22	221 182 570	337 176 355	433 176 542	528 177 313	629 177 664	695 176 330							
116 176 25	227 176 3	344 176 331	437 176 543	531 177 336	634 177 671	695 177 391							
121 176 150	230 176 1	346 176 357	441 177 314	539 177 321	634 180 127	696 177 654							
129 175 953													

VOL. 104, WASHINGTON REPORTS

	Page		Page
Alaska Pacific Nav. Co. v. Southwark Foundry & Machine Co. (176 P. 357)....	346	Haines v. Coastwise Steamship & Barge Co. (177 P. 648).....	685
Alexander v. Lewes (175 P. 572).....	32	Hanson v. Roesch (176 P. 349).....	257
Allen v. Starr (176 P. 2).....	248	Hart v. King County (177 P. 344).....	485
American Sav. Bank & Trust Co. v. National Surety Co. (177 P. 646).....	663	Hilleware v. Hilleware (176 P. 330).....	361
Andersonian Inv. Co. v. Jones (176 P. 17).....	142	Hogen's Guardianship, In re (176 P. 339).....	265
Armstrong v. Burkett (177 P. 333; 180 P. 873).....	476	Hotel Cecil Co. v. City of Seattle (177 P. 347).....	460
Badolato v. Badolato (176 P. 24).....	194	Hoyt, In re (176 P. 11).....	160
Baker Mfg. Co. v. Hall (175 P. 304).....	15	Hubbard v. Tacoma Eastern R. Co. (176 P. 330).....	695
Bank of California Nat. Ass'n v. Mortgage Co., Holland-America (175 P. 956).....	196	Jackson v. White (177 P. 667).....	643
Blackburn v. Vander Aarde (177 P. 658).....	676	J. K. Lumber Co. v. Ash (176 P. 550).....	388
Carlisle v. Draper (175 P. 571).....	29	Johannessen v. Washington Water Power Co. (176 P. 8).....	182
Carlson v. Mock (176 P. 2).....	691	John Davis & Co. v. Miller (177 P. 323).....	444
Chas. W. Johnson Lumber Co. v. Great Northern R. Co. (176 P. 343; 181 P. 932).....	354	Johnson Lumber Co. v. Great Northern R. Co. (176 P. 343; 181 P. 932).....	354
Clark v. Schwaegler (175 P. 300).....	12	Johnston v. Spokane & I. E. R. Co. (177 P. 810).....	562
Cohen v. McKenna Lumber Co. (176 P. 1).....	245	Kirkland v. Dressel (177 P. 643).....	668
Davis & Co. v. Miller (177 P. 323).....	444	Knoll v. Knoll (176 P. 22).....	110
Day v. Great Eastern Casualty Co. (177 P. 650).....	575	Larue v. Farmers' & Mechanics' Bank (176 P. 331).....	693
Deer Park Lumber Co. v. Oregon-Washington Lumber & Mfg. Co. (177 P. 336).....	531	Lavenberg's Estate, In re (177 P. 328).....	515
De Leon v. Doyhof Fish Products Co. (176 P. 355).....	337	Lemley v. Jones (176 P. 4).....	105
Dement Bros. Co. v. Coon (177 P. 354).....	603	Lyon v. Nourse (176 P. 359).....	309
Denham v. Pioneer Sand & Gravel Co. (176 P. 333).....	357	Lyons v. McElroy (177 P. 312).....	481
Drainage Dist. No. 3, King County v. Machias Mill Co. (177 P. 326).....	493	McGillivray v. Columbia Salmon Co. (177 P. 660).....	623
Du Pont de Nemours Powder Co. v. Pederson (176 P. 542).....	433	McLaughlin v. City of Seattle (177 P. 347).....	480
E. I. Du Pont de Nemours Powder Co. v. Pederson (176 P. 542).....	433	Mauseth v. Slayden (177 P. 319).....	512
Ellensburg Creamery & Produce Co. v. Toppenish Creamery Co. (176 P. 1).....	230	Meton v. State Industrial Ins. Department (177 P. 696).....	652
Fawcner, Currie & Co. v. Rio Negro Shipping Co. (177 P. 339).....	571	Mills, In re (176 P. 556).....	278
Fisher v. Ward (177 P. 682).....	589	Mitchell v. Hughes (176 P. 26).....	231
Frye, In re (176 P. 11).....	160	Mohney v. Davis (176 P. 31).....	209
F. W. Woolworth Co. v. City of Seattle (177 P. 664).....	629	Mt. Vernon Nat. Bank v. First Nat. Bank of Monroe (176 P. 13).....	107
Geissler's Estate, In re (177 P. 330).....	452	National Bank of Tacoma v. Puget Sound Lumber Co. (176 P. 553).....	363
Gile Inv. Co. v. Fisher (177 P. 710).....	613	Nelson v. City of Spokane (176 P. 149).....	219
Gill, In re (176 P. 11).....	160	Nelson v. Industrial Ins. Department (176 P. 15).....	204
Gowan, In re (176 P. 7).....	166	Northern Pac. R. Co. v. Longmire (176 P. 150).....	121
Griffith v. Washington Water Power Co. (176 P. 343).....	694	Norton v. State (176 P. 347).....	248
Hahn v. Hahn (176 P. 3).....	227	Noyes v. Parsons (177 P. 651).....	594
		Noyes v. Parsons (177 P. 654).....	696
		Oroville International Salts Co. v. Rayburn (176 P. 14).....	137

104 WASH.—Continued.		Page		Page
Pacific Power & Light Co. v. White (177 P. 313).....	528	State ex rel. Hill v. Port of Seattle (177 P. 671; 180 P. 137).....	634	
Pappas v. General Market Co. (176 P. 25) 116		State ex rel. Kiggins v. Hadley (177 P. 655)	648	
Paton v. Cashmere Warehouse & Storage Co. (176 P. 544).....	414	State ex rel. King County v. Superior Court for Pierce County (176 P. 352)...	268	
Peterson v. Morris (177 P. 320).....	507	State ex rel. Sims v. Savidge (175 P. 568) 79		
Pickering v. Roeder (177 P. 321).....	539	State ex rel. Tacoma Eastern R. Co. v. Northern Pac. R. Co. (176 P. 539).....	405	
Pierce County ex rel. Bellingham v. Duffy (176 P. 670).....	426	Studebaker v. Hogen (176 P. 339).....	265	
Ramat v. California Ins. Co. (177 P. 638) 608		Tacoma Sav. Bank & Trust Co. v. Herren (176 P. 543).....	437	
Randall v. Gerrick (176 P. 675).....	422	Turner, In re (176 P. 332).....	276	
Raymond v. Hattrick (177 P. 640).....	619	Union Machinery & Supply Co. v. McCush (175 P. 559).....	62	
Richmond v. Denny (175 P. 957).....	202	Union Trust Co. v. Moore (175 P. 565)...	50	
Rising, In re (177 P. 351).....	581	Universal Motor Co. v. McGeorge (176 P. 331)	344	
Robinson v. Wilson (176 P. 331).....	694	Van Bug Fish Co. v. Herstrom (177 P. 334)	545	
Roche v. Madar (175 P. 314; 181 P. 857) 21		Ward, In re (176 P. 2).....	170	
Seattle & Lake Washington Waterway Co. v. Richards (176 P. 340).....	328	Washington Water Power Co. v. Wilson (176 P. 34).....	171	
Sherman v. Parker (177 P. 665).....	610	Weber v. Geissler (177 P. 330).....	452	
Spokane & I. E. R. Co. v. Wilson (176 P. 34)	171	Westervelt v. Schwabacher (176 P. 545)...	418	
Standard Lumber Co. v. Deer Park Lumber Co. (175 P. 578).....	84	Wheeler v. Pitwood (175 P. 289).....	1	
State v. Angevine (177 P. 701).....	679	Wick v. Western Union Life Ins. Co. (175 P. 953).....	129	
State v. Belknap (176 P. 5; 182 P. 570) 221		Williams v. Davidson (176 P. 334; 181 P. 874)	315	
State v. Leonard (177 P. 991).....	695	Williams v. School Dist. No. 189 (177 P. 635)	659	
State v. Lowery (177 P. 355).....	520	Woolworth Co. v. City of Seattle (177 P. 664)	629	
State v. McGuff (177 P. 316).....	501	Yakima Valley Transp. Co. v. Wilson (176 P. 34).....	171	
State v. Palmer (176 P. 547).....	396	Zuccone v. Main Fish Co. (177 P. 314)...	441	
State v. Postal Telegraph-Cable Co. (176 P. 346).....	693			
State v. Ripley (176 P. 343).....	299			
State v. Twenty Barrels of Whiskey (176 P. 673).....	382			
State v. Walker (177 P. 315).....	472			
State Bank of Black Diamond v. Johnson (177 P. 340).....	550			
State ex rel. Chandler v. Howell (175 P. 509)	99			
State ex rel. Chas. H. Lilly Co. v. Brawley (176 P. 337).....	374			

